

# IRAN AT THE WTO: THE FUTURE OF U.S. STATE SPONSOR OF TERRORISM SANCTIONS

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## I. INTRODUCTION

The conclusion of the Joint Comprehensive Plan of Action (JCPOA), also known as the “Iran nuclear deal,” represents one of the most significant steps in the Islamic Republic of Iran’s reengagement with the international community in the nearly forty years since the 1979 Revolution. The JCPOA will have dramatic effects on Iran’s foreign and domestic policy: nuclear program-related sanctions will be lifted; assets abroad will be unfrozen; and foreign investment will flow. It also marks a turning point in the relationship between Iran and the alphabet soup of global organizations that give shape to the international system.

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Part of Iran's reengagement is its looming accession to the World Trade Organization (WTO), in which it currently has Observer Status.<sup>1</sup> Iran will harness its newfound membership to effectuate policy goals, namely the eradication of any remaining sanctions that hinder its economic growth and damage its image worldwide.

In the national security arena, Iran's accession is precedent setting: it would be the only current U.S.-designated State Sponsor of Terrorism (SST) to join the WTO.<sup>2</sup> Given this status, Iran would enter the WTO under the shadow of economic sanctions. These sanctions would represent a *de jure* violation of the WTO's core principles. As such, Iran's accession is an instructive case study of hard power international politics intersecting with the soft power of international norms and customs, as exemplified by the General Agreement on Tariffs and Trade (GATT).<sup>3</sup>

This Note is an examination of the forthcoming interplay between the United States and the Islamic Republic of Iran at the WTO, an organization that has served as a proxy forum for hard power foreign policy disputes over the past decade.<sup>4</sup> It begins by outlining the remaining sanctions following the Iran deal, the relevant WTO law, and the likely actions to be filed

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1. *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 14, 2017) ("With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.").

2. *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 14, 2017).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT was a multilateral trade agreement concluded in the aftermath of World War II to foster international cooperation and economic prosperity through trade liberalization. The Marrakesh Agreement, concluded during the Uruguay Round of negotiations in 1994, created the World Trade Organization and incorporated the core principles of the original GATT into the WTO Agreement. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

4. See, e.g., Matthew Dalton, *EU Appeals to WTO Over Russian Pork Ban*, WALL ST. J. (Apr. 8, 2014, 12:53 PM), <http://www.wsj.com/articles/SB10001424052702304819004579489501828157092> ("Moscow has been using trade policy in recent years to pressure its neighbors, most prominently last year when it restricted Ukrainian exports to Russia to dissuade the Ukrainian government from signing a broad political and economic agreement with the EU.").

by Iran before the WTO's Dispute Settlement Body (DSB). It then explores potential U.S. responses and defenses to these claims, paying particular attention to GATT Article XX,<sup>5</sup> the general exceptions to trade obligations, and GATT Article XXI,<sup>6</sup> the national security exception to trade obligations. It concludes by positing a simple doctrinal argument: the United States should invoke GATT Article XX's "public morals" and "human health" exceptions in order to justify the SST sanctions; Article XX has the precedent and interpretive structure with which to build an effective argument, and the United States has a long-term interest in protecting the norm against invoking the national security exception.

## II. POLITICAL AND ECONOMIC BACKGROUND

### A. *Rapprochement in Geneva: The Iran Deal*

In November 2013, formal, public negotiations began between Iran and the so-called P5+1 countries—the United States, the United Kingdom, Russia, France, China, and Germany—over Iran's nuclear program. The negotiations aspired "[t]o reach a mutually-agreed long-term comprehensive solution that would ensure Iran's nuclear program will be exclusively peaceful."<sup>7</sup> The fruit of this undertaking was the JCPOA, which relieved Iran of nuclear-related sanctions after the International Atomic Energy Agency (IAEA) verified that Iran had eradicated its medium-enriched uranium, cut its low-enriched uranium stockpile to 98%, and decreased the number of gas centrifuges.<sup>8</sup> On January 16, 2016, known as "Implementation Day," Iran regained access to the international energy market and banking system.<sup>9</sup> The resulting windfall will be substantial;

5. GATT, *supra* note 3, art. XX.

6. *Id.* art. XXI.

7. Hiran Abtahi, *Introductory Note to the Joint Plan of Action on Iran's Nuclear Program*, 53 I.L.M. 732 (Nov. 24, 2014). The Joint Plan of Action (JPA) was an interim agreement that froze portions of Iran's nuclear program and eased economic sanctions in the short-term.

8. William J. Broad, *The Iran Nuclear Deal—A Simple Guide*, N.Y. TIMES (Jan. 15, 2015), <https://www.nytimes.com/interactive/2015/03/31/world/middleeast/simple-guide-nuclear-talks-iran-us.html>.

9. Saeed Kamali Dehghan, *Sanctions Against Iran Lifted After Compliance with Nuclear Deal*, GUARDIAN (Jan. 16, 2016, 5:59 PM), <http://www.theguardian.com/world/2016/jan/16/sanctions-against-iran-to-be-lifted-after-compliance-with-nuclear-deal> ("[S]enior diplomats in Vienna for-

the U.S. Department of the Treasury estimates Iran will recover \$55 billion of its assets currently frozen in overseas banks.<sup>10</sup>

### B. *The Remaining Sanctions*

Sanctions against Iran long predate nuclear nonproliferation concerns. The United States first levied sanctions against Iran in November 1979 after revolutionaries seized the American embassy in Tehran.<sup>11</sup> Non-nuclear sanctions include the U.S. domestic trade embargo (“U.S. Primary Sanctions”), secondary sanctions against “Specially Designated Nationals,” and the so-called Designation Authorities.<sup>12</sup> The imposition of Designation Authority sanctions against Iran were triggered by the country’s human rights abuses, support for instability in Yemen, and sponsorship of international terrorism.<sup>13</sup>

In January 1984, Secretary of State George P. Shultz designated Iran a SST following the 1983 bombing of the U.S.

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mally announced the lifting of sanctions against the country following confirmations . . . that Tehran had fulfilled its obligations under last year’s nuclear accord.”).

10. Jessica Schulberg, *Treasury: No, Iran Is Not Getting \$150 Billion From The Nuclear Deal*, HUFFINGTON POST (July 29, 2015, 10:23 AM), [http://www.huffingtonpost.com/entry/treasury-iran-150-billion-nuclear-deal\\_us\\_55b8dc41e4b0224d88348e1c](http://www.huffingtonpost.com/entry/treasury-iran-150-billion-nuclear-deal_us_55b8dc41e4b0224d88348e1c). Of course, an exact measurement of the windfall is difficult to determine. The bulk of these assets sit in banks in China, India, Japan, South Korea, Turkey, and Taiwan—countries that have already committed these funds to infrastructure and other investments domestically. Jackie Northam, *Lifting Sanctions Will Release \$100 Billion To Iran. Then What?*, NPR (July 16, 2015, 3:53 PM), <http://www.npr.org/sections/parallels/2015/07/16/423562391/lifting-sanctions-will-release-100-billion-to-iran-then-what>.

11. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) (“I [President Jimmy Carter] hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.”).

12. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS (Jan. 31, 2017), <https://fas.org/sgp/crs/mideast/RS20871.pdf>; U.S. DEPT. OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) ON IMPLEMENTATION DAY 4–5 (2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf).

13. U.S. DEP’T OF THE TREASURY, *supra* note 12, at 4–5.

Marine barracks in Lebanon.<sup>14</sup> Hezbollah, whom American authorities consider an Iranian proxy, was implicated in the attack.<sup>15</sup> The SST designation triggers automatic sanctions under the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act.<sup>16</sup> The sanctions fall roughly into two categories. First, the Export Administration Act severely restricts the sale to Iran of U.S. “dual use” items—goods “having both commercial and military or proliferation applications.”<sup>17</sup> The Arms Export Control Act prohibits arms sales to Iran as well.<sup>18</sup>

Second, the Foreign Assistance Act prohibits the flow of U.S. foreign aid to Iran, including economic assistance, U.S. government loans, credit insurance, and Export-Import Bank credits.<sup>19</sup> Furthermore, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires the U.S. President to withhold foreign aid from any country that offers financial assistance to countries on the SST list.<sup>20</sup> Section 321 of AEDPA makes it a criminal offense for Americans to conduct financial transactions with countries on the list.<sup>21</sup> Finally, the Foreign Assistance Act requires the United States to withhold contribu-

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14. *State Sponsors of Terrorism*, *supra* note 2.

15. Jonathan Masters & Zachary Laub, *CFR Backgrounders: Hezbollah*, COUNCIL ON FOREIGN REL. (Jan. 3, 2014), <http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155>.

16. Export Administration Act, 50 U.S.C.A. § 4605 (West); Arms Export Control Act, 22 U.S.C.A. § 2780 (West); Foreign Assistance Act, 22 U.S.C.A. § 2371 (West).

17. BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, IRAN: GUIDANCE RELATING TO THE JOINT COMPREHENSIVE PLAN OF ACTION (2016), <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/iran> (“Although BIS maintains license requirements for Iran, OFAC is responsible for administering most Iran sanctions.”). See BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, DUAL USE EXPORT LICENSES (2016), [https://www.bis.doc.gov/index.php/licensing/forms-documents/doc\\_download/91-cbc-overview](https://www.bis.doc.gov/index.php/licensing/forms-documents/doc_download/91-cbc-overview) (defining dual use items).

18. 22 U.S.C.A. § 2780 (West).

19. KATZMAN, *supra* note 12, at 3.

20. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 325, 22 U.S.C.A. § 2377.

21. AEDPA § 321, 18 U.S.C.A. § 2332d (“[W]hoever, being a United States person, knowing or having reasonable cause to know that a country is designated under section 6(j) of the Export Administration Act of 1979 . . . as a country supporting international terrorism, engages in a financial transaction with the government of that country, shall be fined under this title, imprisoned for not more than 10 years, or both.”).

tions from international organizations that assist Iran.<sup>22</sup> Under this provision, the Foreign Assistance Act does not prevent contributions in their entirety; it merely requires cuts to contributions in proportion to the organization's budget for programs in Iran.<sup>23</sup>

### C. *The Long Wait: Iran and the WTO*

The WTO accession process is demanding given the organization's consensus-based decision-making and the realities of geopolitics. The process presents particular challenges for countries emerging from central planning economies given their unique institutional and policy environments.<sup>24</sup> The "GATT rules, essentially encouraging governments to use border taxes (tariffs) rather than quantitative restrictions to regulate international trade . . . presuppose a liberal economic order in which foreign trade decisions are made by individual buyers and sellers in response to price signals" as opposed to allocating resources by command.<sup>25</sup> On paper, however, the process is straightforward: (1) a prospective member submits an application to the WTO General Council, which forms a working party open to all members; (2) by studying the applicant's international and domestic trade policies, the working party analyzes areas of discrepancy with WTO rules and sets out the terms and conditions for admission to the WTO; (3) the applicant nation begins bilateral talks with other working party members regarding the concessions and commitments

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22. 22 U.S.C.A. § 2227. This provision will prove problematic to administer if Iran accedes to the WTO since members provide funding for the organization. *WTO Secretariat Budget for 2015*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/secret\\_e/budget15\\_e.htm](https://www.wto.org/english/thewto_e/secret_e/budget15_e.htm) (last visited Mar. 15, 2017) ("The WTO derives most of the income for its annual budget from contributions by its Members. These are established according to a formula based on their share of international trade.").

23. *Id.*

24. For instance, Russia became a WTO member after 18 years of deliberations. Press Release, World Trade Org., Ministerial Conference Approves Russia's WTO Membership (Dec. 16, 2011), [https://www.wto.org/english/news\\_e/news11\\_e/acc\\_rus\\_16dec11\\_e.htm](https://www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm) (noting "that all members contributed to Russia's accession, by constructing the consensus necessary to conclude the accession").

25. Richard Pomfret, *The Economies in Transition, the WTO and Regionalism*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 247, 248 (Patrick F.J. Macroty et al eds., 2005).

on tariff levels and market access for goods and services; and (4) the working party sends a draft membership treaty—the “protocol of accession”—to the General Council or Ministerial Conference to be approved by two-thirds of the membership.<sup>26</sup>

For over 20 years, Iran has remained in accession purgatory largely due to diplomatic tension with the United States: “The U.S. decision to block Iran’s application to join the WTO in 1996 and beyond should . . . be viewed within and as part and parcel of an overall sanctions policy against Iran.”<sup>27</sup> The body eventually granted Iran Observer Status in 2005 and formed a working party to consider its application.<sup>28</sup>

Despite the long slog, the conclusion of the JCPOA and Iran’s reengagement with the international community have accelerated Iran’s path to full WTO membership. Major parties to the agreement have come around. Federica Mogherini, High Representative of the European Union for Foreign Affairs and Security Policy, recently proclaimed that the 28-nation bloc would support Iran’s membership bid, saying, “Iran has delivered on its side of the deal and so has the EU by lifting the sanctions.”<sup>29</sup>

Iran has the momentum to join the WTO at a time when Western powers—especially the United States—still have substantial sanctions imposed against it. Should Iran attain full membership, it will undoubtedly use its new access to the WTO’s DSB to challenge the remaining sanctions that weigh down its economy and besmirch its global reputation.

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26. *Understanding the WTO: Membership, Alliances and Bureaucracy*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm) (last visited Mar. 15, 2017) (“If a two-thirds majority of WTO members vote in favour, the applicant is free to sign the protocol and to accede to the organization. In many cases, the country’s own parliament or legislature has to ratify the agreement before membership is complete.”).

27. S. Jalal Alavi, *Accession of Iran to the World Trade Organization: A Legal-Political Overview*, 1 IRANIAN REV. FOREIGN AFF. 137, 146 (2010).

28. *Members and Observers*, WORLD TRADE ORG., *supra* note 1.

29. Federica Mogherini, High Representative of the European Union for Foreign Affairs and Sec. Policy, Remarks at the Joint Press Conference with Mohammad Javad Zarif, Minister of Foreign Affairs of Iran (Apr. 16, 2016), [http://eas.europa.eu/statements-eas/2016/160416\\_02\\_en.htm](http://eas.europa.eu/statements-eas/2016/160416_02_en.htm) (“We have agreed to enhance our economic cooperation. We will support the Iranian’s bid to join the WTO.”).

### III. THE IRANIAN COMPLAINTS

#### A. *Claim 1: Most Favored Nation Violation*

On their face, the sanctions triggered by the SST designation violate one of the foundations of the multilateral trading system: the most favored-nation (MFN) principle. GATT Article I defines this fundamental principle:

[A]ny 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.<sup>30</sup>

In other words, “whenever a WTO member enacts legislation or certain trade-restricted rules or requirements, it cannot, according to the MFN principle, discriminate between products from one WTO member and like products from any other country.”<sup>31</sup> This concept is a key pillar in the WTO’s regime of nondiscrimination.<sup>32</sup>

A brief look at the economic policy underlying MFN will shed light on the rationale for its prominence in the structure of the GATT. The GATT enshrines the *unconditional* form of MFN, rather than the conditional form.<sup>33</sup> Akiko Yanai offers this distinction:

Under an unconditional MFN clause, a country is prohibited from discriminating against any country with whom it has an agreement. Thus, if Nation A and Nation B agree upon an exchange of concessions based on unconditional MFN treatment, and Nation

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30. GATT, *supra* note 3, art. I:1.

31. INTERNATIONAL TRADE LAW 304 (Andrew T. Guzman & Joost H.B. Pauwelyn eds., 2d ed. 2012).

32. The second “pillar” is the obligation to offer national treatment to imports, which requires the according of “national treatment to all like products whether imported or domestic.” See generally ASIF H. QURESHI, THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS 15 (1996).

33. Edward A. Laing, *Equal Access/non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT’L L.J. 246, 256 (1996). Under this theory of MFN, members must “accord unconditionally past and future benefits given to third states without any future requirement of negotiations, bargains, conditions or concession.”



A then makes new concessions to Nation C, Nation A should also automatically apply these concessions in its dealings with Nation B. If Nation A and Nation B agree upon a conditional MFN clause, however, Nation B can receive those concessions only when Nation B provides Nation A with compensation equivalent to that offered to Nation A by Nation C.<sup>34</sup>

Unconditional MFN serves the overarching goals of liberalized trade and the GATT.<sup>35</sup> As the Preamble indicates, trade liberalization is essential for widespread economic growth and prosperity.<sup>36</sup> Unconditional MFN advances this goal in four distinct, but related, ways. First, by preventing the importing country from varying its tariffs based on the origin of the goods, MFN ensures that the most efficient exporter will supply the goods to a country.<sup>37</sup> Second, it ensures *multilateral* trade liberalization; every member will reduce barriers to trade because every other member will do the same.<sup>38</sup> As a corollary to this advantage, the benefits of liberalized trade are generalized; every country, regardless of economic or political power, receives the concessions.<sup>39</sup> Third, MFN encourages stability

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34. Akiko Yanai, *The Function of the MFN Clause in the Global Trading System* (Inst. of Dev. Economics APEC Study Ctr., Working Paper Series 01/02—No. 3, 2002), [http://www.ide.go.jp/English/Publish/Download/Apec/pdf/2001\\_15.pdf](http://www.ide.go.jp/English/Publish/Download/Apec/pdf/2001_15.pdf).

35. GATT, *supra* note 3, pmb. Relations between parties to the GATT “in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.” *Id.*

36. For a lengthy discussion of the economic rationale for trade liberalization benefits, see MIA MIKIÆ, *INTERNATIONAL TRADE* 424–28 (1998).

37. William Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product,”* in *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* 13, 14 (Thomas Cottier & Petros C. Mavroidis eds., 1998). This goal is closely related to the main economic justification for liberalized trade more generally—comparative advantage: “By specializing in the production of those goods in which a member State has a comparative cost advantage and trading in those goods in which such advantage is relatively less the world’s resources are optimally used and maximized.” QURESHI, *supra* note 33, at 4.

38. MIKIÆ, *supra* note 36, at 305.

39. Davey & Pauwelyn, *supra* note 37, at 15.

and security by heading off discriminatory trade measures that can lead to animosity between states.<sup>40</sup> Finally, it inhibits the power of local special interests, often the source of trade-distortive protectionism, to secure discriminatory trade regulations.<sup>41</sup>

The SST sanctions are a de jure violation of the MFN principle. Indeed, the entire purpose of the sanctions is to single out the designees for discriminatory trade treatment. Assuming that Iran joins the WTO, Iran will bring a complaint to the WTO challenging the SST sanctions, which are especially problematic for Iran given the economic and political liabilities that attach to such a designation.

First, Iran still does not have access to the American economy, which remains the largest in the world in terms of nominal GDP.<sup>42</sup> Due to the SST designation, American firms, including its banks, are prohibited from transacting with Iran. In a rush to engage with the modern global economy, Iran desperately seeks access to the U.S. financial system and has sought the help of the EU to that end.<sup>43</sup>

Second, as Iran attempts to reengage with the international system, the SST designation also presents a political liability. The SST list is an exclusive club with a terrible reputation. Syria and Sudan—the only other two countries currently on the list—are poster children for repression, civil war, and extremism. Such a designation is a hindrance to Iran's legitimacy in the eyes of world powers, and thus also to its diplomatic and political interests.

#### B. *Claim 2: Quantitative Restriction Violation*

Iran can also argue that the SST sanctions violate GATT's prohibition of quantitative restrictions (QR). GATT Article XI addresses the prohibition:

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40. *Id.*

41. *Id.* For a discussion of the downsides of the application of the MFN principle, see *id.* at 15–16.

42. For an overview of the size of the American economy, see generally *The World Factbook—United States*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Mar. 15, 2017).

43. Bozorgmehr Sharafedin, *Iran Seeks E.U. Leverage to Get Financial Concessions from U.S.*, REUTERS (Apr. 17, 2016, 1:29 PM), <http://www.reuters.com/article/us-iran-nuclear-usa-idUSKCN0XD0E3>.

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.<sup>44</sup>

In short, as a general matter, restrictions on the quantity of imports and exports of products are prohibited.

Central to the WTO's trade liberalization regime is the conversion of QRs into tariffs, a process known as "tariffication."<sup>45</sup> The goal is to allow members a sufficient degree of protection while minimalizing the interference with the price system of the global market. Mia Mikiæ explains the benefits of instituting tariffs in lieu of QRs: "higher tariff revenue, less lobbying and rent-seeking, more competition and less uncertainty with a regime based on price instruments."<sup>46</sup> A QR isolates the protected industry from world market prices; a tariff causes a short-term rise in domestic prices, but ultimately causes them to move in parallel again with world market prices.<sup>47</sup> Tariffication also serves as a stepping-stone towards the gradual reduction of tariffs more generally.

The SST designations prohibit both the exportation of American products and financial services to Iranian soil.<sup>48</sup> A quota of zero is, by definition, a QR, which violates GATT Article XI.<sup>49</sup> Iran can therefore challenge the SST sanctions under this provision as well.

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44. GATT, *supra* note 3, art. XI.

45. Mikiæ, *supra* note 36, at 423.

46. *Id.*

47. Arthur Dunkel & Frieder Roessler, *The Ranking of Trade Policy Instruments Under the GATT Legal System*, in INTERNATIONAL TRADE LAW, *supra* note 31, at 222.

48. KATZMAN, *supra* note 12, at 6–8, 26–29.

49. Cf. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 238, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *United States—Gambling*] (“[L]imitations amounting to a zero quota are quantitative limitations.”).

#### IV. THE AMERICAN RESPONSE

##### A. *A Prophylactic Measure: The Protocol of Accession*

The first course of action for the United States is to engage in a preemptive maneuver. It can hedge against a complaint by baking the SST power into Iran's Protocol of Accession (POA). It could also make certain concessions contingent on measureable benchmarks concerning Iran's activities in the region.

Article XII of the Marrakesh Agreement Establishing the WTO provides the pertinent language for countries wishing to accede:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on *terms to be agreed* between it and the WTO.<sup>50</sup>

Article XII is noteworthy for its lack of specificity about the "terms" by which applicants accede. Even the description of the negotiation process is sparse. Of course, the lack of specificity also offers the working party flexibility in crafting unique POAs based on the particular needs of the applicant and the desired concessions from the applicant for existing members. Article XXXIII of the GATT, the precursor to Article XII of the Marrakesh Agreement, was:

[B]ased on the assumption that its Members had, by and large, free market economies and that while their markets were governed by measures dealt with in its agreement . . . access to the markets of applicants which did not necessarily have free market economies might be regulated by government decision.<sup>51</sup>

As such, negotiations must have the flexibility to address concerns that are not covered by the core WTO provisions.

Non-economic conditions, especially political considerations, are theoretically outside the scope of negotiations at this

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50. Marrakesh Agreement, *supra* note 3, art. XII (emphasis added).

51. PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO 48 (2008).

stage of the accession process. But the standards by which the working party evaluates applications are not clear. As Asif Qureshi notes, “in practice the review seems to be fairly wide, focusing on the general state of the economy and on economic matters that arguably are not strictly within the remit of the WTO code.”<sup>52</sup> This lack of transparency and the non-structured nature of the review could lend themselves to members demanding pre-conditions of membership. Using its leverage within the working party, the United States can pressure Iran to cut off its material and ideological support for terrorist groups in exchange for advancing Iran’s POA.

This negotiating tactic is not without precedent. During talks over China’s accession to the WTO, the United States and other members offered the carrot of supporting China’s POA in return for improving its track record on human rights.<sup>53</sup> The problem with this approach is that regardless of what concerns the United States might voice behind the scenes in Geneva, the requirements inscribed in the POAs are always economic. To the extent political terms are included in the POA, they only address how political arrangements in the acceding party’s country affect the applicant’s trade regime. For example, POAs address monetary and fiscal policies, foreign exchange and payments, the investment regime, state ownership, pricing policies, competition policies, trading rights, customs duties, tariffs, QRs, rules of origin, pre-shipment inspection, anti-dumping regulation, export regulation, technical barriers to trade, sanitary measures, government procurement, transit, agricultural policies, textiles, and intellectual property.<sup>54</sup> POAs also address the executive, legislative, and judicial branches of applicant countries, but only as they relate to enforcing the Agreement.<sup>55</sup> Including provisions addressing human rights concerns, or even international terrorism, is a dubious proposition.

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52. QURESHI, *supra* note 32, at 129.

53. See generally Phil C.W. Chan, *Using the WTO for the Protection of Human Rights in China?*, 19 EUR. BUS. L. REV. 605, 617 (2008) (“Many therefore believe that the WTO with its compulsory dispute settlement and enforcement mechanisms may be able to exert pressures on China for the observance of international human rights law, as it is surmised that China cares about its economic development and trade relations with other countries.”).

54. WILLIAMS, *supra* note 51, at 56–113.

55. *Id.*

That being said, there is precedent for carving out special treatment for current members in an acceding party's POA. China's POA contained a provision entitled, "Reservations by WTO members."<sup>56</sup> The provision listed measures from various members that are inconsistent with WTO obligations, but which would remain in place even after China's accession. Part I, section 17 of China's POA provided that "all prohibitions, quantitative restrictions and other measures maintained by WTO Members against imports from China in a manner inconsistent with the WTO Agreement are listed in Annex 7" and that such "prohibitions . . . shall be phased out or dealt with in accordance with mutually agreed terms and timetables."<sup>57</sup> Annex 7 is a laundry list of measures from Argentina, the European Union, Hungary, Mexico, Poland, the Slovak Republic, and Turkey that essentially carve out single country exceptions to the GATT under China's POA.<sup>58</sup> Using a similar provision, the United States can obtain a waiver *embedded* in Iran's POA excusing the United States from abiding by the MFN mandate and QR prohibition solely as they pertain to the SST sanctions.

#### B. *Invoking Article XXI: The National Security Exception*

Given that SST sanctions are facially inconsistent with the Article I MFN principle and the Article XI QR prohibition, the United States must justify its policy under one of several enumerated GATT exceptions, which countries invoke to pursue non-economic objectives.

Article XXI—the national security exception—seems the most likely candidate.<sup>59</sup> The most relevant, and controversial,

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56. World Trade Organization, *Accession of the People's Republic of China*, pt. 1, ¶ 17, WTO Doc. WT/L/432 (Nov. 23, 2001).

57. *Id.*

58. *Id.* Annex 7.

59. Article XXI reads: "Nothing in this Agreement shall be construed: (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting

clause of Article XXI states that the Agreement does not prevent members from “taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.”<sup>60</sup> In short, if a member satisfies the elements of Article XXI, an otherwise invalid regulation may be valid. But application of this seemingly straightforward exception is complicated.

First, the text is vague and provides no guidance for what actions are “necessary” or what interests are “essential.” Such ambiguity is at least partially due to the drafter’s understanding of the delicate balance between security and norm-creation in an international organization: “We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”<sup>61</sup> Some commentators, and most members, consider the exception self-judging based on the text of the document. The inquiry is whether “[the member] considers [the measure] necessary for the protection of its essential security interests.”<sup>62</sup> It is not phrased in a way that lends itself to an objective analysis from the Panel or Appellate Body; it seems almost entirely subjective. The drafters concur: “the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind.”<sup>63</sup>

Second, during disputes, panels have generally either deferred to the self-judging arguments of members or have not ruled on the merits of invocation. After Czechoslovakia lodged a complaint with the GATT over U.S. export control licenses in 1949, for example, the United States invoked the exception. During discussion at the General Council, a member stated, “every country must be the judge in the last resort on questions relating to its own security. On the other hand, every

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party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.” GATT, *supra* note 3, art. XXI.

60. *Id.*

61. WORLD TRADE ORGANIZATION, ANALYTICAL INDEX OF THE GATT 600 (2012).

62. GATT, *supra* note 3, art. XXI.

63. WORLD TRADE ORGANIZATION, *supra* note 61, at 600.

contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement.”<sup>64</sup> Similarly, Ghana justified its boycott of Portuguese goods in 1961 by arguing, “[A]ny action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana.”<sup>65</sup> Then again, in 1982, in response to an Argentinian complaint over European trade restrictions, the EEC representative stated, “every contracting party was—in the last resort—the judge of its exercise of these rights.”<sup>66</sup> This language reflects the members’ view that the invocation of Article XXI is “self-judging.” In other words, “states reserve a right to non-compliance . . . in certain circumstances, predominantly if the state in question considers compliance to harm its sovereignty, security, public policy—or more generally—its essential interests.”<sup>67</sup>

The closest a panel has come to ruling on the merits of a national security exception invocation was an unadopted 1986 Panel Report, *United States—Trade Measures Affecting Nicaragua*. Nicaragua requested a review of the 1985 U.S. trade embargo, which was imposed after the election of the Sandinistas, but the panel skirted the issue, saying it “could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b) (iii) by the United States.”<sup>68</sup> This case was the last time the United States invoked the exception. The DSB has opted against the application of an objective standard for nearly 70 years, despite some criticism.<sup>69</sup>

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64. *Id.*

65. *Id.*

66. *Id.*

67. Stephen Schill & Robyn Briebe, “If the State Considers”: *Self-Judging Clauses International Dispute Settlement*, in 13 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 61, 63 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2009).

68. Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶ 5.1–5.3, L/6053 (Oct. 13, 1986) (not adopted). For a fascinating account of *why*, under the old GATT rules, the Panel could not address the merits of the national security exception invocation, see Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL’Y INT’L BUS. 603, 623 (1987).

69. See, e.g., Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT’L L. 301, 330 (1998) (“[A]n objective ap-



Despite the opaque history of the national security exception in WTO adjudication, the United States could easily establish the elements of the exception. But there are other considerations at stake. Article XXI is self-judging, and a ruling on the merits would create precedent by which other countries, some of which are geopolitical foes, could abuse the exception. At its core, the international system is a set of norms by which countries abide. If the United States invokes Article XXI, the fear is that other countries will abuse the exception by watering down the “necessity” element, precisely the concern of the GATT drafter who proclaimed, “every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement.”<sup>70</sup> Moreover, because a panel has never ruled on the merits of an invocation of the exception, there is no structure by which to evaluate the present claim. The United States should not rest its hopes on an uncertain panel ruling, which would affect not only future sanctions relating to international terrorism, but would have the immediate effect of invalidating the SST sanctions against Syria and Sudan as well.

### C. *Invoking Article XX: The General Exceptions*

While Article XXI strictly addresses the national security exception, Article XX lists the general exceptions to GATT obligations members invoke to justify unilateral trade measures. The relevant portion of Article XX is brief:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a): necessary to protect public morals;
- (b): necessary to protect human, animal or plant life or health.<sup>71</sup>

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proach to the interpretation of the WTO national security exceptions [sic] might better facilitate negotiations for reciprocal tariff reductions.”).

70. WORLD TRADE ORGANIZATION, *supra* note 61, at 600.

71. GATT, *supra* note 3, art. XX.

It is in the long-term geopolitical interest of the United States to look beyond Iran's immediate complaint in order to protect the norm against invocation of Article XXI, especially given the potential future coercive trade measures of Russia, China, and other geopolitical rivals.<sup>72</sup>

The United States should not open the floodgates of Article XXI. Instead, the United States should justify its SST sanctions under the general exceptions of Article XX. There are two main reasons supporting this tactic: (1) Article XX and the accompanying case law has more structure, precedent, and predictive value with which to build an argument; and (2) it will protect the norm against abusing the Article XXI exception.

Doctrinally, analysis of a member's invocation of Article XX is a two-part inquiry. First, the Panel determines whether there is a provisional justification from the listed paragraphs, which involves an examination of the policy concerns in each exception as well as a demonstration that the measure is necessary to accomplish the policy objective.<sup>73</sup> Second, the Panel explores whether the application of the measures is consistent with the "chapeau" of Article XX.<sup>74</sup>

Under Article XX, the United States could plausibly invoke two exceptions to justify SST sanctions due to Iran's use of terrorism in advancing its foreign policy agenda. First, it could invoke Article XX(a), which permits derogation from GATT obligations that are "necessary to protect public morals."<sup>75</sup> In *United States—Gambling*, Antigua filed a complaint under the General Agreement on Trade in Services (GATS) regarding a U.S. law that constituted a total ban on

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72. See, e.g., Andrew Gardner, *Russia Targets Moldovan Trade*, POLITICO (Jul. 10, 2014, 3:55 AM), <http://www.politico.eu/article/russia-targets-moldovan-trade/> ("Moldova's decision to sign an association agreement with the European Union could lead to the loss of its free-trade rights with the Commonwealth of Independent States, Russia has warned.").

73. Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 71 (2001).

74. I.e., the "Subject to . . ." clause. See Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 741 & n.5 (2001) ("In international law, an unnumbered introductory clause or paragraph covering several subsequent provisions is called a chapeau," a French word meaning "hat" or "cap").

75. GATT, *supra* note 3, art. XX(a).

the cross-border supply of gambling services.<sup>76</sup> The United States invoked Article XX(a). Defining the term “public morals” as “standards of right and wrong conduct maintained by or on behalf of a community or nation,” the Panel found that the measures were necessary to protect public morals.<sup>77</sup> Terrorism too would fall under this exception. There is consensus in the United States and the international community that terrorism is “wrong.” Terrorism, as defined by U.S. statute, violates the fundamental values of society.<sup>78</sup> It disrespects the value of innocent civilian life. International law condemns it.<sup>79</sup>

Second, the United States could feasibly invoke Article XX(b), which allows derogation from international trade obligations that are “necessary to protect human, animal or plant life or health.”<sup>80</sup> This exception “has not provoked significant controversy within the WTO dispute resolution system.”<sup>81</sup> Ter-

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76. *United States—Gambling*, *supra* note 49.

77. *Id.* ¶ 6.465. The Panel later found that the measures failed to satisfy the chapeau. While Antigua brought this case under GATS, “the meaning ascribed to the term ‘public morals’ in the GATS is likely to apply as well to that same language in the GATT.” INTERNATIONAL TRADE LAW, *supra* note 31, at 372.

78. 18 U.S.C. § 2331 defines “international terrorism” as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. 18 U.S.C. § 2331.

Such statutory definitions are often broad because they are “designed to give guidance to the executive branch in its efforts to compile a list of states supporting international terrorism and against whom it should apply economic sanctions.” JOHN F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 43 (1989).

79. *See, e.g.*, S.C. Res. 1269 (October 19, 1999) (condemning “all acts of terrorism, irrespective of motive, wherever and by whom ever committed”).

80. GATT, *supra* note 3, art. XX(b).

81. INTERNATIONAL TRADE LAW, *supra* note 31 at 375.

rorism fits neatly under this exception as well. While the goal of international terrorism is political change, the means of accomplishing that goal is violence, precisely by *harming* human life and health.

WTO law contains an important jurisdictional caveat in regards to the “human health” exception: namely, whether members can use trade measures to protect human health beyond their own territory. In the first *Tuna—Dolphin* case, Mexico challenged U.S. conditions on tuna imports originating outside U.S. waters.<sup>82</sup> The Panel ruled that there is no extra-jurisdictional protection of health or life, observing that under too broad an interpretation of Article XX(b), “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights.”<sup>83</sup> The second *Tuna—Dolphin* case rejected this categorical rule, however, noting that other exceptions to the GATT, such as the “prison labour” exception, allow trade measures to address actions occurring outside the territorial jurisdiction of the party in violation.<sup>84</sup> While the current state of the law is unclear, the Appellate Body has sought a “sufficient nexus” between the objective pursued and the country imposing the measure.<sup>85</sup>

The jurisdictional question is problematic for the United States since the focus of the State Department’s reporting on Iran’s support for terrorism is the country’s actions *overseas*—primarily in Iraq, Syria, Lebanon, and Gaza.<sup>86</sup> The analysis of the case law on jurisdiction requires the amusing comparison of terrorists to shrimp and tuna. In *United States—Shrimp*, members challenged an American prohibition on imports from countries that didn’t use Turtle Excluder Devices (TEDs)

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82. Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶¶ 3.33–36 DS21/R (Sept. 3, 1991), GATT BISD (39th Supp.), at 155 (1991) (not adopted).

83. *Id.* ¶ 5.27.

84. Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.16, DS29/R (June 16, 1994) (not adopted).

85. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 133, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *United States—Shrimp*].

86. U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2014, at 284–86 (June 2015), <http://www.state.gov/documents/organization/239631.pdf>.

while shrimping.<sup>87</sup> The Appellate Body found a “sufficient nexus between the migratory and endangered marine populations involved and the United States.”<sup>88</sup> While the American regulation at issue sought to address the transnational problem of protecting an endangered species, the United States could plausibly argue that SST sanctions target the transnational problem of terrorism. A WTO panel will most likely find a sufficient nexus between potential human targets of terrorism and the United States, a country that is ranked “high risk” in the Global Terrorism Index.<sup>89</sup> Alternatively, the United States could argue that Iranian agents have attacked U.S. troops abroad in Iraq or rely on Iran’s role in helping to plan and execute the 1983 bombings of the Marine barracks and U.S. embassy in Beirut.<sup>90</sup> International terrorism thus meets the threshold policy concerns of Article XX.

The burden of demonstrating “necessity” is on the defending member; the United States must demonstrate that the sanctions materially contribute to the objective pursued.<sup>91</sup> The regulating member need only make a prima facie case of necessity by showing there is a plausible or reasonable fit between the measure and its objectives and taking into account both the objectives it is intended to achieve and the degree of

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87. *United States—Shrimp*, *supra* note 85, ¶ 2.

88. *Id.* ¶ 133.

89. INST. FOR ECONS. & PEACE, GLOBAL TERRORISM INDEX (2015), <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf>.

90. *What is a U.S. Embassy?*, U.S. DIPLOMACY CENTER: DISCOVER DIPLOMACY, <http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm> (last visited Mar. 16, 2017) (“U.S. embassies and consulates abroad, as well as foreign embassies and consulates in the United States, have a special status. While diplomatic spaces remain the territory of the host state, an embassy or consulate represents a sovereign state. International rules do not allow representatives of the host country to enter an embassy without permission—even to put out a fire—and designate an attack on an embassy as an attack on the country it represents.”).

91. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 150, WTO Doc. WT/DS332/AB/R (*adopted* Dec. 17, 2007) [hereinafter *Brazil—Tyres*] (“[I]t would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective.”). For the purposes of this Note, the “necessity” and chapeau analysis of these two separate exceptions will be done side by side.

trade restrictiveness involved in obtaining them.<sup>92</sup> To guide this inquiry, the Panel will consider the contribution of the measure to the ends pursued, the importance of the common interests or values protected, and the impact of the measure on imports or exports.<sup>93</sup> A member does not need to prove a measure is indispensable, or *absolutely* necessary, to the objective.<sup>94</sup> In *EC—Seals*, the Appellate Body clearly rejected any requirement of a minimum threshold level of contribution:

If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis.<sup>95</sup>

Fortunately for the United States, there is an entire statutory reporting mechanism tracking the connection between a state's actions, its designation as a SST, and the resulting sanctions. The State Department is required to provide Congress with a full and complete annual report on terrorism for those countries that meet the statutory criteria.<sup>96</sup> This SST report notes Iran's connection to international terrorism:

Iran continued its terrorist-related activity in 2014, including support for Palestinian terrorist groups in Gaza, Lebanese Hizballah, and various groups in Iraq and throughout the Middle East. This year, Iran increased its assistance to Iraqi Shia militias, one of which is a designated Foreign Terrorist Organization (FTO), in response to the Islamic State in Iraq and the Levant (ISIL) incursion into Iraq, and has continued to support other militia groups in the region.<sup>97</sup>

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92. *Id.* ¶ 145 (“Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.”).

93. *Id.* ¶¶ 142–56.

94. *Id.* ¶ 141.

95. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*. ¶ 5.215, WTO Doc. WT/DS400/AB/R (adopted June 18, 2014).

96. 22 U.S.C § 2656f (West). The statute requires detailed assessment of countries that, *inter alia*, provide “significant support” to international terrorism, including “political and financial support.” § 2656f(b)(1)(C)(i).

97. U.S. DEP'T OF STATE, *supra* note 86, at 284–85.

Again, however, empirical studies demonstrating necessity are not required to satisfy this preliminary question. There simply needs to be a rational basis. Like Brazil in *Brazil—Tyres*, the United States has “developed and implemented a comprehensive strategy to deal with” SSTs.<sup>98</sup> Economic sanctions are a “key element” of this strategy. The sanctions “are likely to bring a material contribution to the achievement of its objective” in reducing Iran’s participation in international terrorism through isolation, shaming, and genuine economic harm.<sup>99</sup>

In order to succeed under WTO case law, Iran must then propose alternative measures that are less restrictive than the challenged measure.<sup>100</sup> Iran will likely argue that diplomatic efforts are a feasible, less trade restrictive alternative. The burden then shifts back to the defending member to show the proposed alternative is not reasonably available given the circumstances or why the alternative wouldn’t achieve the same effect.<sup>101</sup> The United States will argue that it has tried through direct and indirect diplomacy—unsuccessfully—to achieve this goal since at least 1984. Imposing economic sanctions on a country that supports international terrorism is one of the least restrictive measures in its arsenal.

In *EC—Asbestos*, the European Community and Canada challenged “The Decree,” a French regulation that banned asbestos fibers in any form—a QR on its face.<sup>102</sup> In analyzing the “necessity” and “alternatives” prong of the exception, the Appellate Body sided with the defending country: “France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt.’ Such an alternative measure would, in effect, prevent France from achieving its chosen

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98. *Brazil—Tyres*, *supra* note 91, ¶ 155.

99. *Id.*

100. *Id.* ¶ 156 (“It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.”).

101. Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WTO Doc. WT/DS33/AB/R (adopted May 23, 1997).

102. See generally Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted April 5, 2001).

level of health protection.”<sup>103</sup> Indeed, the whole purpose of the French regulation was to stop the importation of asbestos in any form.<sup>104</sup> The U.S. sanctions similarly bar the exportation of certain goods and services in their entirety; seeking alternatives would not achieve the same goal.

Even after successfully establishing the necessity of the sanctions, the United States must still satisfy the chapeau of Article XX, which requires that the “measures are not applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination . . . or a disguised restriction on international trade.”<sup>105</sup> The chapeau is focused on the application of the trade measure, and serves to counteract the liberal exception standard of Article XX by balancing the needs of the WTO with democratic interests. As the text indicates, analysis of measures under the chapeau focuses on three prohibited applications: (1) unjustifiable discrimination between countries where the same conditions prevail; (2) arbitrary discrimination between countries where the same conditions prevail; and (3) disguised restriction on international trade.<sup>106</sup> The focus of this inquiry is:

[O]n the cause or rationale given for the discrimination . . . [T]here is arbitrary or unjustifiable discrimination . . . when the Member seeks to justify the discrimination . . . by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the [exceptions].<sup>107</sup>

*United States—Shrimp* provides the most instructive discussion about how to analyze the application of trade measures under the chapeau of Article XX. India, Malaysia, Pakistan, and Thailand challenged an American regulation prohibiting shrimp imports from countries that do not require its fishermen to use TEDs in all shrimp trawlers. The Appellate Body found the United States in violation of the Article XI prohibition on QRs, and also concluded that the ban constituted arbitrary and unjustifiable discrimination under the chapeau of

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103. *Id.* ¶ 174.

104. *Id.* ¶ 2.

105. GATT, *supra* note 3, art. XX.

106. *Id.*

107. *Brazil—Tyres*, *supra* note 91, ¶ 246.



Article XX.<sup>108</sup> In doing so, it provided a step-by-step doctrinal analysis for analyzing the chapeau.

The chapeau first prohibits application of prohibited measures that constitute unjustifiable discrimination. Relevant factors for this determination include the coercive effect of the measure as well as a second consideration of alternatives. In *United States—Shrimp*, the Appellate Body spoke directly on the subject of embargoes:

[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal . . . *without* taking into consideration different conditions which may occur in the territories of those other Members.<sup>109</sup>

But SST sanctions are entirely country-specific. In other words, countries are designated as SST precisely *because* the United States has “taken into consideration different conditions” within countries.<sup>110</sup>

In terms of alternatives, Iran could pull on previous examples of less trade distorting measures the United States has employed against geopolitical adversaries. For instance, the United States could impose visa restrictions and financial asset restrictions, as it did when Russia joined the WTO.<sup>111</sup> The United States could also form an “Iran Commission,” akin to the formation of the China Commission, which monitors human rights conditions in China after its accession.<sup>112</sup> These alternatives are “reasonably open to the United States for securing the legitimate policy goal of its measure.”<sup>113</sup> But unlike in *United States—Shrimp*, the United States did try these other measures; in fact, many of these measures are still in place. Most importantly, they don’t entirely serve the same goal.

108. *United States—Shrimp*, *supra* note 85, ¶¶ 187–88.

109. *Id.* ¶ 164.

110. U.S. DEP’T OF STATE, *supra* note 86.

111. Tom Miles, *Russian Memo to WTO Says U.S. Sanctions are Illegal*, REUTERS (Apr. 24, 2014, 6:26 AM), <http://www.reuters.com/article/us-ukraine-crisis-russia-wto-idUSBREA3N0QS20140424>.

112. *See, e.g.*, U.S. TRADE REPRESENTATIVE, 2015 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (Dec. 2015), <https://ustr.gov/sites/default/files/2015-Report-to-Congress-China-WTO-Compliance.pdf>.

113. *United States—Shrimp*, *supra* note 85, ¶ 171.

There is a symbolic and isolating value to SST sanctions that visa restrictions lack. And visa restrictions don't have the same economic impact as sanctions since they focus on individuals and not the organizational drivers of economic growth.

To determine if there is arbitrary discrimination, WTO panels look to the procedures surrounding the regulation and the situation of other members in relation to the complainant. The American case is even stronger under this prong. First, there is arguably a "transparent, predictable . . . process that is followed by the competent United States government officials" to remove countries from the SST list.<sup>114</sup> There are two ways a designation can be revoked. First, the president can certify to Congress in a report that (a) "there has been a fundamental change in the leadership and policies of the government of the country concerned"; (b) "the government is not supporting acts of international terrorism"; and (c) the "government has provided assurances that it will not support acts of international terrorism in the future."<sup>115</sup> The alternative route is for the president to report to Congress 45 days before a proposed rescission, certifying that: (a) "the government concerned has not provided any support for international terrorism during the preceding six-month period," and (b) "the government concerned has provided assurances that it will not support acts of international terrorism in the future."<sup>116</sup> Even though there is no opportunity for a formal hearing, there is clear evidence of other countries being removed from the SST list after reforms.<sup>117</sup> There is thus sufficient transparency and rationale for the imposition of SST sanctions.

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114. *Id.* ¶ 180.

115. U.S. DEP'T OF STATE, *supra* note 86.

116. *Id.*

117. See, e.g., Julie Hirschfeld Davis, *U.S. Removes Cuba From State-Sponsored Terrorism List*, N.Y. TIMES (May 29, 2015), [http://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html?\\_r=0](http://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html?_r=0) (noting "the ease with which the administration removed Cuba from the list—a step that Cuban-American lawmakers had promised to try to block through congressional action, but ultimately did nothing to stop—reflected the degree to which Mr. Obama's new policy has shifted the debate over Cuba"); Elise Labott, *U.S. to Restore Relations with Libya*, CNN (May 15, 2008, 8:30 PM), <http://www.cnn.com/2006/US/05/15/libya/> (quoting then-Secretary of State Condoleezza Rice as saying, "We are taking these actions in recognition of Libya's continued commitment to its renunciation of terrorism.").

Second, the United States is not singling out Iran for this treatment.<sup>118</sup> In order to dispel any notion that the United States is acting on a whim, it can point to international organizations that have condemned Iran's actions in a similar manner. For instance, the Organization of Islamic Cooperation, a bloc of 57 Muslim states, of which Iran is a member, condemned Iran's sponsorship of terrorism: "[The 13th Islamic Summit of the Heads of State of the OIC Member States] deplore[s] Iran's interference in the internal affairs of the States of the region and other Member States including Bahrain, Yemen, Syria, and Somalia, and *its continued support for terrorism*."<sup>119</sup>

Finally, in order to determine if the SST sanctions are a "disguised restriction on trade," WTO case law instructs members to look to the "design, architecture and revealing structure" of the measure.<sup>120</sup> The SST sanctions are based on detailed reporting requirements and intelligence on specific security concerns emanating from Iran. Moreover, nearly half the measures deal specifically with weapons or "dual use" items. Like "The Decree" in *EC—Asbestos*, the Appellate Body will almost certainly rule that SST regulations are a legitimate response to concerns over human health and not "a premeditated intention to protect" American industry.<sup>121</sup>

As the forgoing discussion reveals, Article XX contains something that Article XXI lacks: doctrine and instructive precedent. For the United States, which must be conscientious not just of the immediate dispute, but also of the institutional integrity of the DSB in a time of rising international tension, invoking the general exceptions to WTO principles—even for an issue that is ostensibly in the realm of national security—is the wisest course of action.

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118. U.S. DEP'T OF STATE, *supra* note 86.

119. *Final Communiqué of the 13th Islamic Summit of the Heads of State of the OIC Member States*, ¶ 33, ORG. OF ISLAMIC COOPERATION (Apr. 15, 2016), [http://www.oic-oci.org/oicv3/topic/?t\\_id=11093&ref=4364&lan=en](http://www.oic-oci.org/oicv3/topic/?t_id=11093&ref=4364&lan=en). The OIC styles itself as "The Collective Voice of the Muslim World."

120. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.239, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001).

121. *Id.* ¶ 8.238.

## V. CONCLUSION

Iran's likely accession to the WTO will mark a major shift in its foreign policy as well as the geopolitics of the region. It signals its reengagement with the world economy and the West after nearly forty years of isolation. But it also presents the United States with a conundrum. It must balance its short-term interests in maintaining the SST sanctions against Iran with its long-term interest in maintaining the structural integrity of the GATT. At a time when non-economic disputes are increasingly playing out at the DSB of the WTO, this accession provides a fascinating case study of how Iran will function in an international system based on norms, and how the United States can respond to national security challenges in a forum seemingly focused exclusively on trade issues.

The election of Donald Trump, an avowed opponent of the multilateral trading regime and a hardliner on Iran, will elevate the conflict over the remaining sanctions.<sup>122</sup> Even if the new administration blocks Iran's accession, the European Union and other countries in the West will still have standing to challenge American imposition of "secondary sanctions" for conducting business with Iran.<sup>123</sup> Moreover, despite the rhetoric of the new administration, key members of Trump's national security team—namely Secretary of Defense James Mat-

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122. See generally Vicki Needham, *Trump Suggests WTO Over Import Tax Proposal*, THE HILL (Jul. 24, 2016, 10:27 AM), <http://thehill.com/policy/finance/289005-trump-suggests-leaving-wto-over-import-tax-proposal> ("The Republican presidential nominee called the [WTO] a 'disaster' and ratcheted up his anti-trade criticism in calling for the punishment of U.S. firms that move overseas."); Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> ("President Trump upended America's traditional, bipartisan trade policy on Monday as he formally abandoned the ambitious, 12-nation Trans-Pacific Partnership brokered by his predecessor and declared an end to the era of multinational trade agreements that defined global economics for decades.").

123. Secondary sanctions are "economic restrictions designed to deter third-country actors from supporting a primary target of unilateral sanctions." Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 906 (2009).

tis—have indicated that the United States will honor the JCPOA, leaving the door open to Iran’s accession.<sup>124</sup>

As a new member, Iran’s first course of action will be to seek sanctions relief at the WTO by filing a complaint against the United States. By justifying its sanctions first and foremost under the “public morals” and “human health” exceptions, the United States will likely win the dispute, and, in doing so, preserve the legal parameters of the international trading system, a pillar of economic prosperity and national security in the 21st century.

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124. Austin Wright & Jeremy Herb, *Mattis Breaks with Trump on Iran, Russia*, POLITICO (Jan. 12, 2017, 10:43 AM), <http://www.politico.com/story/2017/01/james-mattis-confirmation-hearing-233530> (“While Mattis is known as an Iran hawk, he said Thursday he believed the United States should stick with the Iranian nuclear deal.”).

