

The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?

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Abstract

For a multilateral system to be sustainable, it is important to have several escape clauses which can allow countries to protect their national security concerns. However, when these escape windows are too wide or ambiguous, defining their ambit and scope becomes challenging yet crucial to ensure that they are not open to misuse. The recent Panel Ruling in *Russia — Measures Concerning Traffic in Transit* is the very first attempt by the WTO to clarify the scope and ambit of National Security Exception. In this paper, we argue that the Panel has employed a combination of objective and subjective approach to interpret this exception. This hybrid approach to interpret GATT Article XXI (b) provides a systemic balance between the sovereign rights of the members to invoke the security exception and their right to free and open trade. But has this Ruling opened the Pandora's box? In this paper, we address this issue by providing an in-depth analysis of the Panel's decision.

Keywords: World Trade Organization, National Security Exception, *Russia – Traffic in Transit*, Objective Interpretation, Subjective Interpretation, Multilateral Trading System

I. Introduction

Adam Smith has given paramount importance to national security exception in the following words:

There seem, however, to be two cases in which it will generally be advantageous to lay some burden upon foreign for the encouragement of domestic industry. The first is, when some particular sort of industry is necessary for the defence of the country. The defence of Great Britain, for example, depends very much upon the number of its sailors and shipping. The act of navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country

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in some cases by absolute prohibitions and in others by heavy burdens upon the shipping of foreign countries.¹

These observations justify the use of trade-restrictive measures for the protection of domestic industries that contribute directly to national security interests. In a way, it is possible to argue that they also justify the prevailing unilateral actions taken under the guise of national security concerns such as the ongoing US tariffs on the import of steel and aluminum. If the protection of shipping industry is justified for the national security of Britain for its defence as an island is largely reliant on ships, then the protection of steel and aluminum industries in the US could also probably be justified as these metals are required for the production of military equipments such as weapons, tanks and missiles. If we support this view, we seem to go against the long-standing belief that “free trade” and “national security” are complimentary to each other. In the 1990s, the WTO members agreed to sacrifice some of their sovereign rights for the advantages that multilateralism of trade had to offer. One such advantage was more peace and stability in the international order.² Since the Breton Woods Conference, countries have unanimously agreed to the idea that “if goods don’t cross borders, soldiers will.”³ In other words, the countries have realized that open trade could be a catalyst for international peace and security, and hence it is important to balance trade liberalization with national security interests.

The so-called WTO “Security Exception Articles” that stipulate the legal grounds of possible justification for WTO-inconsistent measures are Articles XXI of the GATT, XIV bis of the GATS and 73 of the TRIPS Agreement.⁴ However, none of these agreements has come even close to defining “national security”. We find varied attempts at defining it in the existing literature. Some have defined this expression from a purely military perspective which makes “security” as an objective of the States that is to be achieved by military or diplomatic interventions.⁵ Adam Smith has defined “security” as ‘freedom from the prospect of a sudden or violent attack’.⁶ Others have approached “national

¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (The Modern Library, 1937) Chapter II

² WTO website, ‘The WTO Can Contribute to Peace & Stability’, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm (accessed 5 August 2019)

³ Often attributed to the 19th century French Liberal economist Frederic Bastiat

⁴ General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299; General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183. Other provisions are: Article 3, Agreement on Trade Related Investment Measures, 1868 U.N.T.S. 186; Article 24.7, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, (27 November 2014) WT/L/940; Article 1.10, Agreement on Import Licensing Procedures, 1868 U.N.T.S. 436

⁵ Emma Rothschild, ‘What is Security’, *Daedalus* 124 (3) *The Quest for World Order* (Summer, 1995) 53, at 61

⁶ R. H. Campbell and A. S. Skinner (eds), *Adam Smith, The Theory of Moral Sentiments* (Oxford: Clarendon Press, 1976) 156, 290

security” from an economic point of view and expanded its reach to economic security, food security and security against economic espionage.⁷ The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has further expanded the definition of security to a wide range of areas that include economic, food, health, environmental, personal, community and political aspects.⁸ These spheres are closely related to multilateral trade as they may provide WTO members with reasons to justify their otherwise WTO-inconsistent practices and laws through the use of the national security exception.

Even with various attempts at defining this expression, it falls short of a universally accepted definition; this makes the exception dangerously ambiguous as – unlike other exceptions - it lacks precise requirements and specifications. It explains why the WTO members have remained relatively cautious about the invocation of national security exception since the very creation of the multilateral trading system.⁹ The members have known that the use of this exception - whose interpretation could be a subject of dispute in itself – could lead to the weakening of the multilateral trading system. They also realized that this escape window is too wide – and once opened – it can allow members to escape the obligations they have undertaken as the WTO members.¹⁰ They recognized that invoking this exception could set a wrong precedent that other members could follow to justify blatant violations of multilateral trade agreements.¹¹ However, some members have recently opened this Pandora box as they have invoked this exception to justify various retreats from free trade and liberalization.

National security is an exception that is supposed to justify a WTO-inconsistent measure if valid reasons exist. On one hand, an exception is supposed to be robust enough so it can be used for entertaining important interests; on the other, it should be hard enough to be abused by the members. How to get that balance right is the key issue which the WTO Panel in *Russia — Traffic in Transit* has sought to address.¹² The system of precedents does not exist in WTO legal system, and hence this decision is not binding on future disputes; this decision nevertheless can provide persuasive guidance to future panelists on the issues of interpreting the national security

⁷ See note 6, 55-57

⁸ Segun Osisanya, ‘National Security versus Global Security’ (UN Chronicle, October 2014) <https://unchronicle.un.org/article/national-security-versus-global-security> (accessed 12 July 2019)

⁹ Tania Voon, ‘Can Interbational Trade Law Recover? The Security Exeption in WTO Law Entering a New Era’ *American Journal of International Law* 45 (2019), 113

¹⁰ Roger P. Alford, ‘The Self-Judging WTO Security Exception’, *Utah Law Review* 697 (2011), 698

¹¹ *Ibid*

¹² *Russia – Measures Concerning Traffic in Transit* (14 September 2016, WT/DS512/R). This Panel decision was not appealed and hence adopted as such.

exception.¹³ This Panel decision is the very first attempt by the WTO adjudicatory mechanism to clarify the meaning and scope of the “national security exception”, however it is not the first time this exception has been used since the GATT-era.

After the GATT 1947 was negotiated, the US administration established export licensing control for security reasons which affected Czechoslovakia. The US justified this action by arguing that the ‘goods which were of a nature that could contribute to war potential’ came within the exception of Article XXI.¹⁴ In 1961, Ghana banned the import of goods from Portugal arguing that any action that might build-up pressure on the Portuguese Government might lessen the danger the African continent was facing at the time.¹⁵ In 1975, Sweden invoked Article XXI to impose the global import quota on footwear on the grounds that ‘decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defense as an integral part of the country’s security policy.’¹⁶ In 1982, the European Economic Community, Canada and Australia adopted trade restrictions against Argentina in light of Falkland/Malvinas issue.¹⁷ Another example is the US prohibition of all imports of goods and services of Nicaraguan origin in 1985 in order to fight with the communist political regime in Nicaragua.¹⁸

The exception has also been used in the WTO era. For instance, in 2014, Egypt banned the import of two wheel motorcycles and three wheels tuck-tucks for national security, claiming that the small size of these vehicles allowed them to be used widely in committing crimes and thus posed a serious security threat in several areas nationwide, particularly slums.¹⁹ These examples show that countries have not only used this exception for purely military concerns or for international peace and order, but also for the protection of domestic industry; however, none of these instances has actually led to the adoption of a panel report. These examples stretch the scope and interpretation of GATT Article XXI in different ways. They exemplify various ways in which this exception

¹³ Amrita Bahri, ‘Appellate Body Held Hostage: Is Judicial Activism at Fair Trial’, 53 (2) *Journal of World Trade* (2019) 293, at 304-305

¹⁴ Summary Record of the Twentieth Meeting, at 3-4 (14 June 1949, GATT/CP.3/SR20), Contracting Parties: Third Session, 2 June 1949

¹⁵ Summary Record of the Twelfth Session, at 196 (21 December 1961, SR.19/12), Contracting Parties: Nineteenth Session, 9 December 1961

¹⁶ Sweden – Import Restrictions on Certain Footwear, at 3 (17 November 1975, L/4250) <https://docs.wto.org/gattdocs/q/GG/L4399/4250.PDF> (accessed 8 August 2019)

¹⁷ Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons (18 May 1982, L/5319/Rev.1) https://www.wto.org/gatt_docs/English/SULPDF/90990462.pdf (accessed 8 August 2019)

¹⁸ United States – Trade Measures Affecting Nicaragua (9 May 1985, L/5803) <https://docs.wto.org/gattdocs/q/GG/L5999/5803.PDF> (accessed 8 August 2019)

¹⁹ ‘Egypt imposes one-year imports ban on motorcycles, tuk-tuks’ (Ahrām Online, 12 February 2014), <http://english.ahram.org.eg/NewsContent/3/12/94095/Business/Economy/Egypt-imposes-oneyear-imports-ban-on-motorcycles,-.aspx> (accessed 8 August 2019)

could be exploited *inter alia* for protectionist purposes. The most obvious instance of this abuse is perhaps Sweden's attempt at protecting its footwear industry based on the argument that soldiers need footwear for performing their services. If we accept this argument, we can justify any kind of trade restriction against any kind of goods because soldiers need everything a non-soldier human being needs, including clothing, food, clean air, alcoholic and non-alcoholic beverages, and the list goes on.

The key questions that emerge from these examples are the following: Did the drafters of GATT intend to allow a country to invoke this exception for the protection of a domestic industry (such as footwear or even clothing) which may contribute even remotely or indirectly to war or other military consequence? Did they mean that any trade measure taken for non-economic, but political purposes could fall under the scope of GATT Article XXI as long as it is remotely connected with "essential security interests"? One of the GATT's drafters stated that having a wide security exception which allows members to escape from their obligations is dangerous because that would permit anyone to 'justify anything under the sun'.²⁰ This is the problem we refer to when we use the Pandora's box analogy.

If we were to find that the national security exceptions are actually a "Get out of jail free card" for all countries to use at their discretion, it would diminish the overall predictability and enforceability of the multilateral trading system. Therefore, there is a need to strike a balance between governments protecting their national security whilst not affecting free trade and economic liberalization. In this paper, we argue that the Panel Ruling achieves this balance by employing a combination of objective and subjective approach to interpret this exception. However, this dispute has opened the Pandora's box that WTO members have kept closed for so long.

In this paper, we first provide a conceptual discussion on different approaches that can be employed to interpret national security exception. We then analyze the Panel's interpretation of this exception and demonstrate that this interpretation is a balanced combination of objective and subjective approach. We conclude with a brief discussion on whether this dispute could lead to the further weakening of the multilateral trading system and its relevance in the future.

II. National Security Exception: Objective or Subjective Interpretation?

²⁰ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Thirty-Third Meeting of Commission A (24 July 1947) E/PC/T/A/OV/33, 20–21.

The main question that should be addressed with respect to the interpretation of Article XXI (b) is the following: Should it be construed in an objective or subjective manner? Alternatively, is it possible to use a hybrid approach that combines objective and subjective way of interpretation as it may allow the panels to meet the public international law requirements of interpretation? Under Article 3.2 of the Dispute Settlement Understanding (DSU), ‘... the [WTO] Members recognize that [WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’.²¹ In line with this, the Appellate Body has observed that the general rule of interpretation:

‘...forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement [...]. Therefore, the General Agreement is not to be read in clinical isolation from public international law’.²²

The customary rules of interpretation are enshrined in Article 31 of the Vienna Convention on the Law of the Treaties (VCLT).²³ Article 31 (1) of the VCLT provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.²⁴ This approach of construction requires some level of objectiveness as it invokes the requirement of “good faith”, which is to be ascertained in light of the “ordinary meaning” and “object and purpose” of the text. The AB has explained this holistic interpretation approach in *China-Raw Materials*²⁵ case. China in this case argued that “like any other state”, it enjoys the right to regulate trade in a manner that promotes conservation and public health.’²⁶ Referring to the Appellate Body report in *China – Publications and Audiovisual Products*, China argued that such a right to regulate trade is an “inherent right” of the sovereign nation and is not bestowed by international treaties such as the *WTO Agreement*.²⁷ Rejecting these arguments, the AB shed light on the wording of DSU Article 3.2 and reaffirmed that the customary rules of interpretation of public international law in the Vienna Convention should be applied in a

²¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401

²² Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, at 17

²³ Panel Report, Russian Federation— Measures Concerning Traffic in Transit, 5 April 2019, WT/DS512/R. § 7.59

²⁴ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679

²⁵ China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012

²⁶ Ibid, § 275

²⁷ Ibid, § 275

holistic manner to determine whether China may have recourse to the provisions of GATT Article XX to justify export duties that are found to be inconsistent with Paragraph 11.3 of China's Accession Protocol.²⁸ This decision affirms that invoking general exceptions is not an 'inherent right' as it is subject to an objective determination by WTO panels. The Panel decision in *Russia – Traffic in Transit* harmonized this approach with the requirement to grant flexibility in the application of security exception. In this process, one of the key questions which the Panel was asked to address is the following: Is Article XXI (b) "justiciable" or "self-judging" in nature?

Much of the debate comes from the wording used in the introductory clause of paragraph (b). The introductory paragraph of Article XXI (b) reads as follows:

'Nothing in this Agreement shall be construed [...] (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests [...].'

A provision is self-judging when the members can decide whether and how this exception can be applied to the measure. It is non-justiciable when the issue cannot be subject to the findings of a WTO panel or the adjudicative system. This is known as the subjective interpretation approach, which advocates that the phrases "it considers" and "necessary" should be read together. The provision is justiciable if the phrases "it considers" and "necessary" are not read together. This view upholds the purely objective approach of interpretation. The view that the notions of "self-judging" and "non-justiciable" are interconnected and may be used in the context of "subjective" approach and consequently notions of "not-self-judging" and "justiciable" may be used in the context of "objective" approach finds support in the wording of DSU's Article 11. According to this provision, 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements [...]'. Therefore, if the provision of the covered agreement is "self-judging", it is "non-justiciable" in nature as the panel has to rely on the subjective determination of the issue made by the party invoking the provision. Existing literature also observes that 'the words "it considers" unequivocally indicate a subjective standard and are typical of expressly self-judging provisions'.²⁹ Therefore, a provision is totally "self-judging" and "non-justiciable" when it could be assessed subjectively by the invoking country without reliance on any legal standard or test. On the contrary, a provision is "not-self-judging" and "justiciable" if the panel can

²⁸ *Ibid.*, § 307

²⁹ Andrew D. Mitchell, 'Sanctions and the World Trade Organization', in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar, 2017) 293; Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does' 19(2) *University of Pennsylvania Journal of International Economic Law* (1998), 273, at 268; Schill & Briese, "If the State Consider": Self-Judging Clauses in International Dispute Settlement' 13 *Max Planck UNYB* (2009), 110, at 61

rely on objective legal standards and in this manner employ an objective approach of interpretation.³⁰

In *Russia – Traffic in Transit*, Ukraine argued that the phrases “it considers” and “necessary” should not be read together and the use of the latter makes this exception justiciable in nature.³¹ On the other hand, Russia claimed that the wording of the provision – “it considers necessary” should be read together as the national security exception is self-judging and non-justiciable in nature.³² It argued that the member invoking the national security exception can determine whether the security concerns are legitimate and whether the measure taken to achieve national security is necessary to achieve the end.³³ The US as a third party supported this position as it argued that national security issues are purely political in nature and thus not appropriate to be considered by the WTO dispute settlement system.³⁴

The subjective construction of Article XXI was reflected in the GATT Contracting Parties Decision in *US-Export Restrictions (Czechoslovakia)*. In this case, the United Kingdom argued that ‘every country must be the judge in the last resort on questions relating to its own security’.³⁵ Subsequently, in 1982, the European Economic Community (EEC) and its Member States, together with Canada and Australia suspended the imports of products from Argentina.³⁶ The EEC in this case argued that ‘each party had to judge on its own whether to invoke this Article’.³⁷ Supporting this view, Canada argued that only the individual contracting party itself could judge questions involving national security; a panel does not have the authority to make that judgment.³⁸ Respondents invoking national security exception in the ongoing WTO litigations are also employing this course of arguments. In *United Arab Emirates – Goods, Services and IP Rights*, the United Arab Emirates (UAE) has objected to Qatar's panel request, arguing that it

³⁰ Multiple scholarly works support this analogy such as: Hahn, ‘Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception’ 12(3) *Michigan Journal of International Law* (1991), 558, at 584; Akande & Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ 43 *Virginia Journal of International Law* (2003) 402, at 365; Schloemann & Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence’ 93 *American Journal of International Law* (1999) 444, at 424; Piczak, ‘The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Question Doctrine’ 61(1) *University of Pittsburgh Law Review* (1999) 326, at 287

³¹ Panel Report (note 23), § 7.34

³² *Ibid*, § 7.28

³³ *Ibid*

³⁴ Panel Report, § 7.52 (United States' response to Panel question 1, at 18 and 22)

³⁵ Summary Record of the Twenty-Second Meeting, US – Export Restrictions (Czechoslovakia), CP.3/SR.22 (Contracting Parties Third Session, 8 June 1949)

³⁶ Trade Restrictions Affecting Argentina Applied for Non-economic Reasons, GATT L/5319/Rev.1 (1982)

³⁷ ‘Minutes of the Meeting of the GATT Council’ [C/M/191 (1985)], at 44, <https://docs.wto.org/gattdocs/q/GG/C/M191.PDF> (accessed 17 July 2018)

³⁸ *Ibid*, at 45

(along with eight other countries) was forced to take trade-restrictive measures in response to Qatar's funding of terrorist organizations.³⁹

Scholars have observed that the phrase “any action which it considers” gives great importance to a country’s discretion.⁴⁰ The phrase “it considers” makes this exception “non-justiciable” and “self-judging” in nature; hence the only plausible interpretation approach that the Panels could use for this provision is “subjective”. In other words, the standard of review can only be determined by the party invoking the provision of Article XXI (b) (iii). This “all-encompassing” discretion bears the risk of opening the Pandora box. To avoid this consequence, it is possible to argue that the interpretation of this provision cannot be purely subjective as the word “necessary” requires an objective assessment of whether the measure at issue is necessary to satisfy the policy objective. This argument can only be accepted if the phrases “it considers” and “necessary” are not read together as a single phrase. This approach finds some support in the existing scholarship.

Scholars underline that the discretion provided by this provision should be balanced with the trade interests of other WTO members. Such balance can only be achieved if the measure is reviewable by the WTO adjudicatory mechanism, the absence of which would make the provision ‘prone to abuse without redress’.⁴¹ This approach is grounded in the ICJ jurisprudence which confirms that a legal question could have both political and legal aspects.⁴² It goes on to state that ‘...the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task.’⁴³ The ICJ decided that even if such clauses are ‘self-judging’, ‘the requested State must act reasonably and in good faith’. These requirements establish the authority of the court to review such a clause.⁴⁴ Moreover, according to DSU Article 3.10, ‘it is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures *in good faith* in an effort to resolve the dispute’.⁴⁵

³⁹ Dispute Settlement Body, Minutes of Meeting (20th February 2018, WT/DSB/M/403) §4.4. Available at: https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm (accessed 8 August 2019)

⁴⁰ P Lindsay, ‘The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?’ 52 *Duke Law Journal* (2003) 1282

⁴¹ P Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2013), 596

⁴² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (22 July 2010) para 27 [Application for Review of Judgment No.158 of the United Nations Administrative Tribunal, Advisory Opinion, 1073, para 14]

⁴³ *Ibid*, para 27

⁴⁴ Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France, ICJ Reports 2008), paras 135, 145

⁴⁵ DSU Agreement (note 21)

One way to define the principle of good faith is for the States to act honestly and reasonably and to refrain from taking unfair advantage of other actors.⁴⁶ It is inherently linked to the doctrine of abuse of rights, which prohibits States from using their rights solely to harm others or for purposes other than those for which these rights were initially granted.⁴⁷ The Appellate Body reaffirms that the good faith principle is:

‘a general principle of law and a general principle of international law, [which] controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights [...]. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting’.⁴⁸

The existing literature also lends support to the view that under the good faith requirement, a State invoking Article XXI has to demonstrate that it “genuinely considers” the adopted restrictions to be linked to its essential security interests and that it genuinely believes that these restrictions are proportionate.⁴⁹ The requirement of “good faith” brings in some level of objectiveness and subjects this provision to a certain level of judicial review.

With two opposing ways to approach this exception, with the recent Panel decision, and with the other ongoing disputes pending over this exception, this issue has been attracting a lot of scholarly discussions and media coverage. The WTO members have long awaited a panel ruling on this issue. This wait was partially put to rest with the recent Panel Ruling in *Russia – Traffic in Transit* which tries to settle the debate on whether this provision should be construed objectively or subjectively. However, the WTO members are now waiting to see if this decision will be followed in the ongoing disputes filed over security concerns. Whether this provision is self-judging or justiciable in nature has been and still is an ongoing controversy, and decisions delivered in the pending WTO disputes in the near future will probably diffuse this debate further. In the following section, we will analyze the Panel decision *Russia – Traffic in Transit* and examine how and whether it has provided a balanced solution to put this long-standing debate at bay.

⁴⁶ ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill-Nijhoff, 2009), 425

⁴⁷ Ibid

⁴⁸ Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products, 22 October 2001, WT/DS58/AB/RW, § 158

⁴⁹ Akande & S. Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ 43 *Virginia Journal of International Law* (2003), 365, at 392

III. Analysis of Panel’s Decision: A Combination of Objective and Subjective Approach

In *Russia — Traffic in Transit*, Ukraine challenged Russia’s imposition of restrictions and ban on transit of goods by road and rail from Ukraine to Kazakhstan (and subsequently, to Kyrgyz Republic). Ukraine contended that these measures are inconsistent with GATT 1994 and with the commitments Russia has undertaken under its WTO’s Accession Protocol.⁵⁰ Russia responded to this challenge by arguing that there is an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist and pose a serious threat to Russia’s essential security interests.⁵¹ It also argued that, ‘the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measure taken pursuant to Article XXI’.⁵² These arguments are based on the subjective interpretation of Article XXI (b) (iii).⁵³ Employing a combination of objective and subjective approach, the Panel decided that Russia in addition to satisfying the requirements of subparagraph (iii) has also satisfied the conditions of the chapeau.⁵⁴

To decide this matter, the Panel chose the following order of analysis: *first*, the Panel assessed whether it had the jurisdiction to review Russia’s invocation of Article XXI (b) (iii). The Panel addressed this issue by clarifying the meaning of the expression “taken in time of war or other emergency in international relations” and determining whether the measures at hand were taken in such times; *second*, the Panel determined whether the conditions of the chapeau, i.e., the element of “necessity” and “essential security interests”, were satisfied by the respondents. This was done by clarifying whether these elements should be construed in a subjective or an objective manner and by identifying several qualifying requirements that should be assessed along with these elements. In the following sub-sections, we will follow this order of analysis to better understand the individual elements of this provision and how they were interpreted by the Panel. In addition, some conceptual discussion to understand better the decisive elements of this exception such as “essential security interests”, “emergency in international relations” and “necessary to protect” will be provided..

1. Panel’s Jurisdiction and Existence of the Measure: Interpreting “Emergency in International Relations”

⁵⁰ Panel Report (note 23)§7.21

⁵¹ Ibid §7.27

⁵² Ibid §7.28

⁵³ Ibid § 7.57

⁵⁴ Ibid §7.8.1

The Panel in this case had two intertwined legal issues at hand. The first issue was to determine whether the measures taken by Russia fall within the scope of and can possibly be justified under Article XXI (b) (iii). The second issue was to establish whether the Panel had jurisdiction to address the first issue. In other words, to answer the first issue, it had to determine whether this provision is “self-judging” and “non-justiciable”. If this is the case, the Panel has no jurisdiction *ratione materiae* to decide this matter.⁵⁵ To address these issues, the Panel had to clarify whether the words used in the introductory clause of paragraph (b) “which it considers” should be read together with the words “necessary”, “essential security interests” and the “circumstances” listed in subparagraphs (i) to (iii).⁵⁶ The Panel concluded that for the ‘action to fall within the scope of Article XXI (b) it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision’.⁵⁷ The Panel established the following requirements for the measure to fall under Article XXI (b) (iii).

First, the Panel established a chronological criterion for the measure as it underlined that the phrase ‘taken in time of’ describes the ‘connection between the action and the events of war or other emergency in international relations’⁵⁸. Therefore, in the Panel’s view, whether the measure was taken in a particular period or not (meaning the period of war or other emergency in international relations) must be determined in an objective manner.

Second, the Panel assessed the nature of “emergency” and defined the phrase “emergency in international relations”. The Panel observed that ‘war is one example of the larger category of “emergency in international relations”’⁵⁹ and that the emergency in international relations encompasses ‘all defense and military interests, as well as maintenance of law and public order interests’⁶⁰. One interesting point to note is that the Panel expressly excluded political and economic interests from the scope of “essential security interests”, as it clarified that ‘political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for the purposes of subparagraph (iii) [...] unless they give rise to defense and military interests, or maintenance of law and public order interests’⁶¹. Moreover, the Panel added that ‘emergency in international relations within the meaning of subparagraph (iii) of Article XXI (b) [is] a situation of armed conflict, or latent armed conflict, or heightened tension or crisis, or general instability engulfing or surrounding a

⁵⁵ Ibid §§7.57, 7.58, 7.66

⁵⁶ Ibid § 7.64

⁵⁷ Ibid §7.82

⁵⁸ Ibid §7.70

⁵⁹ Ibid §7.72

⁶⁰ Ibid §7.74

⁶¹ Ibid §7.75

state'.⁶² Through these attempts at defining and illustrating the term “emergency in international relations” and “essential security interests”, it seems that the Panel was trying to establish its jurisdiction *ratione materiae* whilst at the same time curtailing the scope and nature of this exception. However, it is worth noting that unlike the typology of “defense and military interests”, the notions of “law and public order interests”, “tension or crisis” or “general instability engulfing or surrounding a state” are rather broad and can give extensive discretion to the WTO members to interpret this exception.

Third, the Panel concluded that subjecting this exception to the unilateral will of the member and leaving its interpretation to an ‘outright potestative condition’ would seriously undermine the security and predictability of the multilateral trading system.⁶³ Following this three-dimensional analysis, the Panel established its jurisdiction by employing an objective approach based on the textual and contextual restrictive interpretation.⁶⁴ The Panel concluded that the phrase “which it considers necessary” in the chapeau does not extend to the determination of the circumstances in each of the subparagraphs.⁶⁵ The Panel substantiated this finding with GATT’s negotiating history as it concluded that the security exception would remain subjected to the WTO dispute settlement mechanism⁶⁶ and that the Panel ‘has jurisdiction to determine whether the requirements of Article XXI (b) (iii) are satisfied’⁶⁷. These discussions show that the Panel relied on the purposive approach of interpretation as it delivered these findings in light of the object and purpose of the WTO Agreements. According to this approach, each of the covered agreements must be interpreted in light of the purpose of the text and in a way that would give ‘effect to all the terms of the treaty’⁶⁸. This also resonates with the progressive approach as the Panel through these findings tried to preserve the relevance of multilateral trading system which is already facing multiple challenges in the current times.

As for the existence of the measure, the Panel found that the Complainant had presented sufficient evidence to show the existence of the measures concerning transit restrictions and transit bans.⁶⁹ It then proceeded to analyze whether these measures

⁶² Ibid §7.111

⁶³ Ibid §7.79

⁶⁴ Ibid §7.83

⁶⁵ Ibid §7.101

⁶⁶ Ibid §7.97

⁶⁷ Ibid §7.104

⁶⁸ Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, 29 April 1996, WT/DS2/AB/R. P. 21; Panel Report, Japan — Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R

⁶⁹ Panel Report (note 23) §7.105

‘were in fact taken during time of war or other emergency in international relations’⁷⁰, wherein it found that there was indeed an emergency in international relations between Ukraine and Russia as the relation between Ukraine and Russia was a matter of international concern as it involved an armed conflict that had led to the imposition of sanctions by several countries against Russia.⁷¹ As a result, the Panel found that the challenged measures were taken in times of emergency in international relations for the purposes of subparagraph (iii) of Article XXI (b).

The strongest point of criticism against this finding is that such an interpretation would completely diminish the self-judging character of Article XXI, which could be contrary to the drafters’ intention.⁷² The drafting history of GATT Article XXI shows that most contracting parties engaged in GATT negotiation including the U.S. negotiators had never intended the security exception to be construed in a purely self-judging manner. On the contrary, they advocated that national security and trade liberalization should co-exist in a balanced manner and national security should not be construed in a subjective manner so as to allow free flow of trade between members.⁷³ In line with this view, a number of scholars have argued for the application of objective standard to interpret the notion of “emergency in international relations”. For example, Hahn observes that the text of Article XXI (b) (iii) suggests that “other emergency in international relations” sets a clear standard which the members invoking this provision have to satisfy.⁷⁴ The term “emergency” excludes from its scope ordinary strained relations between States; it implies some sort of extreme conflict between States.⁷⁵ Thus, a preliminary interpretation reveals that “emergency” encompasses all hostile interactions between States that involve the use of force. Following this line of argument, some countries during the GATT-era argued that the party having ‘recourse to Article XXI (b) (iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken; the security exception should not be used to impose economic sanctions for non-economic purposes’⁷⁶. These discussions show that the Panel’s decision in this respect finds support in the existing literature and previous GATT jurisprudence.

2. Panel’s Interpretation of the Chapeau: “Necessity” and “Essential Security Interests”

⁷⁰ Ibid §7.108

⁷¹ Ibid §7.122

⁷² HL Schloemann and S Ohlhoff, ‘Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence’, 93 *American Journal of International Law* (1993), 424

⁷³ Mona Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception’ (Draft paper), at 11, 76, at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353426 (accessed 9 September 2019)

⁷⁴ MJ Hahn, ‘Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception’, 12(3) *Michigan Journal of International Law* (1991), 589

⁷⁵ Ibid

⁷⁶ Ibid

The key question for the Panel in respect of the chapeau was whether the term “it considers” should be read with the terms “essential security interests” and “necessary”.⁷⁷ With respect to the interpretation of the “essential security interests”, the Panel found that phrase “it considers” will determine the term “essential security interests”, leaving its determination largely in the hands of the invoking members.⁷⁸ In doing so, the Panel ignored the long-standing position established in international jurisprudence. In the *Oil Platforms* case⁷⁹, the ICJ constricted the scope of this notion by clarifying it as a right to self-defense against armed attacks under international law. In this case, the court recognized the uninterrupted flow of maritime commerce as being a reasonable security interest of the US; however, it clarified that such commercial interests were considered relevant only because armed attacks were at play.⁸⁰ In this manner, it explicitly ruled out the use of purely economic circumstances to justify the invocation of the essential security defence. Supporting this view, the European Court of Justice (hereinafter ECJ) in *European Commission v. Republic of Finland* case found that Article 346 of the Treaty on the Functioning of the European Union (TFEU) does not allow Member States to depart from the provisions of the Treaty by merely referring to such interests.⁸¹ It also clarified that derogation under this provision is limited to exceptional and clearly defined cases.⁸²

A contrary view was taken by international tribunals in cases such as *CMS v. Argentine Republic*, *LG&E v. Argentine Republic* and *Enron v. Argentine Republic*. In these cases, the tribunals concluded that major economic crises could not in principle be excluded from the scope of essential security interests.⁸³ They pointed out that ‘when a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion’.⁸⁴ Supporting this view, the International Tribunal for the Law of the Sea in the *M/V Saiga No. 2* case ruled that economic interest in maximizing tax revenue can be considered as an essential interest.⁸⁵ This discussion shows that there is no consensus in international law on the meaning and scope of “essential security

⁷⁷ Panel Report (see note 23) §7.128

⁷⁸ *Ibid* §7.98

⁷⁹ *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 161 <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf> (accessed 8 August 2019)

⁸⁰ *Ibid* §73

⁸¹ *European Commission v. Republic of Finland* (ECJ Case C-284/05); *European Commission v. Sweden* (ECJ Case C-372/05); *European Commission v. Italian Republic* (ECJ Case C-239/06)

⁸² *Commission of the European Communities v. Kingdom of Spain* (Case C-414/97, 16 September 1999); *European Commission v. Italian Republic* (Case C-239/06)

⁸³ *LG&E Energy Corp. v. Argentine Republic* (ICSID Arb/02/1, 2006)

⁸⁴ *Ibid*, §238

⁸⁵ *M/V Saiga No. 2* (International Tribunal for the Law of the Sea, 1 July 1999) http://www.worldcourts.com/itlos/eng/decisions/1999.07.01_Saint_Vincent_v_Guinea.pdf (accessed 8 August 2019)

interests”. There is a debate on whether this notion includes solely military emergencies or it may include economic matters as well.

The Panel in *Russia – Traffic in Transit* case decided to construe this notion in a subjective manner; however it went on to define this term as those interests that relate to the ‘quintessential functions of the state, namely, the protection of its territory and population from external threats, and the maintenance of law and public order internally’.⁸⁶ The Panel stressed that unlike in situation of an armed conflict, such interests like “defense of military interests” or “maintenance of law and public order interests” to qualify under the notion of “essential security interests” needed to be articulated by the Member ‘with greater specificity than would be required when the emergency in international relations involved [...] armed conflict’⁸⁷.

The Panel followed a similar approach in respect of “necessity” as it ruled that the phrase “it considers” should be read together with the term “necessary”, implying that the party invoking this exception has the discretion to determine what is necessary to protect its essential security interests. The Panel clarified that ‘there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure, i.e. that there is no reasonably available alternative’.⁸⁸ In this manner, it diverged from the traditional conceptualization of this term.

The Panel in the case at hand decided that if it concludes that there is an emergency in international relations within the meaning of subparagraph (iii) of Article XXI (b), the adjectival phrase “which it considers” will determine both “necessity” and “essential security interests”. Hence, the Panel applied the subjective approach to interpret the chapeau; nevertheless it limited the “self-judging” component by the obligation to act in good faith and the plausibility criterion.⁸⁹ In doing so, the Panel underlined that the obligation of good faith should not only be employed to identify the essential security interests that arise from a particular emergency in international relations, but it should also apply to the interest’s connection with the measures at issue.⁹⁰ In this manner, the Panel has applied the good faith requirement to interpret all three decisive elements of the provision – “emergency in international relations”, “essential security interests” and “necessity”.

⁸⁶ Panel Report (see note 23) §7.130

⁸⁷ Ibid §7.135

⁸⁸ Ibid §7.108

⁸⁹ Panel Report (see note 23) §7.137

⁹⁰ Ibid §7.138

The Ruling created an inter-dependent relationship between these three factors. This was done with the following relational equation: the closer the emergency in international relations is to an armed conflict, the more necessary the measure at issue is to protect essential security interests. Following this equation, the Panel in this case concluded that since the emergency in international relations is very close to the ‘hard core’ of war or armed conflict, the measure imposed by Russia is necessary to protect its essential security interests.⁹¹ This course of reasoning resonates with the one traditionally employed by the Appellate Body in *Korea-Beef*⁹² and further reaffirmed in *EC-Asbestos*⁹³. In these cases, the AB found that the more important the interest or value being pursued by the measure, the more likely it is that the measure is necessary to achieve the end. This ratio closely follows the proposals made by the EU in this case. The EU in its third-party submissions proposed that ‘while “essential security interests” should be interpreted as to allow Members to identify their own security interests and their desired level of protection, a panel should, on the basis of the reasons provided by the invoking Member, review whether the interests at stake can “reasonably” or “plausibly” be considered essential security interests’.⁹⁴

The Panel used a hybrid approach to interpret Article XXI (b) (iii). It used an objective approach to interpret the subparagraph (iii) as it found that the adjectival phrase “it considers” in the chapeau should not be read together with the circumstances provided in the particular subparagraphs. Moving on, the Panel employed a subjective approach to interpret the chapeau as it found that the term “it considers” should be read together with the terms “essential security interests” and “necessary”. In this manner, it left the definition and scope of both necessity and essential security interests on the discretion of the invoking member. However, this discretion is not absolute; it is limited by the requirements of good faith and plausibility criterion.⁹⁵ These requirements bring in some level of objectivity and subject this provision to a certain level of Panel’s analysis. Such an interpretation would satisfy the requirements provided in Article 31 of the VCLT.

This decision allows members some degree of discretion to apply this exception, but it does not leave it entirely up to them to abuse this exception by tying their hands to the objective interpretation of “emergence in international relations” and the requirements of “good faith” and “plausibility”. In this manner, the application of this hybrid approach to interpret Article XXI (b) (iii) finds balance between the two competing interests. But can

⁹¹ Ibid §7.136

⁹² Appellate Body Report, Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, Para 166 and 163

⁹³ Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 12 March 2001, Para 172

⁹⁴ Panel Report (see note 23) §7.43

⁹⁵ Ibid § 7.138

we safely conclude that adoption of this combined approach could limit the scope of this exception and minimize the possibility of its misuse in the future?

This Ruling is a double-edged sword that provides an indication of how future WTO panels could deal with the ongoing disputes involving Article XXI exception. If future panelists employ a purely subjective approach, these decisions could inspire other countries to impose protectionist measures in the name of national security without having to justify how legitimate their concern is or whether the means they are adopting are necessary to meet the end. It could also encourage the economically powerful and developed members to use tariffs as a tool against economically weaker and developing countries in situations of political conflict as they could justify these actions under Article XXI exception. If the panels in the future do not side with a purely subjective approach and issue a ruling that limits a country's ability to use this exception, it could tie the hands of the US (and any other country that attempts to use this exception) from abusing this provision. However, such an approach could possibly lead the US to continue paralyzing the WTO's DSM or withdraw from the WTO altogether. Either of these results could cripple the multilateral trading system.

VI. Concluding Remarks

The Panel in *Russia — Traffic in Transit* has made several clarifications for the nature and scope of Article XXI (b) (iii). Most importantly, the Panel has found that the actions taken under Article XXI (b) can be reviewed by WTO DSM.⁹⁶ The Panel has clarified that the subparagraphs (i) to (iii) of Article XXI 'operate as limitative qualifying clauses', meaning thereby that they curtail the discretion given to the WTO members under this provision.⁹⁷ In this manner, the Panel has shown very little sympathy for the argument that this provision is self-judging and non-justiciable.⁹⁸ On the other hand, the Panel has decided that an assessment of what constitutes "essential security interests" and the element of "necessity" is subjective in nature and hence can be judged by the members invoking this provision. In doing so, it provided a definition of 'essential security interests'⁹⁹; however, it has delegated the final determination of what constitutes 'essential security interests' to the WTO members. It is possible to argue that such a delegation is not complete or decisive, as the unfettered discretion of the members can be restricted by the good faith requirement imposed by the Panel.¹⁰⁰ The element of "necessity" is left to a subjective interpretation by respondents, as they do not have the

⁹⁶ Ibid § 7.103

⁹⁷ Ibid, §7.65

⁹⁸ Ibid, §7.103

⁹⁹ Ibid, §7.130

¹⁰⁰ Ibid, §7.132-134

burden of proof to show that there is any causal connection between the measure and the protection of its national security interests. However, this should be read with the limitation to adhere to the obligation of good faith as a general principle of law and a principle of general international law.¹⁰¹

This combination of objective and subjective approach is a laudable attempt by the Panel to provide a systemic balance between the sovereign rights of the members to invoke security exception and the rights of the members to free and open trade. If followed in the future disputes, this decision will leave some discretion in the hands of members and at the same time allow the panels to review whether there was “an emergency in international relations”, whether the measure “was taken at the time of” such emergency, whether there was “good faith” determination of “essential security interests”, and whether the measure at issue meets a “minimum requirement of plausibility” in relation to the argued security interest.

If the Panel had employed a completely subjective approach, it would have lent its support to the idea that national security is an exception to liberalization of trade and the two values are contradictory in nature. This idea, and its essence, is problematic because free trade for many decades has allowed countries to work together for their individual benefits. It has made countries dependent on each other, which has indeed fostered greater cooperation and understanding between countries. Identification of common interests has led to countries coming together as trade partners. This shows that the spirit of trade liberalization and multilateralism on one hand and national security on the other hand are very much complimentary to each other. Protection of one can lead to the enhancement of the other interest. The Panel’s decision in *Russia – Traffic in Transit* reinforces and restores this belief.

This case is first of its kind, but it could have far reaching implications and immediate repercussions on the pending cases that are invoking the national security exception.¹⁰² How this exception is interpreted in the ongoing and future disputes will not just clarify the security exception, but also the future of multilateral trading system.

¹⁰¹ Ibid, §7.132-7.138

¹⁰² These ongoing litigations include the following: United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS256, 31 July 2017); Qatar — Certain measures concerning goods from the United Arab Emirates (DS576, 28 January 2019); Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights (DS567, 1 October 2018)