

“Trade Wars are Good and Easy to Win”: From Security Exceptions to the Post-WTO World

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Abstract

The tariffs on steel and aluminium products imposed by the United States under the pretext of national security presented an unprecedented challenge to the functionality of the current multilateral trade governance system based on the WTO agreements. The ambiguity in the interpretation of the security exceptions contained in the GATT, GATS, and TRIPS left ample room for speculation as to the legitimacy of these trade-restrictive measures under international trade law. This delicate balance has been shaken by the recent WTO panel report in Russia – Measures concerning traffic in transit case, which provided a long awaited guidance on the interpretation of Article XXI GATT. The paper provides an analysis of the security exceptions in WTO law following the debate on their interpretation and application in the recent cases including the U.S. tariffs, the EU/U.S.-Russia confrontation over Ukraine and Gulf States' embargo against Qatar.

Keywords: World Trade Organization, GATT, economic sanctions, security exceptions, tariffs, protectionism, dispute settlement mechanism

I. Introduction: The Start of the New Era of Trade Wars

*When a country (USA) is losing many billions of dollars on trade with virtually every country it does business with, trade wars are good and easy to win. For example, when we are down \$100 billion with a certain country and they get cute, don't trade anymore – we win big. It's easy!*¹

On March 1, 2018, the U.S. President Donald J. Trump has announced the decision to raise the tariffs on steel and aluminium imports in order to counter the alleged threats to the national security of the United States caused by the current levels of imports.² The measures outlined in the Presidential Proclamations included 25% *ad valorem* tariff on steel³ and 10% *ad valorem* tariff on aluminium.⁴ These trade restrictions have been applied to the imports from all countries except Canada and Mexico, which were temporarily exempted due to “shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico.”⁵ Other countries

1) Donald J. Trump (@realDonaldTrump), Twitter (Mar. 2, 2018, 6:50 pm), <https://twitter.com/realDonaldTrump?lang=en>.

2) See Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminium Industry (Mar. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-listening-session-representatives-steel-aluminum-industry/> (last visited: Apr. 2, 2019).

3) Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 15, 2018). On Adjusting Imports of Steel into the United States (8 March 2018), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/> (last visited: Apr. 2, 2019), para 8. The steel articles covered by the tariff are defined at the Harmonized Tariff Schedule (HTS) 6digit level as: 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90.

4) Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 15, 2018). On Adjusting Imports of Aluminium into the United States (8 March 2018), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/> (last visited: Apr. 2, 2019), para 7. The articles covered by the tariff are defined in the HTS as: (a) unwrought aluminium (HTS 7601); (b) aluminium bars, rods, and profiles (HTS 7604); (c) aluminium wire (HTS 7605); (d) aluminium plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminium tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminium castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70).

have been invited “to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country.”⁶

The responses from the U.S.’ trading partners, although prompt and highly critical, have been initially quite vague concerning the concrete measures that the respective countries are going to undertake within the current multilateral trading system governed by the rules of the World Trade Organization (WTO). The EU Trade Commissioner Malmström was hopeful for an exemption: “We still hope, as a USA security partner, that the EU would be excluded.”⁷ Later, she questioned the legitimacy of the U.S. actions under the WTO rules: “We believe that this U.S. measure is a safeguard in disguise; that the security exception that does exist in the WTO, but which is meant to be used for wartime, is misused. So we are confident that we could win such a case in the WTO.”⁸ Ultimately, the EU has resorted to retaliation (extra duties on U.S. imports of steel, aluminium, and agricultural products)⁹ and initiated a WTO dispute against the U.S.¹⁰ This move was encouraged by some scholars arguing that “the EU should proceed with its WTO complaint to set its retaliation on a sound legal basis, to clarify the limits of Article 21 and to force the United States to clarify its position with regard to the dispute settlement procedure.”¹¹ Japan’s trade officials also hoped that Japan could secure an exemption.¹² The Brazilian

5) *Id.* para 10.

6) *Id.* para 9.

7) Eur. Comm’n, *European Commission Outlines EU Plan to Counter US Trade Restrictions on Steel and Aluminium*, News Archive (Mar. 7, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1809>.

8) Eur. Parl. Deb. (Mar. 14, 2018) Closing remarks of Commissioner Malmström, statements by Vice President Katainen and Commissioner Malmström: *U.S. Decision to Impose Tariffs on Steel and Aluminium*, (Strasbourg, Mar. 14, 2018), http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156640.pdf. At the same time, the German Minister of Economy Peter Altmeier hurried to Washington to hold bilateral talks with the U.S. trade officials, which signalled that some Member States could be prepared to take parallel steps to ensure the exemptions of their steel and aluminium exports to the U.S. See Jorge Valero, *Germany breaks ranks with rush White House meeting on tariffs* (Mar. 17, 2018), <https://www.euractiv.com/section/economy-jobs/news/germany-breaks-ranks-with-rush-white-house-meeting-on-tariffs>.

9) Eur. Comm’n, *EU Adopts Rebalancing Measures in Reaction to US steel and Aluminium Tariffs*, News Archive (Jun. 20, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1868>.

10) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1, (adopted Jan. 28, 2019).

11) Uri Dadush, *U.S. steel and aluminium tariffs: how should the EU respond?* Bruegel (Mar. 9, 2018), <http://bruegel.org/2018/03/u-s-steel-and-aluminum-tariffs-how-should-the-eu-respond/>.

finance minister confirmed the intention to negotiate: “We just have to know what sort of negotiation this is; what they’re willing to negotiate. The issue will be considered bearing in mind what Brazil has to win or lose.”¹³ The Chinese authorities, on the other hand, have objected to the U.S. measures as incompatible with WTO rules: “To restrict the trade of steel and aluminium products with the excuse of national security will severely destroy the multilateral trading system represented by the WTO and is sure to impact on normal international orders.”¹⁴

The somewhat conciliatory tone of the public statements made by some of the U.S. trading partners should not dismiss the fact that global tariffs on steel and aluminium imposed by the United States are unprecedented in many respects. For instance, it is one of the rare cases where the major Western powers have been engaged in a security-related trade dispute, another rare example being the extraterritorial application of the U.S. Helms-Burton Act imposing sanctions on Cuba, which also affected companies from the third countries and has been contested by the EU, Canada, and Mexico.¹⁵ Moreover, in the present case the security concerns were advanced by the U.S. against its traditional allies – the members of the North Atlantic Treaty Organization (EU Member States including United Kingdom, and non-EU members Albania, Canada, Montenegro, and Turkey),¹⁶ as well as traditional partners in Asia (Japan, South Korea) and the Middle East.

The U.S. move to use trade restrictive measures as a response to an alleged security threat has revived the debate on the role and application of the security

12) See Jim Brunsten and Shawn Donnan, *EU and Japan Press US on Steel and Aluminium Tariffs*, Financial Times (Mar. 11, 2018), <https://www.ft.com/content/e5729ee2-248b-11e8-b27e-cc62a39d57a0>.

13) Sabrina Craide, *Brazil Plans to Negotiate US Steel Tariffs*, Agencia Brasil (Mar. 9, 2018), <http://agenciabrasil.ebc.com.br/en/economia/noticia/2018-03/brazil-plans-negotiate-us-steel-tariffs>.

14) Ministry of Commerce of People’s Republic of China, *Head of MOFCOM Trade Remedy and Investigation Bureau Wang Hejun Comments on US Restrictive Measures on Imported Steel and Aluminium Products*, (Mar. 5, 2018), <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201803/20180302718061.shtml>; *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/9, (Jan. 28, 2019). China has also launched a dispute at the WTO.

15) See Riyaz Dattu and John Boscariol, *GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception*, 28 Can. Bus. L.J. 198, 209 (1997).

16) See Josh Boak and Ken Thomas, *US May Tie NATO Contributions to Tariff Exemptions*, AP News (Mar. 10, 2018), <https://apnews.com/0e8965f9c46a481ba3929da5cdc2101b>.

exceptions in the WTO agreements, which allow the state to deviate from their commitments under the said agreements due to the national security concerns.¹⁷ At the same time, the possible litigation in the WTO and the invocation of the security exception by the U.S. have been already labelled as “unmitigated disaster” that “would most likely lead to the disintegration of the WTO.”¹⁸ The present paper provides a critical analysis of the role that the WTO Dispute Settlement Mechanism (DSM) can play in resolution of the trade dispute between the U.S. and its trading partners, as well as the consequences of the recent WTO ruling in *Russia – Measures concerning traffic in transit* case¹⁹ on the legitimacy of the U.S. trade restrictions under WTO law. The paper is structured as follows. Section II analyses the domestic law aspects of the trade-restrictive measures imposed by the U.S. Section III addresses the ambiguous interpretations of the security exceptions embedded in the WTO agreements. In Section IV we shall analyse the current trade disputes involving national security interests and the application of the security exceptions in these cases. Section V offers a prospective outlook on the future of the WTO DSM.

II. U.S. Tariffs on Steel and Aluminium: Side-Stepping the WTO Trade Remedies?

*We thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance.*²⁰

The above mentioned tariffs were imposed by the U.S. President on the basis of the Section 232 of the Trade Expansion Act of 1962, which empowers the administration to “adjust imports” if they threaten to impair national security.²¹

17) Art. XXI of the General Agreement on Tariffs and Trade, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994); Art. XIV bis of the General Agreement on Trade in Services, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); Art. 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

18) Stuart S. Malawer, *Trump, Trade, and National Security – Blowing Up the WTO?* SSRN eLibrary (Mar. 10, 2018), <https://ssrn.com/abstract=3133770>.

19) *Russia – Measures concerning traffic in transit*, WTO Doc. WT/DS512/R, (adopted Apr. 5, 2019).

20) WTO, Analytical Index of the GATT, Article XXI Security Exceptions, at 600, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

The legislative provisions directly link the welfare of the national economy to the concept of national security: “the Secretary [of Commerce] and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries.”²² The substantive criteria for the assessment of the imports’ impact on national security included among others: (1) requirements of defense and essential civilian sectors; (2) growth requirements of domestic industries to meet national defense requirements; (3) quantity, quality, and availability of imports; (4) impact of foreign competition on economic welfare of the essential domestic industries; and (5) other factors relevant to the particular cases.²³

On March 19, 2018, the U.S. Department of Commerce has released the procedure for exclusion from the imposed tariffs on steel and aluminium products.²⁴ According to these procedures, only the individuals and organizations using the respective products in their business activities (construction, manufacturing, supplying steel or aluminium products to users) in the United States can file the requests for exclusion. Any other parties may only submit their comments on the requests of exclusion, which will be published for public comment. The exclusion “will only be granted if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security considerations.”²⁵ It should be noted, however, that the above mentioned exclusion procedures do not apply to exemptions that may be requested by countries in the process of bilateral negotiations with the United States, which may be subject to a different type of political and economic bargaining. Following the start of negotiations with individual countries looking for an exemption, the U.S. President has provisionally excluded the following countries from the application of the increased tariffs: Australia, Argentina, South Korea, Brazil, and the EU.²⁶

21) Trade Expansion Act of 1962, 19 U.S.C§1862 (1964).

22) *Id.* para (d).

23) *See* Effect of Imported Articles on the National Security (15 C.F.R.§705),§705.4.

24) Dep’t of Commerce, Bureau of Industry and Security, 15 C.F.R.§705, 83 Fed. Reg. 53 (Mar. 19, 2018), <https://www.bis.doc.gov/index.php/documents/aluminum/2197-federal-register-vol-83-no-53-monday-march-19-2018-12106-12112-pdf/file>.

25) Supplement No. 1 to Pt. 705 – Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Proclamation No. 9705 (Mar. 8, 2018). Adjusting Imports of Steel Articles into the United States, para 5.

Ironically, the early commentators of U.S. Trade Expansion Act have labelled it “a strong step in the direction of expansion of international trade, a continuation and strengthening of the trade agreement program, whose purpose is to reduce artificial barriers to increased trade among nations.”²⁷ Notably, the previous U.S. administrations exercised substantial restraint in applying the import restrictions for the national security reasons. The summary of investigations conducted under Section 232 by the Bureau of Industry and Security of the Department of Commerce indicates that up until now the import restrictions have been imposed exclusively in relation to petroleum products.²⁸ Other seemingly strategic products, such as iron ore and semi-finished steel, uranium, chromium, manganese, and silicon ferroalloys, gears and gearing products have been investigated but the conclusion reached was that the respective imports do not threaten national security.²⁹ For instance, after the 2001 investigation on the national security impact of steel imports, the U.S. Department of Commerce was “unable to conclude that imports of iron ore and semi-finished steel threaten to impair the national security of the United States, or to recommend to the President that he take action under Section 232 to adjust the level of imports.”³⁰ This reluctance to apply trade-restrictive measures under pretext of national security have been called “a courageous contribution to an open and secure trading system. Unless this commitment is reversed, the continuing need for section 232 is surely doubtful.”³¹

26) See Proclamation No. 9711 (Mar. 22, 2018), 83 Fed. Reg. 60 (Mar. 28, 2018), adjusting imports of steel into the United States, https://www.usitc.gov/documents/20180322_proc_9711_steel_relief_under_section_232_amendment.pdf; *Id.* Adjusting imports of aluminium into the United States, https://www.usitc.gov/documents/20180322_proc_9710_aluminum_relief_under_section_232_amendment.pdf.

27) Stanley D. Metzger, *The Trade Expansion Act of 1962*, 51(3) Geo. L.J. 425, 466 (1963).

28) See Bureau of Industry and Security, Office of Technology Evaluation, Sec. 232 Investigations Program Guide, *The Effect of Imports on the National Security: Investigations conducted under the Trade Expansion Act of 1962, as amended* (Jun. 2007), <https://www.bis.doc.gov/index.php/documents/section-232-investigations/86-section-232-booklet/file>, at 13-20. See Proclamation No. 3279, 24 Fed. Reg. 1781 (1959); Proclamation No. 4210, 38 Fed. Reg. 9645 (1973); Proclamation No. 4341, 40 Fed. Reg. 3964 (1975); Proclamation No. 4744, 45 Fed. Reg. 22,864 (1980); Proclamation No. 4907, 47 Fed. Reg. 10,607 (1982).

29) The reports adopted under Sec. 232 by the Dep’t of Commerce are available at <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations>.

30) Dep’t of Commerce, *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security* (Oct. 2001), <https://www.bis.doc.gov/index.php/documents/section-232-investigations/81-iron-ore-and-semi-finished-steel-2001/file>, at 2.

On the other hand, the current move of the U.S. administration to impose tariffs and make them subject to *ad hoc* negotiations with individual trading partners may have signalled the decline of the WTO's multilateral trade system as we know it.³² The U.S. Trade Representative Lighthizer reiterated the U.S. position on the matter: "Article XXI [GATT] gives broad authority to WTO Members to take action necessary to protect essential security interests. For decades, the United States has consistently held the position that actions taken pursuant to Article XXI are not justiciable by any panel of the WTO... President Trump's actions regarding steel and aluminium plainly fall within the legitimate scope of Article XXI."³³ This invocation of the largely dormant national security clause embedded in the pre-WTO foreign trade legislation and imposition of the unilaterally determined trade-restrictive measures without prior consultations with the affected countries represent a side-stepping of the WTO trade remedies procedures negotiated and agreed by the U.S. in 1947 (GATT – General Agreement on Tariffs and Trade) and 1994 (Marrakesh Agreement/WTO). The WTO agreements allow the members to deviate from their trade commitments when justified by the essential security interests. In order to understand whether these security exceptions have managed to strike the balance between trade and security interests, the following section outlines the ongoing debate on the interpretation and application of security exceptions under WTO law.

III. Security Exceptions under WTO law: Self-Judging Clauses or Reviewable Measures?

If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the [member states] ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other

31) David D. Knoll, *Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond*, 10 Md. J. Int'l L. & Trade 55, 87 (1986).

32) See Edward Alden, *Trump, China, and Steel Tariffs: The Day the WTO Died*, Council on Foreign Relations, (Mar. 9, 2018), <https://www.cfr.org/blog/trump-china-and-steel-tariffs-day-wto-died>.

33) Statement by Ambassador Robert E. Lighthizer on Retaliatory Duties (Jun. 26, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/statement-ambassador-robert-e>.

*than those set out in this provision?*³⁴

The relevant provision of Article XXI GATT, which largely mirrors its equivalents in GATS and TRIPS agreements, reads as follows:

Nothing in this Agreement shall be construed...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;

Notably, the Charter of the International Trade Organization (Havana Charter), which was designed “as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations,” provided for a stronger relationship between the ITO and the UN on the matters of the national security:

The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.³⁵

Needless to say, the Marrakesh Protocol establishing the WTO does not contain such institutional arrangement between the WTO and the UN. The Decision Concerning Article XXI GATT specified that “when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.”³⁶ Such rights may be invoked under Article XXIII GATT on nullification and impairment of benefits.

The scholarly debate on the application of the security exceptions in the

34) *United States – Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986), para 5.17.

35) Havana Charter for an Int'l Trade Org., adopted at UN Conference on Trade and Employment held at Havana, Cuba from Nov. 21, 1947 to Mar. 24, 1948, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf, at art. 86(3).

36) Decision concerning Article XXI of the General Agreement (Nov. 30, 1982), WTO Doc. https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf.

context of the WTO DSM proceedings can be roughly condensed to the two opposing approaches. One group of scholars regards the security exceptions as largely self-judging clauses that provide the states with the discretionary right to define the threats to their national security and to protect their essential security interests by adopting trade-restrictive measures.³⁷ According to the followers of this approach, the WTO DSM is unsuitable for the resolution of the security-related disputes and the WTO Dispute Settlement Body (DSB), when seized on the security exceptions, should exercise self-restraint and deference towards the determination reached by the respective state.³⁸ The opponents of the DSB review of the security-related restrictions argue that various suggested review criteria such as proportionality of the adopted measures in relation to the identified security threats, or the requirement that the adopted measure should be the least trade-restrictive, would infringe on the sovereignty of the WTO members.³⁹

Another group of scholars advocates the reviewability of the trade-restrictive measures taken by the states under the security exception by the WTO DSB panel.⁴⁰ This group derives the justification for their approach from

37) See e.g. Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19(2) U. Penn. J. Int'l Econ. L. 263, 317 (1998); Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse*, 11(1) J. Int'l Econ. L. 135, 154 (2008); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 620 (1991); Richard Sutherland Whitt, *The Politics of Procedure: An Examination of GATT Dispute Settlement Panel and Article XXI Defence in the Context of the U.S. Embargo on Nicaragua*, 19 L. & Pol'y in Int'l Bus. 603, 631 (1987).

38) See e.g. William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, 4(1) J. Int'l Econ. L. 79, 110 (2001).

39) See e.g. Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91(2) Am. J. Int'l L. 268, 313 (1997).

40) See e.g. Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States Under the GATT National Security Exception*, 11 Fla. J. of Int'l L. 559, 584 (1997); C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Question Doctrine*, 61 U. Pitt. L. Rev. 238, 287 (1999); Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 Int'l L. & Poli. 437, 496 (2008); Diane Desierto, *Protean 'National Security' in Global Trade Wars, Investment Walls, and Regulatory Controls: Can 'National Security' Ever Be Unreviewable in International Economic Law?* EJIL: Talk! (Apr. 2, 2018), <https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/>.

the general principles of international public law such as good faith⁴¹ and the fact that security exception provisions in the WTO treaties include specific conditions and objective criteria, which can be verified by the panel.⁴² For example, one of the academic proposals advocates a two-prong approach where the terms “necessity” and “essential security interests” should be left to the discretion of the state invoking the security exception. At the same time, the situations listed in Article XXI(b) GATT such as “taken in the time of war or other emergency in international relations” should be reviewable by the panel.⁴³ The proponents of this approach argue that the “necessity” element should be subjected to a more lenient review than “timing” element, which should be reviewed *de novo* on the basis of the objective criteria.⁴⁴

Other factors that can be used for the assessment of the trade restrictions adopted under the security pretext include: necessity, exhaustion of alternative remedies, selection of the least restrictive alternative, etc.⁴⁵ For example, the necessity criterion can be examined in the light of the existing jurisprudence based on Article XX GATT, which establishes a relationship between the purpose of the restrictive measure and the measure itself.⁴⁶ Some proponents of the reviewability of the security-related measures went even further and called on the WTO DSB to take a more pro-active stance in investigating the security measures imposed by the members, establish burden of proof and evidentiary

41) See Hannes L. Schloemann & Stefan Ohlhoff, ‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 Am. J. Int’l L. 424, 445 (1999); Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. Int’l Econ. L. 449, 466-468 (2015); Andreas Buser, *Justiciability of Security Exceptions in the US Steel (and other) Disputes: Some Middle-Ground Options and the Requirements of Article XXI lit. b(i)-(iii)*, EJIL:Talk! (Nov. 20, 2018), <https://www.ejiltalk.org/justiciability-of-security-exceptions-in-the-us-steel-and-other-disputes-some-middle-ground-options-and-the-requirements-of-article-xxi-lit-b-i-iii/>.

42) See Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?* 43 Va. J. Int’l L. 365, 399 (2003).

43) See Sandeep Ravikumar, *The GATT Security Exception: Systemic Safeguards against Its Misuse*, 9 NUJS L. Rev. 321, 328 (2016).

44) See Tsai-fang Chen, *To Judge the “Self-Judging” Security Exception Under the GATT 1994 – A Systematic Approach*, 12 Asian J. of WTO & Int’l Health L. & Pol’y, 311, 340-344 (2017).

45) See Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int’l L. 413, 485 (2001).

46) See Rene E. Browne, *Revisiting National Security in an Interdependent World: The GATT Article XXI Defense after Helms-Burton*, 86 Geo. L. J. 405, 423-426 (1997).

standards for the assessment of the motives behind the trade-restrictive measures and their proportionality.⁴⁷ The academic voices also urged the WTO membership to adopt an illustrative list of measures or policy areas that would come in the ambit of the security exceptions contained in the WTO treaties as well as procedural guidelines for the members who seek to impose security-related trade restrictive measures.⁴⁸ Echoing these concerns, the Russian delegation at the 10th session of the WTO Ministerial Conference in 2015 has proposed to develop a General Council decision on joint understanding on the interpretation of the scope of the rights and obligations of the WTO Members under security exceptions provisions, which “shall focus on identification of circumstances when application of the measures pursuant to Security Exceptions is justified, as well as provision of specific transparency requirements and possible retaliatory measures.”⁴⁹

In the absence of the decisive WTO case law in relation to the security exceptions, the academic circles have sustained the discussion exploring various fields where the WTO members can use security exceptions for justification of their otherwise WTO-inconsistent measures: terrorist groups and other non-state actors,⁵⁰ energy security,⁵¹ cybersecurity,⁵² climate change,⁵³ and human rights issues.⁵⁴ It should be noted that the above-mentioned

47) See Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. Int'l Econ. L. 449, 477-478 (2015).

48) See Panagiotis Delimatsis & Thomas Cottier, *Art. XIV bis GATS: Security Exceptions*, Max Planck Commentaries on World Trade Law, WTO – Trade in Services, Rüdiger Wolfrum, Peter-Tobias Stoll, 6 Clemens Feinäugle (eds.) at 329-348.

49) Proposal on MC10 Ministerial Declaration – Pt. III, WTO Doc. WT/MIN(15)/W/14, (Nov. 13, 2015.)

50) See Eric J. Lobsinger, *Diminishing Borders in Trade and Terrorism: An Examination of Regional Applicability of GATT Article XXI National Security Trade Sanctions*, 13(1) ILSA J. Int'l & Comp. L. 99, 138 (2006).

51) See Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, (1994) 12(1) J. Energy & Natural Res. 117, 127 (1994).

52) See Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. Int'l Econ. L. 449, 478 (2015).

53) See Felicity Deane, *The WTO, the National Security Exception and Climate Change*, 2 Carbon & Climate L. Rev. 149, 158; Sophocles Kitharidis, *The Unknown Territories of the National Security Exception: The Importance and Interpretation of Art XXI of the GATT*, 21 Austl. Int'l L. J. 79, 93-99 (2014).

54) See Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2(1) Chi. J. Int'l L. 101, 119 (2001).

academic debate on the meaning and reviewability of security exceptions under WTO law has been largely constrained to the academic circles as the WTO DSB has not yet had an opportunity to assess the application of Article XXI GATT and its equivalents in other WTO agreements. This state of affairs has changed with the recent WTO panel report in case *Russia – Measures concerning traffic in transit*, which provided a comprehensive interpretation of Article XXI GATT. The following section examines the contents of the WTO DSB’s ruling on interpretation and application of security exceptions.

IV. Current WTO Cases Involving Trade and National Security

*Once we start down this path, it will be very difficult to reverse direction. An eye for an eye will leave us all blind and the world in deep recession. We must make every effort to avoid the fall of the first dominoes. There is still time.*⁵⁵

As exemplified by the long history of economic sanctions, the most common example of invocation of security exceptions is for the purposes of economic protectionism or political coercion,⁵⁶ which is fully confirmed by the recent cases. Legal scholars have noted on numerous occasions that the current ambiguity in the interpretation of the security exceptions in WTO law supported by the apparent reluctance of the states to engage in WTO DSM on the matters of national security leads to the situation where the countries will be discouraged from abusing the security exceptions.⁵⁷ For example, it was argued that the threat of WTO litigation itself can be used as a bargaining tool during negotiations where the countries are perceived to be abusing Article XXI GATT against the countries with lesser economic power.⁵⁸ The proponents of this approach argued that “the strength of the multilateral trading system can serve predominantly as an effective check against abuse of this controversial

55) WTO, *Azevêdo Calls on Members to Avoid Triggering an Escalation in Trade Barriers* (Mar. 5, 2018), https://www.wto.org/english/news_e/news18_e/dgra_05mar18_e.htm.

56) See Regis Bonnan, *The GATT Security Exception in a Dispute Resolution Context: Necessity or Incompatibility*, *Currents*, 19 Int’l Trade L. J. 3, 4 (2010).

57) See e.g. Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 *Duke L. J.* 1277, 1313 (2003).

58) See Sandeep Ravikumar, *The GATT Security Exception: Systemic Safeguards Against Its Misuse*, 9 *NUJS L. Rev.* 321, 339 (2016).

provision of the GATT.”⁵⁹ However, the conclusions that the “countries have for the most part exercised a good deal of self-restraint with respect to the use of Article XXI to justify trade restrictions”⁶⁰ or that “the self-judging security exception has worked reasonably well. It certainly has not undermined the effective functioning of the WTO”⁶¹ are based on the scarce jurisprudence of reviewing the cases where the security exceptions were invoked by the parties.⁶²

The above conclusions regarding the apparent success of the WTO security exceptions are misleading because the countries generally have not regarded the WTO DSM as an appropriate forum to litigate their national security concerns, which led to the situation that the Article XXI GATT has not been yet expressly interpreted by the WTO DSB. When the U.S. sanctions against Cuba have been contested by the EU, the scholars noted that the litigation of this security-related dispute in the WTO would place the panel before the Hobson’s choice: “uphold the unilateral invocation of national security to justify violations of the GATT and risk opening the door to a virtually unlimited number of such justifications in the future, or side against Washington and risk the withdrawal of U.S. support for the WTO, which could reverse much of the trading progress of the last decade.”⁶³ Another example is *China – rare earths* dispute, where the Chinese authorities argued that the restrictive measures were designed to “encourage the export of high value-added products and deep processing products and at the same time strictly control the export of ... rare metal products involved in national strategic security.”⁶⁴ Although Article XXI GATT was mentioned in the panel’s report, China did not formally invoke it to defend the contested export quotas. Such steering away from the testing of the scope of security exceptions under GATT has been explained by the desire to preserve certain flexibility and ambiguity in their interpretation, as “members are not certain

59) *Id.* at 340.

60) Alan S. Alexandroff and Rajeev Sharma, The National Security Provision – GATT Art. XXI in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005), at 1571, 1578.

61) Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 Utah L. Rev. 697, 758 (2011).

62) For example, Alford noted that “in over sixty years of international trade, invocations of the security exception have only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision.” *Id.* at 699.

63) David T. Shapiro, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 Geo. Wash. J. Int’l L. & Econ. 97, 99 (1997).

64) *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R, (adopted Mar. 26, 2014), para 7.169 .

which side they will be on in any future dispute.”⁶⁵

A. Cases Involving Russia and Ukraine

At the same time, the WTO DSM, beyond its procedural mechanism, which allows the parties to hold consultations and attempt to settle the underlying dispute, offers remedies that would be unlikely to solve the security dispute even if the trade-restrictive measures have not been justified under the security exceptions. For example, the WTO DSB can allow the injured party to engage in reciprocal retaliation, which in case of economic sanctions between large economies and genuine security interests will unlikely lead to the resolution of the dispute. In this respect, the Western sanctions against Russian Federation and the latter’s counter-measures present an illustrative example of such scenario. Following the organization of the referendum in Crimea in 2014 after which the peninsula has been *de facto* separated from Ukraine, the U.S., the EU and their allies adopted a number of restrictive measures against Russia, both of economic and political nature.⁶⁶ In response, the Russian government has applied import ban on certain food products from the respective Western countries that joined anti-Russian sanctions.⁶⁷

The Russian trade-restrictive measures can be hardly viewed as traditional sanctions since the only condition advanced by the Russian authorities was the cancellation of the U.S./EU sanctions against Russia.⁶⁸ At the same time, Russia openly declared that the counter-sanctions have been part of its import substitution program in the agricultural sector.⁶⁹ It should be also pointed out

65) Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. Int’l Econ. L. 449, 462 (2015).

66) See Rostam J. Neuwirth & Alexandr Svetlicinii, *The current EU/US–Russia conflict over Ukraine and the WTO: a preliminary note on (trade) restrictive measures*, 32(3) Post-Soviet Affairs, 237, 271 (2016).

67) See Presidential Decree No. 560 of Aug. 6, 2014 on the application of certain special economic measures for the purposes of maintaining the national security of the Russian Federation; Government Regulation No. 778 of Aug. 7, 2014 on measures for implementation of the Presidential Decree No. 560 application of certain special economic measures for the purposes of maintaining the national security of the Russian Federation.

68) See Viljar Veebel & Raul Markus, *Lessons from the EU-Russia Sanctions 2014-2015*, 8(1) Baltic J. L. & Poli. 165, 177 (2015).

69) See WTO Trade Pol’y Rev. of Russian Fed., Report by the Secretariat, WT/TPR/S/345, (Aug. 24, 2016), para 28., 24.,

that when formulating its imports ban Russia has followed the differentiated retaliation approach by targeting primarily the countries which persistently followed and supported anti-Russian policies both at bilateral and the EU level.⁷⁰ This is especially visible when one considers that exports to Russia are significantly higher in Central and Eastern European as well as in Baltic countries, which after the Russian counter-measures have declined considerably and much more than for the EU as a whole.⁷¹ This approach challenges the commonly held belief that Russian sanctions were aimed at the Western countries collectively or were designed exclusively to protect and stimulate domestic agricultural production.

When addressing the legitimacy of the above-mentioned restrictive measures, both sides were vocal in their intention to challenge each other's trade-restrictive measures in the WTO. Russian high-ranking officials have declared their intention to initiate WTO litigation on numerous occasions.⁷² The representatives of the most affected EU Member States also urged the EU to challenge Russian trade-restrictive measures in the WTO.⁷³ In the end, however, neither party has lodged the request for consultations before the WTO

70) See Masha Hedberg, *The Target Strikes Back: Explaining Countersanctions and Russia's Strategy of Differentiated Retaliation*, 34(1) *Post-Soviet Affairs* 35, 54 (2018).

71) See Eur. Par., Directorate-General for External Policies, *Russia's and the EU's Sanctions: Economic and Trade Effects, Compliance and the Way Forward*, EP/EXPO/B/INTA/2017/11 (Oct. 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603847/EXPO_STU\(2017\)603847_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603847/EXPO_STU(2017)603847_EN.pdf), at 7.

72) See e.g. Lidia Kelly & Krista Hughes, *Update 1 – Russia challenges U.S. at WTO over sanctions – PM Medvedev*, Reuters (Jun. 20, 2014), <https://www.reuters.com/article/ukraine-crisis-russia-sanctions/update-1-russia-challenges-u-s-at-wto-over-sanctions-pm-medvedev-idUSL6N0P15AS20140620>, quoting RF Prime Minister: “When the United States imposed sanctions against Russia, which had a negative impact on our foreign trade, we decided to challenge these sanctions in the World Trade Organisation”; *US sanctions against Russian Banks Challenge WTO Foundations – Minister*, TASS – Russian News Agency (May 19, 2014), <http://tass.com/world/732117>, quoting RF Minister of Economic Development: “During the previous meeting of the WTO General Council we saw attempts of our European and US counterparts to speak about some sectoral sanctions against Russia, which would imply a politically motivated limitation of export. And this is a direct violation of the WTO foundations.”; *Russia Still Prepares to Challenge EU, US Sanctions in WTO: Kremlin*, Sputnik International (Sep. 11, 2014), <https://sputniknews.com/russia/20140911192844662-Russia-Still-Prepares-to-Challenge-EU-US-Sanctions-in-WTO/>, quoting presidential aide Andrei Belousov: “These lawsuits are being prepared. I can't say for sure when [they will be filed], but it will happen fairly soon.”

73) See e.g. Benjamin Fox, *Poland Demands WTO Challenge over Russia Food Ban*, EU Observer (Aug. 20, 2014), <https://euobserver.com/news/125295>.

DSB. Scholars analysing potential arguments that both sides can advance in a case that Russia will move to challenge the Western sanctions in the WTO do not arrive to a resolute conclusion indicating that both sides have valid arguments for contesting or asserting the legitimacy of the sanctions under Article XXI GATT.⁷⁴

The decision to keep the security-related issues outside the WTO DSM stands in stark contrast with Russia’s active participation in WTO proceedings. While joining the WTO in 2012, Russia has already suffered its first losses in the WTO DSM⁷⁵ and currently has several disputes with the EU⁷⁶ and Ukraine⁷⁷ pending their resolution.⁷⁸ In October 2015, the Ukrainian Government filed the request for consultations concerning Russia’s failure to recognize the conformity assessment certificates for the railway equipment and parts.⁷⁹ In September 2016, Ukraine requested consultations with Russia in another dispute

74) See Rishika Lekhadia, *Can the West Justify its Sanctions against Russia under the World Trade Law?* 7 *Indian J. Int’l Trade L.* 151,176 (2015).

75) *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WTO Doc. WT/DS475/AB/R, (adopted Feb. 23, 2017); *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WTO Doc. WT/DS485/R (adopted Aug. 12, 2016).

76) *European Union – Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia*, WTO Doc. WT/DS521/2, (adopted Mar. 15, 2019); *Russian Federation – Recycling Fee on Motor Vehicles*, WTO Doc. WT/DS462/8, (adopted Oct. 11, 2013); *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*, WTO Doc. WT/DS474/4 (adopted Jun. 6, 2014); *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WTO Doc. WT/DS476/R, (adopted Aug. 10, 2018); *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WTO Doc. WT/DS479/AB/R, (adopted Mar. 22, 2018); *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (second complaint)*, WTO Doc. WT/DS494/5 (adopted Dec. 18, 2018).

77) *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WTO Doc. WT/DS493/R, (adopted Jul. 20, 2018); *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WTO Doc. WT/DS499/R, (adopted Jul. 30, 2018); *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted , Apr. 5, 2019); *Ukraine – Measures relating to Trade in Goods and Services*, WTO Doc. WT/DS525/1, (adopted Jun. 1, 2017).

78) For the review of Russia’s experience with WTO DSM, See Pamela A. Jordan, *Diminishing Returns: Russia’s Participation in the World Trade Organization*, 33(6) *Post-Soviet Affairs* 452, 471 (2017).

79) *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WTO Doc. WT/DS499/R, (adopted Jul. 30, 2018).

concerning the alleged restrictions on transit for the freight traffic from Ukraine destined to the third countries.⁸⁰ In October 2016, Ukraine launched another trade dispute against Russia in relation to trade restrictions imposed on juice products, beer, beer-based beverages and other alcoholic beverages, confectionary products, and wallpaper and similar wall coverings.⁸¹ Finally, in May 2017, Russia has initiated a WTO litigation against Ukraine based on the alleged discrimination against Russian entities, goods and services, and freight in transit.⁸²

The most notable of the above cases is *Russia – Measures concerning traffic in transit* as in that case Russia argued that its invocation of Article XXI GATT places the dispute outside the panel’s terms of reference. Russia argued that “under Article XXI(b)(iii), both the determination of a Member’s essential security interests and the determination of whether any action is necessary for the protection of a Member’s essential security interests are at the sole discretion of the Member invoking the provision.”⁸³ To the contrary, Ukraine argued that the panel should objectively determine whether the trade-restrictive action was taken in time of war or other emergency in international relations and that the invocation of Article XXI GATT was made in good faith *i.e.*, that there is a rational relationship between the action and the protection of essential security interests.⁸⁴

Siding with the Ukrainian position, the EU in its third party submission argued that there is no provision in the GATT that should be viewed as non-justiciable.⁸⁵ According to the EU’s approach, the party invoking Article XXI GATT as a defence, bears the burden of proving that the applicable conditions described in this legal provision are met.⁸⁶ For the assessment of security-related exceptions, the EU proposed to use the analytical framework

80) *Russia – Measures concerning traffic in transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

81) *Russia – Measures concerning the Importation and Transit of Certain Ukrainian Products*, WTO Doc. WT/DS532/1, (adopted Oct. 19, 2017).

82) *Ukraine – Measures Rrelating to Trade in Goods and Services*, WTO Doc. WT/DS525/1, (adopted Jun. 1, 2017).

83) WTO Doc. WT/DS512/R, para 7.27.

84) WTO Doc. WT/DS512/R, paras 7.32-7.34.

85) See EU Third Party Written Submission in Case DS512, *Russia – Measures Concerning Traffic in Transit*, para 14 (adopted Nov. 8, 2017), http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf.

86) *Id.* para 24.

developed under Article XX GATT in order to verify whether (1) the measure is taken “in time of war or other emergency in international relations”; (2) the war or other emergency in international relations threatens its “essential security interests”; (3) the measure is designed “for” the protection of the relevant essential security interests against that threat.⁸⁷ As a second part of the Article XX-inspired test, the panel should verify whether the adopted measures are “necessary” for the protection of the specified security interests.⁸⁸ Although supporting the reviewability of Article XXI measures, China urged the panel “to exercise extreme caution in its assessment of Russia’s invocation of Article XXI(b)(iii), in order to maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member’s right to protect its essential security interests, including a Member’s “sole discretion” regarding its own security interests, on the other hand.”⁸⁹

The U.S., in its written third-party submission in the same case, has insisted that the wording of the Article XXI GATT “which it considers necessary for” reflects the self-judging and non-justiciable nature of this provision. According to the U.S., the difference in wording between Articles XX and XXI (the absence of the words “necessary” in the latter) precludes the application of the Article XX by analogy.⁹⁰ The U.S. concluded that “the dispute is non-justiciable in the sense that the Panel cannot make findings on Russia’s invocation, other than to conclude that Article XXI has been invoked.”⁹¹

The panel has concluded that Russia’s invocation of Article XXI(b)(iii) GATT is within the panel’s terms of reference and proceeded to interpret the meaning of the respective provision through the application of customary rules of interpretation of public international law. The panel held that the existence of war or other emergency in international relations is capable of objective determination. According to the panel, the usage of words “war” in conjunction with “or other emergency in international relations” suggests that “political or economic differences between Members are not sufficient, of themselves, to

87) *Id.* para 38.

88) *Id.* para 56.

89) WTO Doc. WT/DS512/R, para 7.41.

90) Third Party Executive Summary of the United States in Case DS512, *Russia – Measures Concerning Traffic in Transit* (Feb. 27, 2018), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-35>, para 4.

91) *Id.* para 8.

constitute an emergency in international relations for purposes of subparagraph (iii).⁹² When reviewing the preceding practice of invoking security exceptions the panel noted that despite the absence of a common understanding of the meaning of Article XXI, “Members have generally exercised restraint in their invocations of Article XXI(iii)(b), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes.”⁹³ After reviewing the negotiating history of Article XXI GATT, the panel concluded that the consensus was achieved insofar “Members would have “some latitude” to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b).”⁹⁴

After concluding that Article XXI(iii)(b) is not self-judging, the panel has proceeded to evaluate whether Russia has presented a compelling case that would meet the requirements of the specified provision. The panel noted that relations between Ukraine and Russia have deteriorated to such a degree that the international community (UN General Assembly) referred to an armed conflict between the two parties.⁹⁵ This was sufficient for the panel to conclude that the situation between Ukraine in Russia from 2014 onwards constitutes an emergency in international relations within the meaning of Article XXI(iii) GATT.⁹⁶

When determining the existence of essential security interests, the panel noted that it should be left to the invoking country to define what it considers essential security interests, which are “directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances.”⁹⁷ At the same time, the WTO panel qualified that such determination must be done by the invoking country in good faith, which should not be done “simply by re-labelling trade interests that it had agreed to protect and promote within the system, as “essential security interests,” falling outside the reach of that system.”⁹⁸ For example, “the less

92) WTO Doc. WT/DS512/R, para 7.75.

93) *Id.* WT/DS512/R, para 7.80.

94) *Id.* WT/DS512/R, para 7.98.

95) *Id.* WT/DS512/R, para 7.122.

96) *Id.* WT/DS512/R, para 7.123.

97) *Id.* WT/DS512/R, para 7.131.

98) *Id.* WT/DS512/R, para 7.133.

characteristic is the “emergency in international relations” invoked by the Member, *i.e.*, the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise.”⁹⁹ When looking at the facts of the case, the panel noted that “all of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia’s relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict.”¹⁰⁰ As a result, the panel has reached the conclusion that “Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b)(iii) of the GATT 1994.”

B. Economic Blockade against Qatar

Another security-related trade dispute that has been brought before the WTO DSM is the situation concerning the trade embargo imposed by the three Arab States against Qatar due to its alleged harbouring of terrorists and supporting other subversive activities threatening the security of the Gulf States. The three respective cases have been initiated in the WTO DSM by Qatar against Bahrain,¹⁰¹ Saudi Arabia,¹⁰² and the United Arab Emirates (UAE).¹⁰³ The list of demands presented to Qatar included the requests to curb diplomatic ties with Iran, to terminate Turkish military presence in the country, and to shut down Al-Jazeera news outlet, among others.¹⁰⁴ At the time of the writing of this paper, the case

99) *Id.* WT/DS512/R, para 7.135.

100) *Id.* WT/DS512/R, para 7.144.

101) *Bahrain - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS527/1, (adopted Aug. 4, 2017).

102) *Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS528/1 (adopted Aug. 4, 2017).

103) *United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526/3, (adopted Sep. 3, 2018).

104) See Patrick Wintour, *Qatar Given 10 Days to Meet 13 Sweeping Demands by Saudi Arabia*, *The Guardian* (Jun. 23, 2017), <https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade>. See also Alexandra Hofer & Luca Ferro, *Sanctioning Qatar: Coercive Interference in the State’s Domaine Réservé?* EJIL: Talk! (Jun. 30, 2017), <https://www.ejiltalk.org/sanctioning-qatar-coercive-interference-in-the-states-domaine-reserve/>.

against UAE has reached the stage of the composition of the panel on September 3, 2018. The UAE has already invoked Article XXI GATT, Article XIV bis GATS and Article 73 TRIPS as justification for the Gulf States' restrictive measures against Qatar,¹⁰⁵ which raises the chances that the WTO panel will have to address their interpretation. The commentators have argued that the Gulf States' demands could fail the test of proportionality in relation the essential security threats allegedly posed by Qatar.¹⁰⁶ As expected, the respondent countries argued that the invocation of security interests automatically removes the dispute from adjudication under the WTO DSM.¹⁰⁷

The approach taken by the WTO DSM panel in *Russia – Measures concerning traffic in transit* case indicates that the jurisdictional objections raised by the Gulf States will be likely overthrown and the panel will verify their compliance with the requirements of the Article XXI GATT. While the political confrontation between Qatar and Gulf States is more salient than that of the Ukraine-Russia conflict, the invoking countries could experience significant challenges in presenting their case as “other emergency in international relations.” The panel, on the other and will be faced with a difficult task of evaluating the facts, some of which may not be disclosed by the parties due to national security reasons.

What would be the likely result of the panel's ruling in *Russia – Measures concerning traffic in transit* case for the legitimacy of the US tariffs on steel and aluminium in particular and for the functioning of the multilateral trade system in general? The concluding session attempts to address these questions and to chart the road for the WTO membership in addressing the emerging national security concerns.

V. Conclusion

Introversion, protectionism, and cold war climate seem to feed upon one another while awaiting a superior initiative to break the cycle and restore an open world economy and peace. Realisation of the consequences of a deteriorating political climate often provides the

105) See *Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights*, WTO (Oct. 23, 2017), https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm.

106) See Johannes Fahner, *Qatar under siege: Chances for an Article XXI case?*, EJIL: Talk! (Jan. 9, 2018), <https://www.ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/>.

107) See e.g. Tom Miles, *Saudi Cites National Security to Block WTO Case Brought by Qatar*, Reuters (Dec. 4, 2018), <https://uk.reuters.com/article/uk-saudi-qatar-wto/saudi-cites-national-security-to-block-wto-case-brought-by-qatar-idUKKBN1O31QQ>.

*impetus for reversal of the process of entropic autarky.*¹⁰⁸

The ambiguity of the security exceptions in WTO law has survived the Cold War period relatively well, since in the majority of cases the embargoes and economic sanctions have been imposed by the Western nations affecting the trade of smaller, developing countries. Since the Iron Curtain has shielded the Soviet bloc from the ambit of GATT and WTO the majority of those cases have been resolved through political and diplomatic means. The post-Cold War period starting with the disintegration of Soviet Union has changed the balance of power and the accession of China (2001) and Russia (2012) to the WTO have substantially increased the risk that trade-restrictive, security-related measures would be brought to the WTO DSM more frequently.

At the time of writing, the following WTO members challenged the U.S. tariffs on steel and aluminium products before the WTO DSB: China,¹⁰⁹ India,¹¹⁰ the EU,¹¹¹ Canada,¹¹² Mexico,¹¹³ Norway,¹¹⁴ Russia,¹¹⁵ Switzerland,¹¹⁶ and Turkey.¹¹⁷ China does not regard the tariffs as national security measures, its request for consultations refers to them as “safeguard measures in substance” and alleges incompatibility with the Agreement on Safeguards.¹¹⁸ In its reply, the U.S. delegation argued that the specified tariffs are not the safeguard

108) David D. Knoll, *The Impact of Security Concerns upon International Economic Law*, 11 *Syracuse J. Int'l L. & Com.* 567, 607 (1984).

109) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/9, 28 (adopted Jan. 28, 2019).

110) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS547/9, (adopted Jan. 28, 2019).

111) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1, (adopted Jan. 28, 2019).

112) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS550/12, (adopted Jan. 28, 2019).

113) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS551/12, (adopted Jan. 28, 2019).

114) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/11, (adopted Jan. 28, 2019).

115) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS554/18, (adopted Jan. 28, 2019).

116) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/16, (adopted Jan. 28, 2019).

117) *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/16, (adopted Jan. 28, 2019).

118) WTO Doc. WT/DS544/1 (adopted, Apr. 9, 2018) at 2.

measures but measures of national security, which are “political matters not susceptible to review or capable of resolution by WTO dispute settlement” pursuant to Article XXI GATT.¹¹⁹ While the dispute is far from its resolution, the legal scholars have already argued that it is “unlikely that the U.S. national security defence will be upheld, given the lack of evidence of a security threat and that the clause is intended to be used in situations of war or threat of war.”¹²⁰ It was also argued that the procedures under Section 232 of the Trade Expansion Act do not contain sufficient safeguards to meet the requirements of the eventual review under Article XXI, as it does not require the existence of war or other emergency in international relations.¹²¹

The WTO DSM panel’s ruling in *Russia – Measures concerning traffic in transit* case reinforces the above-mentioned arguments against the U.S. tariffs’ compliance with the Article XXI requirements. First of all, the U.S. will likely fail in substantiating the existence of “other emergency in international relations” that prompted it to impose increased tariffs on steel and aluminium products. The existence of global excess capacity and U.S.’ trade deficit with certain countries could not qualify as emergency given that the panel emphasized that “emergency in international relations would, therefore, appear to refer generally to 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.”¹²² Second, the U.S. will have significant difficulties “to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.”¹²³ Indeed, the increased tariffs have been equally imposed by the U.S. on China and the NATO members, which are linked to the U.S. by a security alliance. In addition, the readiness to negotiate with other WTO members on the part of the U.S. also diminishes the latter’s good faith appearance in defending its alleged “essential security interests.”

119) WTO Doc. WT/DS544/2 (adopted Apr. 17, 2018) at 1.

120) See e.g. Antoine Martin & Bryan Mercurio, *Trump, China, and a Tale of Aluminium and Steel Tariffs*, Trade Pacts (Apr. 23, 2018), <https://tradepacts.com/news/trump-china-tale-aluminum-steel-tariffs/>.

121) See Tsai-fang Chen, *To Judge the “Self-Judging” Security Exception under the GATT 1994 – A Systematic Approach*, 12 Asian J. WTO & Int’l Health L. & Pol’y, 311, 349-350 (2017).

122) WTO Doc. WT/DS512/R, para 7.76.

123) *Id.* WT/DS512/R, para 7.134.

Certainly, the ruling of the WTO DSM panel in *Russia – Measures concerning traffic in transit* case provided the long awaited guidance by clarifying the use of the national security exceptions under WTO agreements. But this could also become a catch-22 situation¹²⁴ whereby the U.S. will be forced to take a decision as to whether it wants to remain a WTO member.¹²⁵

124) See Rostam J Neuwirth & Alexandr Svetlicinii, *The Economic Sanctions over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions*, 49(5) J. World Trade 891, 914 (2015).

125) See Tetyana Payosova, Gary Clyde Hufbauer, Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Peterson Institute for Int'l Econ. Pol'y Brief 18-5 (Mar. 2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/01/WTO-dispute-settlement.pdf>.

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