

The WTO Panel Report in *Russia – Traffic in Transit*: Cutting the Gordian Knot of the GATT Security Exception?

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1. Introduction

The security exception of the GATT 1994 was inserted into the original GATT 1947 and it was then reinstated in the GATT 1994 under Article XXI.¹ Starting from its negotiation history, the security exception of the GATT was riddled with debates over the meaning of some words like ‘essential security interests’ or ‘it considers’.² Some scholars called the security exception an ‘unreviewable trump card’,³ since contrary to the general exceptions provision, GATT Article XX, it has never been

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¹ The wording of GATT art XXI states as follows: ‘Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security’.

² For example, the representative of the Netherlands at that time, Mr. Antonius B Speekenbrink, argued that he found ‘that kind of exception very difficult to understand and therefore possibly a very big loophole in the whole Charter’. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the 33rd Meeting of Commission, Held on Thursday, 24th July, 1947, at 2.30 pm in the Palais des Nations, Geneva E/PC/T/A/PV/33’ <<https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>> 19.

³ RP Alford, ‘The Self-Judging WTO Security Exception’ (2011) 3 Utah L Rev 697, 698.



interpreted by Panels in the history of the GATT/WTO.⁴ To be sure, throughout the history of the GATT/WTO, certain States have brought cases challenging the trade-restrictive measures which other States justified by recourse to the national security provision of the GATT 1994 – Article XXI.⁵ However, such cases have been either solved diplomatically or a Panel was restricted by its terms of reference.⁶ Benton J. Heath calls this approach ‘the Cold War Settlement’ where the set of informal dispute-settlement procedures prevail.⁷

In other words, fearing the precedent,⁸ States have expressed caution in invoking the GATT security exception. As a result, States built a system of trust in trade which was perceived to keep trade and national security issues separate.⁹ However, the so-called ‘Cold War Settlement’ is currently challenged by various factors in the context of national security, such as new security threats, new actors and new types of vulnerabilities.¹⁰ The cases which currently deal with national security at the WTO vary from disputes that have arisen from geopolitical conflicts like one

⁴ For the full history on the negotiation of the GATT Art XXI see M Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions’ (2020) 41 *Michigan J Intl L* 109.

⁵ For the list of the cases see, for example, J Yeong Yoo, D Ahn, ‘Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?’ (2016) 19 *J Intl Economic L* 417, 431-434.

⁶ For example, in the case brought by Nicaragua against the US in 1985, challenging the US’ embargo on trade with Nicaragua, the Panel had special terms of reference: ‘To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States’ *L/6053, United States – Trade Measures Affecting Nicaragua, Report by the Panel* see para 1.4.

⁷ J Benton Heath, ‘The New National Security Challenge to the Economic Order’ (2019) 129 *Yale L J* 1050.

⁸ For the history of the GATT/WTO practice see D Akande, S Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ (2003) 43 *Virginia J Intl L* 365. For example, Krzysztof Pelc mentions in this regard: ‘In both the GATT national security exception and the *rebus sic stantibus* doctrine, countries grew to fear how their invocation might set a precedent, normalizing reliance on a provision that held nothing else to stop it.’ KJ Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (CUP 2016) 136.

⁹ T Voon, ‘The Security Exception In WTO Law: Entering a New Era’ (2019) 113 *AJIL Unbound* 45.

¹⁰ Heath (n 7) 1021.



between Russia and Ukraine or the Gulf diplomatic crisis¹¹ to the cases challenging the US' tariffs on steel and aluminium or the use of the security exception by Japan in its conflict with South Korea.¹² While most of these cases are still pending before WTO Panels, the first Panel report which interpreted the security exception was adopted on 5 April 2019 in the case brought by Ukraine against Russia.

2. *Context of the Russia-Traffic in transit case*

The Russia-Ukraine trade disputes have arisen from a broader geopolitical conflict between the two countries. The relations between Russia and Ukraine have started to deteriorate in the last five years¹³ and entered into significant geopolitical controversy in 2014,¹⁴ following the accession of Crimea into Russia following a referendum in March 2014.¹⁵

¹¹ For example, Qatar brought cases against the UAE (DS526), Bahrain (DS527), Saudi Arabia (DS528). Some countries brought cases against the US' measures: DS564 (Turkey), DS556 (Switzerland), DS552 (Norway), DS548 (EU), DS547 (India), DS554 (Russia), DS544 (China). Other cases include: *Russia – Pigs (EU) - Article 21.5* (DS475), *Ukraine – Measures Relating to Trade in Goods in Services* (DS525).

¹² B Dooley, 'Japan Cites "National Security" in Free Trade Crackdown. Sound Familiar?' *The New York Times* (15 July 2019) <www.nytimes.com/2019/07/15/business/japan-south-korea-trade-war-semiconductors.html>.

¹³ For example, there were Russo-Ukrainian gas disputes starting from 2005. Reuters Staff, 'TIMELINE: Gas Crises between Russia and Ukraine' *Reuters* (11 January 2009) <www.reuters.com/article/us-russia-ukraine-gas-timeline-sb/timeline-gas-crises-between-russia-and-ukraine-idUSTRE50A1A720090111>. The most intense one erupted in 2009, for a comprehensive review see S Pirani, K Yafimava, J Stern, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment' (2009) Oxford NG 27 <www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG27-TheRussoUkrainianGasDisputeofJanuary2009AComprehensiveAssessment-JonathanSternSimonPiraniKatjaYafimava-2009.pdf>.

¹⁴ For the Ukraine crisis timeline see (up to 9 February 2017) 'The Ukraine Crisis Timeline' *The Centre for Strategic and International Studies* (9 February 2017) <<http://ukraine.csis.org/#514>>.

¹⁵ The Russian involvement in the referendum was acknowledged by President Vladimir Putin in 2015. See S Walker, 'Putin Admits Russian Military Presence in Ukraine for First Time' *The Guardian* (17 December 2015) <www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine>.



The annexation of Crimea sparked various disputes between Russia and Ukraine in the international courts.¹⁶ As a matter of fact, Ukraine started to ‘piecemeal’ the dispute over Crimea across different tribunals namely the: International Court of Justice,¹⁷ European Court of Human Rights¹⁸ and UNCLOS tribunals.¹⁹ Some scholars even started to discuss the possibility of the Ukraine bringing the case over Crimea to the WTO by claiming that Russia should maintain Ukraine’s WTO customs regime with regard to Crimea.²⁰ While this argument might be worthy of academic discussion, its feasibility in practice is debatable since a dispute with regard to the country’s customs territories seems to be relevant at the time of accession rather than post-accession.²¹

Apart from bringing legal disputes, both countries started to employ economic warfare tactics against one other. Indeed, amidst the geopolitical conflict, both Ukraine and Russia adopted economic sanctions

¹⁶ For an overview of cases between Russia and Ukraine up to March 2016 see G Nuridzhanian, ‘Ukraine vs. Russia in International Courts and Tribunals’ EJIL:Talk! (9 March 2016) <www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/>.

¹⁷ See International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)* (Application instituting proceedings).

¹⁸ See applications Ukraine v Russia (App no 20958/14) Ukraine v Russia (IV) (App no 42410/15) Ukraine v Russia (V) (App no 8019/16) Ukraine v Russia (VI) (App no 70856/16) and Ukraine v Russia (App no 38334/18).

¹⁹ See the ITLOS order ‘Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russia)’ <www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf>.

²⁰ Nataliya Haletska claimed that an annexation of Crimea by Russia caused certain trade barriers for Ukraine that are contrary to art II and art XI:1 of the GATT 1994. In turn, Russia should bear responsibility under art XXVI:5 (a) of the GATT 1994. N Haletska, ‘Guest Post on Annexation of Ukrainian Territory’ International Economic Law and Policy Blog (24 November 2015) <<http://worldtradelaw.typepad.com/ielpblog/2015/11/guest-post-on-annexation-of-ukrainian-territory.html>>.

²¹ See, generally, D Geraets, *Accession to the World Trade Organisation: A Legal Analysis* (Edward Elgar Publishing 2018). For example, at the time of the Russian accession to the WTO, Georgia brought an issue as to the disputed customs territory in Georgia. For a concise overview of the situation see I Gorst, S Wagstyl, ‘Russia/WTO: What’s in It for Georgia?’ *Financial Times* (2 November 2011) <<https://www.ft.com/content/ac6ace76-b53a-3bf9-ad26-7ef439d4f12b>>. For a more extensive analysis of the situation see D Warner, ‘Moving Borders: Russia’s Creative Entry into the World Trade Organization (WTO)’ (2014) 39 *Alternatives: Global, Local, Political* 90.



against each other which they consequently challenged at the WTO.²² In one of these cases, brought by Ukraine against the Russian trade-restrictive measures, Russia invoked the security exception of the GATT to justify its measures.²³ A large number of WTO Member States joined as third parties to the dispute which demonstrated the systemic importance of the case.²⁴ The next section will briefly overview the facts of the case.

3. *The Panel report: brief summary of the facts*

In February 2017, Ukraine requested the establishment of a WTO Panel when it challenged the Russian restrictions on traffic in transit of goods from Ukraine to the Republic of Kazakhstan and the Kyrgyz Republic through the territory of the Russian Federation. Such restrictions included, among others, (1) the requirement for the road and railway transit of goods from Ukraine to the Republic of Kazakhstan and Kyrgyz Republic through the territory of the Russian Federation only from the Belarus-Russia border along with an obligation to use a special means of identification (seals) and certain registration cards for drivers during the trip; and (2) a ban on the transit of goods which have tariff rates higher than zero according to the Common Customs Tariff of the Eurasian Economic Union. Ukraine maintained that the Russian trade restrictions were inconsistent, among others, with Articles V:2, V:3, V:4, X:1, X:2 of the GATT and the Protocol of the Accession of the Russian Federation.²⁵ In turn, Russia justified its measures by recourse to Article XXI (b) (iii) of the GATT, ie the security exception of the GATT. The Panel issued its report on 5 April

²² For an overview of the cases see O Kryvetska, N Isakhanova, 'Trade Restrictions and WTO Disputes in Ukraine–Russia Trade Relations' (2018) *Getting the Deal Through, Trade&Customs*.

²³ Ukraine, 'DS512: Russia — Measures Concerning Traffic in Transit, Request for Consultations by Ukraine, WT/DS512/1' <www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm>.

²⁴ The third parties included: Australia, Bolivia, Brazil, Canada, Chile, China, the European Union, India, Japan, Korea, Moldova, Norway, Paraguay, Saudi Arabia, Singapore, Turkey and United States.

²⁵ *Russia - Measures Concerning Traffic in Transit - Request for the establishment of a panel by Ukraine* WT/DS152/3.



2019 which was not appealed by the parties and has been adopted by the DSB on 26 April 2019.²⁶

3.1. *The Panel report: procedural matters*

Before discussing the report of the Panel, this case note will briefly explain the nature of the security exception and two procedural issues stemming from it. Exceptions, by their nature, unlike exemptions²⁷, allow a breach of a primary rule like the most-favoured nation principle or national treatment principle in case of the WTO law to be justified.²⁸ The review by a Panel in cases involving exceptions normally involves two steps (i) whether there is a breach of a primary norm and (ii) whether such a breach can be justified by an exception. Indeed, WTO Panels follow this order of review under GATT Article XX (general exceptions) which has a similar structure to GATT Article XXI.²⁹

²⁶ See DS512/7, Action by the Dispute Settlement Body dated 29 April 2019. See the main arguments of the third parties summarized by the Panel in paras 7.35-7.52 of the Panel report DS512: *Russia – Measures Concerning Traffic in Transit—Panel Report*.

²⁷ In the case of exemptions, the tribunal should initially determine whether the exemption applies, which will evidently exclude the application of a general rule. For example, art 3.3 SPS Agreement allows WTO Members to deviate from international standards if they comply with certain conditions J Pauwelyn, ‘Defenses and the Burden of Proof in International Law’ (26 July 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863962> 6, 16. In other words, the exemption clause functions as an alternative to a general rule and its violation can lead to a liability. On the contrary, the exception allows a deviation from rules when certain conditions are met and therefore it cannot be violated as such. *ibid.* 14 On different types of exception rules see J E Viñuales, ‘Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law’ <<https://ssrn.com/abstract=2888963>> 10.

²⁸ In this regard Pauwelyn (n 27) 15 states: ‘An exception provision, in contrast, justifies breach of another provision; it can never, by itself, be violated. A respondent cannot, for example, violate GATT Article XX; at worst, it does not meet the conditions in Article XX so that its breach of, say, GATT Article III cannot be justified’.

²⁹ The operation of the general exception provision, GATT art XX, was specified by the Appellate Body in *Thailand-Cigarettes (Philippines)*: ‘...It is true that, in examining a specific measure, a panel may be called upon to analyse a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a ‘line of equilibrium’ between a substantive obligation and an exception. Yet this does not render that panel’s analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the ‘further and separate’ assessment of whether such measure is otherwise justified’. See DS371: *Thailand*



The specificity of the exception, in turn, has consequences for the burden of proof.³⁰ The exception requires a claimant to prove that the defendant breached the primary rule and then, in turn, the defendant bears the burden of proof of compliance with the requirements imposed by the invoked exception clause. In other words, the claimant makes an affirmative claim and the respondent makes an affirmative defence and each party bears the burden of proof with regard to the claim or defence it has made respectively.³¹

Having this particular nature of the GATT security exception in mind, two points are worth mentioning with regard to the Panel's approach in the *Russia-Traffic in Transit* case. First, the Panel deviated from the order of review which Panels normally follow in their review of general exceptions under GATT Article XX. To be precise, the Panel started reviewing whether the Russian measures could be justified by GATT Article XXI without establishing that they had breached the Russian trade obligations under a primary rule contained, for example, in GATT Article V (freedom of transit obligation).³² The Panel explained that the emergency in international relations involves a fundamental change of circumstances which

— *Customs and Fiscal Measures on Cigarettes from the Philippines—Appellate Body Report* para 173.

³⁰ In civil law the burden of proof means 'the duty of parties to prove their allegations' (ie the burden of persuasion). It corresponds to *actori incumbit probatio*. See J Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?' (1998) 1 J Intl Economic L 227, 229. David Unterhalter claims that the burden of proof asks two questions: which party must satisfy the tribunal as to the issue once all evidence was provided (incidence) and second, what is the standard of proof (quantum of proof). However, the WTO case-law has mainly focused on the incidence of proof. D Unterhalter, 'Allocating the Burden of Proof in WTO Dispute Settlement Proceedings' (2009) 42 Cornell Intl L J 209.

³¹ The Appellate Body in *US-Wool Shirts and Blouses* explained the burden of proof with regard to an affirmative defence as '...the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.' DS33: *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India* DS371: *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines—Appellate Body Report* 14.

³² The Panel explained that 'The novel and exceptional features of this dispute, including Russia's argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits'. *Russia – Traffic in Transit* (n 26) para 7.24.



‘radically alters the factual matrix of the evaluation of consistency of the WTO measures’.³³ Consequently, according to the Panel, there was no need to review the WTO-inconsistency of the measures if they had been taken in normal times. That said, the Panel proceeded with substantive claims of violation in the second part of the report. The Panel explained that ‘it was mindful that, should its findings on Russia’s invocation of Article XXI (b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis’.³⁴

Second, as mentioned above, the review under the GATT security exception has its implications for the division of the burden of proof between parties.³⁵ In the case at hand Ukraine had a burden of proof as to the breach of primary obligations by Russia. In turn, Russia had a burden of proof as to its compliance with requirements under GATT Article XXI. Ukraine presented the evidence as to the breach by Russia of its obligations under Article V of GATT and its Protocol of Accession.³⁶ Russia, for its part, did not provide the evidence as to compliance with requirements under GATT Article XXI and instead claimed that the Panel had a limited jurisdiction due to the self-judging nature of the security exception.³⁷ Against this backdrop, one could claim that the Panel should have ruled

³³ *ibid* para 7.108.

³⁴ *ibid* para 7.152. Some scholars like Dylan Geraets consider this finding to be questionable since the Panel should avoid deciding on issues which ‘are not absolutely necessary to dispose of the particular dispute’ D Geraets, ‘WTO Issues Ruling in Russia – Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable’ (*Mayer Brown, Perspectives and Events*, 8 April 2019) <<https://www.mayerbrown.com/en/perspectives-events/publications/2019/04/wto-issues-ruling-in-russia-traffic-in-transit-measures-justified-on-national-security-grounds-are-justiciable>>.

³⁵ In civil law the burden of proof means ‘the duty of parties to prove their allegations’ (ie the burden of persuasion). It corresponds to *actori incumbit probatio*. See Pauwelyn (n 30) 229.

³⁶ *Russia – Traffic in Transit* (n 26) paras 7.1-7.2.

³⁷ The Panel stated: ‘Russia invokes the provisions of Article XXI(b)(iii) of the GATT 1994, arguing that, as a result, the Panel lacks jurisdiction to further address the matter.’ See para 7.3-7.4. Moreover, in para 7.23 the Panel noted that ‘... Russia does not present arguments or evidence to rebut Ukraine’s specific claims of inconsistency with Articles V and X of the GATT 1994, or commitments in Russia’s Accession Protocol’. Russia stated: ‘Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security’ *ibid* para 7.112.



in favour of Ukraine since Russia did not discharge its burden of proof.³⁸ The Panel, instead, extensively interpreted its fact-finding authority under Article 13 DSU which allows a panel to seek information from any relevant source and to consult individual experts or expert bodies to obtain their opinion on certain aspects of the matter before it.³⁹ As a matter of fact, the Panel did not require a high level of specificity from Russia with regard to the identification of the situation of emergency in international relations.⁴⁰ In other words, the standard of proof applied by the Panel was so low that Russia was able to justify its compliance with the requirements under GATT Article XXI.⁴¹

³⁸ In *EC – Hormones*, the Appellate Body said that: ‘It is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case’. *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, DS 26 [1998] WTO WT/DS26/AB/R, WT/DS48/AB/R, para 104. As a matter of fact, the Panel stated that Ukraine would have established a prima facie case as to a breach of art V:2 of the GATT by Russia, had the measures not been taken during the situation of emergency in international relations. *Russia – Traffic in Transit* (n 26) para 7.183.

³⁹ The Panel, on its part, had to look for evidence from the Resolutions of the UN General Assembly (see para 7.122).

⁴⁰ For example, Russia avoided mentioning a specific situation of emergency in international relations and the Panel had to look at the evidence available before it. The Panel stated: ‘In the case at hand, the emergency in international relations is very close to the ‘hard core’ of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border’ para 7.136.

⁴¹ This argument was explained by the Appellate Body in *Japan – Measures Affecting Agricultural Products* as ‘Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.’ DS76: *Japan – Measures Affecting Agricultural Products* DS371: *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines—Appellate Body Report* paras 127-130.



3.2. Main findings of the Panel

As has already been mentioned, *Russia – Traffic in Transit* was the landmark case where a WTO Panel interpreted the GATT security exception for the first time.⁴² This part of the article will summarize the main findings of the Panel, with a particular focus on two aspects: the jurisdiction of the Panel and its framework for review of Article XXI.

3.2.1. The Panel's jurisdiction over Article XXI of the GATT 1994

First and foremost, the crux of the issue in *Russia – Traffic in Transit* case was whether the Panel would accept its jurisdiction over the security exception. As is well known, the jurisdiction of a Panel over a specific case is an essential element for a Panel to adjudicate the matters before it.⁴³

In *Russia-Traffic in Transit*, the Panel determined that inherent jurisdiction provides international tribunals with authority to determine all matters arising in relation to the exercise of their own substantive jurisdiction.⁴⁴ In other words, the Panel referred to the *compétence de la*

⁴² For comments on the Panel Report see, for example, G Vidigal, 'WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?' (2019) <<https://www.ssrn.com/abstract=3400717>>. For a short overview of the Panel report see I Bogdanova, 'The WTO Panel Ruling on the National Security Exception: Has the Panel "Cut" the Baby in Half?' EJIL:Talk! (12 April 2019) <www.ejiltalk.org/the-wto-panel-ruling-on-the-national-security-exception-has-the-panel-cut-the-baby-in-half/#more-17087> and Yana Dreyer, 'WTO Report on Russia-Ukraine Transit to Test Future of Trading' (*Borderlex*, 8 April 2019) <www.borderlex.eu/2019/04/08/wto-thrown-into-crisis-russia-us-agreement-over-kazakhstan-ruling/>.

⁴³ The importance of the jurisdiction was underlined by the Appellate Body in the case the *United States – Anti-Dumping Act of 1916* by saying that 'The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.' The Appellate Body further explained the authority of Panels in *Mexico-Corn Syrup*: '...For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.' DS132: *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 215 of the DS* DS371: *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines—Appellate Body Report* para 36.

⁴⁴ See *Russia – Traffic in Transit* (n 26) para 7.53. For a discussion of the jurisdiction of a WTO Panel over the security exception see L Bartels, 'The Separation of Powers In the WTO: How To Avoid Judicial Activism' (2004) 53 ICLQ 861, 868-871.



compétence principle.⁴⁵ The Panel explained that GATT Article XXI falls within the Panel’s terms of reference since (i) it is covered by the WTO agreements as required by Article 1.1. DSU, (ii) it is not subject to special rules for dispute settlement under Article 1.2 DSU and (iii) the Panel was established according to standard terms of reference under Article 7.2 DSU.⁴⁶

Having accepted its jurisdiction, the Panel had to interpret the meaning of GATT Article XXI in order to decide whether it had the power to review the invocation of GATT Article XXI, i.e. whether the security exception was justiciable.⁴⁷ In a brief detour it is worth mentioning that according to Article 3.2 DSU, Panels and the Appellate Body use the customary rules of interpretation of public international law.⁴⁸

In its interpretation of GATT Article XXI, the Panel adopted a four-step approach. By way of reminder, the relevant part of Article XXI of the GATT 1994 states as follows:

⁴⁵ The Panel noted that ‘This is known as the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French.’ The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, *US – 1916 Act*, fn 30 to para 54; and *Mexico – Corn Syrup* (Article 21.5 – US), para 36. See *Russia – Traffic in Transit* (n 26) fn 145.

⁴⁶ *ibid* paras 7.54-56.

⁴⁷ *ibid* para 7.58.

⁴⁸ ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’. Understanding on Rules and Procedures Governing the Settlement of Disputes, art 3.2. By way of reminder, art 31 (1) of the 1969 Vienna Convention on the Law of Treaties (VCLT) has attained the status of a customary rule of interpretation of public international law. In this regard the Appellate Body in *US – Gasoline* stated that ‘... As such, it forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by art 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other ‘covered agreements’ of the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.’ DS2: *United States – Standards for Reformulated and Conventional Gasoline* DS371: *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*—Appellate Body Report WT/DS2/AB/R (1996) Appellate Body 17.



‘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 ... (iii) taken in time of war or other emergency in international relations; or ...’.

As a first step, the Panel replied to the question as to whether the wording ‘it considers’ in para. (b) qualifies the determination of enumerated subparagraphs in that provision. ‘It considers’ was at the centre of a heated debate since some States such as Russia and the United States, claimed that this wording provided a full deference to the State and, in turn, made GATT Article XXI beyond the reach of the Panel.⁴⁹ On the contrary, other WTO Members like Ukraine and the European Union, claimed that if Article XXI of the GATT 1994 were not reviewable, it would leave the decision as to the invocation of GATT Article XXI in the hands of one State which would be contrary to Article 23.1 DSU which provides other WTO Members with a right to redress the violations of trade obligations under DSU rules.⁵⁰

In light of the structure of Article XXI, the Panel established that ‘it considers’ could qualify three notions: (i) the word ‘necessary’, i.e. the necessity of the measures for the protection of ‘its essential security interests’; or (ii) also the determination of these ‘essential security interests’; or (iii) the determination of the matters described in the three subparagraphs of Article XXI(b) as well.⁵¹ The Panel noted that from a logical structure it was apparent that the three sets of circumstances under subparagraph (i) to (iii) qualify and limit the exercise of the discretion accorded to Members

⁴⁹ For example, in its third party oral statement the US claimed that ‘Most importantly, Article XXI is a self-judging provision, and its invocation is not subject to review by the DSB (ie, all WTO Members convening as that Body) or an adjudicator to which the DSB refers a matter (automatically, under the DSU).’ Third-Party Oral Statement of the United States of America, *Russia-Measures Concerning Traffic in Transit* (DS512) (<<https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>>) para 5. As a matter of fact, the United States was trying to transpose the US concept of the political question doctrine into WTO law. See fn 183, para 7.103, 50 of the Panel Report.

⁵⁰ By way of reminder, art 23.1 DSU states: ‘When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding’ *Russia – Traffic in Transit* (n 26) para 7.31.

⁵¹ *ibid* para 7.63.



under the *chapeau*. In other words, there would be no *effet utile* of these limitations if the determination were to be left at the discretion of the invoking Member.⁵² Hence, the Panel concluded that the existence of an emergency in international relations was an objective state of affairs and the determination of whether the action was ‘taken in time of’ an ‘emergency in international relations’ under subparagraph (iii) of Article XXI(b) was that of an objective fact, subject to objective determination by the Panel.⁵³

As the second step, the Panel had to establish whether the object and purpose of the treaty supported an objective review under one of the subparagraphs of Article XXI of the GATT 1994. By looking at the preamble of the GATT 1994 and its functions, the Panel mentioned that it would contradict the object of the treaty and would be contrary to ‘the security and predictability’ of the multilateral system if the WTO obligation was left to the unilateral will of States.⁵⁴

As to the third step, the Panel proceeded to confirm its interpretation by reference to the subsequent practice within the meaning of 31(3)(b) VCLT. Given the fact that the overview of the statements of Member States has revealed conflicting views as to the interpretation of GATT Article XXI, the Panel found that it did not reveal any subsequent practice establishing the agreement between the Members regarding the interpretation of Article XXI under Article 31 (3)(b) of the VCLT.⁵⁵

Lastly, the Panel confirmed its textual and contextual interpretation by extensive reference to the negotiating history of the GATT.⁵⁶ The Panel discussed at length the deliberations during the negotiations of the ITO Charter out of which the GATT 1947 was drafted.⁵⁷ Upon such an

⁵² *ibid* para 7.65.

⁵³ *ibid* para 7.77.

⁵⁴ ‘It would be entirely contrary to the security and predictability of the multilateral trading system ... to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member’s GATT and WTO obligation to a mere expression of the unilateral will of that Member’ *ibid* para 7.79.

⁵⁵ *ibid* para 7.80.

⁵⁶ It should be noted that the Panel in its analysis made references to the US internal documents for which it was criticized by the US. US Trade Representative, ‘First Written Submissions of the United States of America, United States-Certain Measures on Steel and Aluminum Products (EU) (DS548)’ <<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf>> para 172, 55.

⁵⁷ *Russia – Traffic in Transit* (n 26) paras 7.74-7.100.



overview the Panel concluded that ‘there is no basis for treating the invocation of Article XXI (b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.’⁵⁸ In other words, the Panel further confirmed its interpretation that ‘it considers’ did not qualify the three subparagraphs in Article XXI (b) GATT. Hence, in order to be justified under Article XXI of the GATT 1994, a measure should fall under the circumstances envisaged in para (b), whose existence falls under the Panel’s jurisdiction.

3.2.2. *Compliance with requirements under the GATT Article XXI(b)(iii)*

After the Panel had accepted its jurisdiction and confirmed the justiciability of GATT Article XXI, it moved to the interpretation of the requirements set by para (iii) of GATT Article XXI (b). The Panel interpreted the situation of ‘emergency in international relations’ as a situation of: (i) ‘armed conflict’, (ii) ‘latent armed conflict’, (iii) ‘heightened tension or crisis’, or (iv) ‘general instability engulfing or surrounding a state’.⁵⁹ In the case at hand, Russia did not clearly state the specific situation of emergency, but rather referred to ‘an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue.’⁶⁰ On its part, the Panel had to look for evidence before it like the UN General Assembly Resolution which established that the Russia-Ukraine dispute involved an armed conflict.⁶¹ In the end the Panel stated that the Russian identification of a situation of emergency was sufficient in the particular circumstances of the dispute.⁶² Hence, the Panel was satisfied that the situation between Russia and Ukraine constituted an emergency in international relations.⁶³ As a further step, the Panel checked whether all measures taken by Russia were introduced during such a situation of emergency in international relations. In its review the Panel confirmed that Russia took measures in the course of

⁵⁸ *ibid* para 7.100.

⁵⁹ *ibid* para 7.76.

⁶⁰ *ibid* para 7.112.

⁶¹ The Panel noted: ‘By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict’ *ibid* para 122.

⁶² *ibid* para 7.119.

⁶³ *ibid* para 7.123.



its conflict with Ukraine.⁶⁴ In light of the above, Russia complied with the requirements under subparagraph (iii) of the GATT Article XXI. Consequently, the Panel proceeded with the review under the *chapeau*.

3.2.3. The review under the *chapeau* of GATT Article XXI

By way of reminder, the *chapeau* under Article XXI states 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.’ In this part of the review the main question before the Panel was how much deference it should provide to the State during the review of certain elements of the *chapeau*. Since ‘it considers’ wording was claimed to be subject to ‘self-judging’, ie giving a full deference to the State, the Panel had to answer which elements are qualified by ‘it considers’.⁶⁵ In particular, the question was whether ‘it considers’ qualifies both the determination of essential security interests and the necessity of the measure for the protection of those interests or simply the determination of the necessity of the measure.⁶⁶

First, the Panel interpreted the notion of ‘essential security interests’ and stated that the specific interests would depend on the particular situation. The designation of essential security interests is left, in general, to the Member. However, the discretion of a Member is limited by the obligation of good faith which requires them not to use the exceptions as a means of circumventing their trade obligations under the GATT 1994.⁶⁷ The Panel explained that an example of circumvention would be where the Member re-labelled trade interests, which it had agreed to protect as ‘essential security interests’ within the system, meaning that they would fall outside of the reach of the system.⁶⁸ Therefore, the State should articulate its essential security interests sufficiently enough in order to check their veracity. The sufficient level of articulation, in turn, will depend on the particular

⁶⁴ *ibid* paras 7.123-7, 124.

⁶⁵ For example, it was the argument brought by the United States: ‘The United States bases its position on its interpretation of the text of Article XXI, specifically, the ‘self-judging’ language of the *chapeau* in Article XXI(b) ‘which it considers necessary for the protection of its essential security interests’ *ibid* para 7.52.

⁶⁶ *ibid* para 7.128.

⁶⁷ *ibid* paras 7.132-7.134.

⁶⁸ *ibid* para 7.133.

situation meaning that the further removed from armed conflict or other 'hard core' emergency, that the 'emergency' is, the greater the level of specificity which would be required with respect to the articulation of essential security interests.⁶⁹ Given the fact that the emergency between Russia and Ukraine was close to the 'hard core' of war or armed conflict, the Panel did not place a high standard of proof on Russia. That is why, despite the fact that Russia did not specify its essential security interests in detail, 'its articulation was minimally satisfactory in these circumstances.'⁷⁰

Secondly, the Panel proceeded with the review of 'for' wording which is enshrined in the wording 'any action which it considers necessary for the protection of its essential security interests.' In this regard the Panel stated that the obligation of good faith was also applicable to the connection between essential security interests and the measure at issue. The Panel explained that in this case good faith meant

... that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.⁷¹

The Panel found that the Russian measures cannot be considered so remote from, or unrelated to the 2014 emergency that 'it is implausible that Russia implemented the measures for the protection of essential security interests arising from that emergency.'⁷²

Lastly, the Panel stated that if any legal effect should be given to the wording 'which it considers' the State should have a full deference with regard to the necessity of the measures.⁷³ Against this backdrop, the Panel confirmed that Russia satisfied requirements under Article XXI (b) of the GATT 1994 and its measures were covered by Article XXI (b)(iii).⁷⁴

⁶⁹ The Panel noted: '...The less characteristic is the emergency – the greater specificity is needed' *ibid* paras 7.134-7, 135.

⁷⁰ *ibid* paras 7.136-7.137.

⁷¹ *ibid* para 7.138.

⁷² *ibid* para 7.145.

⁷³ *ibid* para 7.146.

⁷⁴ *ibid* paras 7.148-7, 149. As mentioned above, the Panel did not stop here and proceeded with the review of the breach of substantive obligations by Russia in case the Panel report was overturned. The Panel concluded that had the measures not been taken during the situation of emergency in international relations, Ukraine would have



To sum up, the Panel decided that Russia satisfied the requirements under Article XXI (b) (iii) of the GATT 1994 and thus, the Russian measures were justified by GATT Article XXI. Ukraine decided not to appeal the Panel report and it was adopted by the Dispute Settlement Body on 26 April 2019.

4. *Comments on the Panel report*

The report of the Panel, without any doubt, is a landmark decision with regard to the interpretation of GATT Article XXI and is likely to guide future Panels. The panelists should be acclaimed for drafting a carefully worded report which was able to find a balance between trade and security. Moreover, each party had something for it in this report or, as some scholars put it, the Panel ‘cut the baby in half.’⁷⁵ On the one hand, Russia was able to justify its measures by reference to GATT Article XXI (b) (iii) and announced that this interpretation would help it in its case against the US’ tariffs.⁷⁶ Ukraine, on the other hand, was satisfied with the fact that there was confirmation as to the existence of an emergency in respect of the international relations between Russia and Ukraine.⁷⁷ In turn, Ukraine could use this argument for its defence in another case where Russia similarly challenged the Ukrainian sanctions against Russia.⁷⁸

Main takeaways from the dispute are (i) acknowledgment by the Panel of its jurisdiction over GATT Article XXI and (ii) establishment of a legal

established a *prima facie* case that certain Russian measures were inconsistent with art V:2 of the GATT 1994 and paragraph 1161 of Russia’s Working Party Report, *ibid* para 8.2.

⁷⁵ Bogdanova (n 42).

⁷⁶ ‘Russia won the WTO case on transit of Ukrainian goods’ [Rossiya vyigrala spor v VTO o tranzite ukrainskih tovarov] *BBC New Russian* (5 April 2019) <www.bbc.com/russian/news-47832866>.

⁷⁷ See the press release of the Ukrainian Ministry of Economic Development ‘Intergovernmental group of the Ministry of economic development recommended not to appeal the decision in the case on the Russian restrictions of transit from Ukraine [Mizhvidomcha grupa pry Minekonomrozvytky rekomendovala utrumatysya vid apelyatsiinogo oskargennya y spravi pro obmezheniya Rosiyeyu tranzyty z Ukraini]’ *Cabinet of Ministers of Ukraine* (15 April 2019) <www.kmu.gov.ua/news/mizhvidomcha-robocha-grupa-pri-minekonomrozvitku-rekomendovala-utrimatisya-vid-apelyatsijnogo-oskarzhennya-u-spravi-pro-obmezheniya-rosiyeyu-tranzitu-z-ukrayini>.

⁷⁸ DS525: *Ukraine — Measures relating to Trade in Goods and Services, Request for consultations by Russia*, 19 May 2017.



framework for the review of consistency with requirements under Article XXI of the GATT 1994 which includes (iii) various standards of review.

4.1. *Jurisdiction of the Panel*

While some scholars commented that the Panel's accepting of jurisdiction was something 'old' and predictable, it was necessary to set it in stone in case-law.⁷⁹ The Panel was aware of the risks associated with the adjudication of national security cases, which are inherently political and are always likely to prompt attacks from the Member States.⁸⁰ Furthermore, by accepting the jurisdiction, the Panel drew a line between 'high politics' cases such as a dispute over the annexation of Crimea, which are beyond the competence of the WTO and other trade-related disputes which embody national security measures. In this way, the Panel gave a signal to States that they should avoid using Article XXI cases as a backdoor to adjudicate cases related to the occupation of territory or the use of force. In this regard the Panel stated that it was not necessary to characterize the situation of emergency under international law in general and it was not relevant which actor bore the international responsibility for the emergency.⁸¹ Some leading scholars such as Steve Charnovitz criticized this conclusion by saying that the discretion of States to act in an emergency might incentivize them to create such a situation of emergency and to use it to their benefit, in order to justify their trade restrictions.⁸² In other words, some scholars pointed out the possibility of using the clean hands doctrine

⁷⁹ Vidigal (n 42) 5.

⁸⁰ For example, the US President has already threatened to withdraw from the WTO. The relevant US Statute seems to require Congressional approval for US withdrawal. See Section 125 'An Act to Approve and Implement the Trade Agreements Concluded in the Uruguay Round of Multilateral Trade Negotiations.' <www.govinfo.gov/content/pkg/BILLS-103hr5110enr/pdf/BILLS-103hr5110enr.pdf>. Reuters Staff, 'Trump Threatens Action on WTO after Reports He Wants to Withdraw' *Reuters* (2 July 2018) <www.reuters.com/article/us-usa-trade-wto-ross/trump-threatens-action-on-wto-after-reports-he-wants-to-withdraw-idUSKBN1JS194>.

⁸¹ *Russia – Traffic in Transit* (n 26) para 7.121.

⁸² 'It just can't be irrelevant what state is responsible for the emergency. Otherwise, the leeway in Article XXI to act in an emergency would allow states to create an emergency in order to justify any trade action they want.' See the comment by Steve Charnovitz to the blogpost of S Lester, 'The Russia - Traffic in Transit Panel Report' *International Economic Law and Policy Blog* (5 April 2019) <<https://ielp.worldtradelaw.net/2019/04/the-russia-traffic-in-transit-panel-report.html>>.



in WTO law.⁸³ Given the fact that this doctrine is scarcely used in public international law,⁸⁴ transposing it into the WTO might have brought additional arguments for a backlash against the WTO system.⁸⁵

4.2. Framework of review

The Panel provided a framework for the review of GATT Article XXI which established varying levels of deference with regard to the review of different elements of the provision. The Panel has adopted the most stringent standard of review with regard to the elements of sub-para b (iii). The Panel explained that the situation of emergency in international relations functions as a limitation on the right to adopt trade-restrictive measures – i.e. it is not possible to justify trade-restrictive measures in the absence of the situation of emergency in international relations. Thus, the Panel would conduct a full review of these elements (i.e. emergency and the timing coincidence between the measures and such emergency). That said, there is still some ‘wiggle room’ for States: the interpretation of ‘emergency in international relations’ which includes wording such as ‘heightened tension or crisis’ provides a margin of flexibility to address various types of security threats. As Benton J. Heath puts it, ‘the equation of emergency with crisis

⁸³ The essence of the doctrine, as stated by Gerald Fitzmaurice, is as follows: ‘He who comes to equity for relief must come with clean hands. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it’. See G Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours de l’Académie de Droit International* 119.

⁸⁴ For example, in a recent case brought by Iran against the US, the International Court of Justice rejected the applicability of the clean hands doctrine and stated ‘...Without having to take a position on the ‘clean hands’ doctrine, the Court considers that, even if it were shown that the Applicant’s conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the ‘clean hands’ doctrine’. *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Preliminary objections Judgement) [2019] ICJ Rep 7, 44 para 122.

⁸⁵ On the use of the clean hands doctrine in relation to the WTO security exception see B Rice, ‘Russia and the WTO: Is It Time to Pierce the Article XXI(b)(iii) Security Exception?’ [2015] <www.ssrn.com/abstract=2695936> 28.



would give future panels broad flexibility to deal with new kinds of threats and unforeseen scenarios.⁸⁶

The Panel provided more discretion to States with regard to the review of (i) the designation of their essential security interests and (ii) their connection with the measures. Certainly, the discretion of States is not unlimited but rather controlled by the good faith obligation with regard to the designation of essential security interests and the connection between such interests and the challenged measures. The Panel interpreted the good faith obligation in two ways: (i) as the requirement ‘to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity’⁸⁷ and (ii) as the ‘minimum requirement of plausibility’ with regard to the connection between essential security interests and measures adopted for their protection.⁸⁸

Lastly, the Panel gave full deference with regard to the necessity of the measures due to the ‘it considers’ wording. In other words, the Panel would not review the necessity of the measures.

Looking at the levels of discretion provided to States, one might claim that the Panel distinguished between subjective and objective elements of review.⁸⁹ The word ‘subjective’, though, appears to be misleading since the measures of the State are limited by the requirement of good faith and remain subject to the objective review by the Panel. Indeed, Article 11 DSU provides guidance for the Panel as to the objective assessment of facts. The standard of review should not be confused with an objective assessment of facts.⁹⁰ The standard of review prescribes the level of deference which the

⁸⁶ B Heath, ‘Guest Post: Trade, Security and Stewardship (Part IV): A Variable Framework for Security Governance’ *International Economic Law and Policy Blog* (8 May 2019) <<https://worldtradelaw.typepad.com/ielpblog/2019/05/guest-post-trade-security-and-stewardship-part-iv-a-variable-framework-for-security-governance.html>>.

⁸⁷ *Russia – Traffic in Transit* (n 26) para 7.134.

⁸⁸ *ibid* para 7.138.

⁸⁹ Some scholars call it a ‘partially objective approach, combined with plausibility requirements’. W Weiß, ‘Interpreting Essential Security Exceptions in WTO Law in View of Economic Security Interests’ in W Weiß, C Furculita (eds), *Global Politics and EU Trade Policy* (Springer International Publishing 2020) 257.

⁹⁰ In this regard the Panel in *US – Shirts and Blouses* noted: ‘...although the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU which describes the parameters of the function of panels, is relevant here...’ *DS33: United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India—Panel Report* para 7.16.



Panel/AB provide to the States in their choice of their actions on the one hand, and the level of intrusiveness, which applied by Panels/AB in review of such actions, on the other hand.⁹¹ What is more, an ‘objective assessment of facts’ should be conducted by Panels, notwithstanding varying levels of deference.⁹²

4.3. *What standard of review?*

Having in mind the ambiguity of the notion of standards of review, one could attempt to attribute the discretion by the Panel to the standards of review. Against this backdrop, Joost Pauwelyn differentiates 4 types of standards of review: *de novo* review, objective review, reasonable assessment and self-judging provision (i.e. full deference).⁹³ To recall, in *Russia-Traffic in Transit* the Panel observed that the situation of the emergency of international relations and its coincidence with measures at issue are objects of review by the Panel. It appears that the Panel fully reviewed the actions by the State, i.e. applied a *de novo* review. In turn, the Panel gave more deference to the State with regard to (i) the definition of essential security interests and (ii) their connection between the measures at issue. One could say that the Panel used the reasonable assessment standard of review and checked the good faith requirement.⁹⁴ The minimum requirement of plausibility enshrined in good faith seems, however to be a very relaxed requirement. For example, the Panel did not take into account the fact that Russia has not adopted a full embargo, but rather applied certain restrictive measures which contradicts the aim of the protection of national security.⁹⁵ Lastly, the Panel gave full deference to the State with regard to

⁹¹ The standard of review was defined as: ‘...the degree of deference or discretion that the court accords to legislators and regulators; or, looked at from the other perspective, the degree of intrusiveness or invasiveness into the legislator’s or regulator’s decision-making process’. J Bohanes, N Lockhart, ‘Standard of Review in WTO Law’ in D Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 379.

⁹² CD Ehlermann, N Lockhart, ‘Standard of Review in WTO Law’ (2004) 7 J Intl Economic L 491, 495.

⁹³ Pauwelyn (n 27) 4.

⁹⁴ *Russia – Traffic in Transit* (n 26) para 7.138.

⁹⁵ The Panel stated that ‘This conclusion is not undermined by evidence on the record that the general instability of the Ukraine-Russia border did not prevent some bilateral trade from taking place along parts of the border’, *ibid* para 7.145.

the necessity of the measure – ie considered it to be a self-judging part of the provision.

Time and again, one can only guess at the specific standards of review, since international courts and tribunals tend to avoid mentioning a precise standard of review and it is quite hard to attribute the discretion utilised to a specific standard of review.⁹⁶ Moreover, Panels might use various levels of standards of proof – i.e. the amount of proof necessary for the party to discharge its burden of proof.⁹⁷

5. *Concluding remarks*

Benton J. Heath characterized the approach of the Panel as fitting into a ‘stewardship function’ of international courts which includes notions of ‘embeddedness’ (where courts establish paths to receive political signals from States) and ‘responsiveness’ (where a court can devise a flexible legal standard which might be adapted to those signals).⁹⁸ The courts should be aware, though, of the risks associated with ‘over-embeddedness’ and ‘over-responsiveness’ since it is quite easy for things to become over-politicized in national security cases.

Without diminishing the importance of the Panel report in the *Russia-Traffic in Transit* case, one might claim that the Russia-Ukraine dispute was relatively ‘easy’ to adjudicate on, since the situation of emergency was close to the ‘hard core’ emergency in international relations.⁹⁹ What is more important, is that new types of good faith security claims like cybersecurity or

⁹⁶ For example, in *Whaling in Antarctic*, the International Court of Justice stated: ‘...by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one.’ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226, 254 para 67. Some scholars like Asier Muñoz claimed that the ‘objective standard’ was ‘reasonableness’ and it is relevant for the determination of the applicable standard of review since it is based on good faith and proportionality. See A Garrido-Muñoz, ‘Managing Uncertainty: The International Court of Justice, “Objective Reasonableness” and the Judicial Function’ (2017) 30 *Leiden J Intl L* 457, 458.

⁹⁷ Pauwelyn (n 27) 3.

⁹⁸ Heath (n 86).

⁹⁹ See, for example, S Lester, H Zhu, ‘Closing Pandora’s Box: The Growing Abuse of the National Security Rationale for Restricting Trade’ <www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale>.



environmental security, which require a rethinking of the national security concept and its adjudication by international tribunals, pose more serious challenges to the future of the multilateral trade system.¹⁰⁰

To sum up, the Panel skillfully dealt with the interpretation of the security exception of the GATT 1994, which was hanging over it like the Sword of Damocles. The Panel managed to design a flexible framework which will accommodate the need for deference of WTO Members on the one hand, and will prevent the abuse of the security exception on the other hand. That said, while it seems that the Panel successfully cut the Gordian Knot of the security exception of the GATT, future Panels will have to tackle a lot of other complex matters related to the evolving nature of the relationship between trade and security in the context of novel security threats and the changing world order.¹⁰¹ Yet, the *Russia – Traffic in Transit* Panel Report laid the groundwork for future case-law on the security exception in WTO law.¹⁰²

¹⁰⁰ This argument is extensively addressed by Benton J Heath where he proposes rethinking institutional arrangements for security governance Heath (n 7).

¹⁰¹ On a new Geoeconomic World Order see A Roberts, H Choer Moraes, V Ferguson, ‘Geoeconomics: The Variable Relationship Between Economics and Security’ (*Lawfareblog*, 27 November 2018) <www.lawfareblog.com/geoeconomics-variable-relationship-between-economics-and-security>.

¹⁰² Without any doubt, the case will have an impact on the US Section 232 cases, but it seems that the US cases involve a clear example of trade protectionism rather than novel types of security threats. For comments on the implications of the *Russia – Traffic in Transit* Report for the US Section 232 cases see W A Reinsch, J Caporal, ‘The WTO’s First Ruling on National Security: What Does It Mean for the United States?’ Center for Strategic and International Studies (5 April 2019) <www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>.

