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# The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994

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## **The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994**

Peter Van den Bossche<sup>1</sup> and Sarah Akpofure<sup>2</sup>

### **Introduction**

Economic nationalism and anti-globalist unilateralism have been on the rise in recent years. The most obvious and consequential examples of this trend are the trade policy measures taken by the United States which undermine the rules-based multilateral trading system. Among these measures, one type stands out as being particularly troublesome, namely trade restrictive measures allegedly taken for the protection of national security. Other WTO Members have in recent years also taken trade restrictive measures which they sought or seek to justify on national security grounds. Whereas for 70 years, first GATT Contracting Parties and then WTO Members showed much self-restraint in invoking national security as a justification for trade restrictive measures, such self-restraint now seems a thing of the past. The invocation of the national security exception, in particular the national security exception under Article XXI of the *General Agreement on Tariffs and Trade 1994*, has proliferated. Against this background, this paper explores the nature and the scope of the national security exception under Article XXI, and examines the role the WTO, and in particular its dispute settlement system, can play in containing the abuse of this exception.<sup>3</sup>

### ***National security exceptions in international trade agreements***

National security exceptions are a common provision in international trade agreements and for good reasons. States rightly value their national security and that of their citizens more than the economic benefits generated by international trade. None other than Adam Smith already noted in 1776 that “defence ... is of much more importance than opulence.”<sup>4</sup> National security comes first. The three principal WTO agreements, the *General Agreement on Tariffs and Trade 1994* (‘GATT 1994’), the *General Agreement on Trade in Services* (‘GATS’), and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (‘TRIPS Agreement’), provide for a national security exception in Article XXI of the GATT 1994, Article XIV *bis* of the GATS and Article 73 of the TRIPS Agreement respectively. Note, however, that none of the other WTO multilateral agreements on trade in goods, except for the *Agreement on Trade Related Investment Measures* (‘TRIMS Agreement’) and the *Agreement on Trade Facilitation*, contain, or explicitly refers to, a national security exception.<sup>5</sup> Whether the national security exception of Article XXI of the GATT 1994 is available to justify measures inconsistent with those other WTO

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<sup>3</sup> Note that the dispute settlement system of the WTO is currently in crisis due to the United States’ obstruction of the appointment of WTO appellate judges and the resulting paralysis of the WTO Appellate Body. By appealing first instance WTO panel reports to the paralysed Appellate Body, the losing party keeps a dispute in legal limbo and prevents the dispute from being resolved in a legally binding manner. While this paper does not deal with this existential crisis, it should be kept in mind when considering the possible role of WTO dispute settlement in containing the abuse of the national security exception by WTO Members.

<sup>4</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published in 1776), (Modern Library, 1994).

<sup>5</sup> For the *TRIMS Agreement*, see Article 3 thereof, and for the *Agreement on Trade Facilitation*, see Article 24.7 thereof.

agreements, devoid of a national security exception, such as the *WTO Agreement on Subsidies and Countervailing Measures* ('SCM Agreement') or the *Agreement on Technical Barriers to Trade* ('TBT Agreement') remains undecided, but the Appellate Body's case law on the scope of Article XX would suggest that it is not.<sup>6</sup>

National security exceptions are also commonly found in other multilateral trade agreements such as the *International Convention on the Harmonized Commodity Description and Coding System* ('HS Convention') as well as in regional trade agreements.<sup>7</sup> A search of the DESTA Database reveals that 291 regional and preferential trade agreements incorporate a national security exception.<sup>8</sup>

Article XXI of the GATT 1994, however, is the most-prevalent and most-discussed national security exception in international trade law.<sup>9</sup> This provision states:

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.

The national security exceptions under Article XIV *bis* of the GATS and Article 73 of the *TRIPS Agreement* are *mutatis mutandis* worded similarly. The latter is also the case for the national security exceptions in other multilateral trade agreements and most regional trade agreements.<sup>10</sup> Hence, this paper will primarily focus on the

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<sup>6</sup> Inspired by the case law on the scope of the general public policy exceptions under Article XX of the GATT 1994, the panel in *Russia – Traffic in Transit (2019)* ruled that Russia could also invoke Article XXI of the GATT 1994 to justify measures inconsistent with the provisions of Russia's Protocol of Accession to the WTO, because the Protocol can be read to refer implicitly to Article XXI. See Panel Report, *Russia–Traffic in Transit (2019)*, para. 7.238. The panel referred to Appellate Body Report, *China – Publication and Audiovisual Products (2010)* paras. 214-233; Appellate Body Reports, *China – Raw Materials (2012)*, paras. 278-306; and Appellate Body Reports, *China-Rare Earths (2014)*, paras. 5.50 and 5.57.

<sup>7</sup> Article 3.1(b) of the HS Convention.

<sup>8</sup> See Andreas Dür, Leonardo Baccini and Manfred Elsig, 'The Design of International Trade Agreements: Introducing a New Database', (2014) *Review of International Organizations*, 353, at <https://www.designoftradeagreements.org>. Note that there is no 'one size fits all' definition of national security. The definition and terminology of national security vary from state to state. See Leonard K Cheng, Gregory W Whitten and Jingbo Hua, 'The National Security Argument for Protection of Domestic Industries', (2019) *Journal of Chinese Economic and Business Studies*, 365. Moreover, some authors observe that the definition is also slowly evolving from 'traditional' security concerns dealing mainly with military or armed conflict and public safety to a broader range of risks that could include infectious disease, economic issues as well as cultural and technological dimensions. See Benton Heath, 'The New National Security Challenge to the Economic Order', (2020) *Yale Law Journal*, 1024. As such, the DESTA Database describes the term 'security' as 'military cooperation, anti-terrorism, peace-building and arms control', giving a traditional sense of national security.

<sup>9</sup> Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO', (2002) *Virginia Journal of International Law*, 367.

<sup>10</sup> The wording of the national security provision in some regional trade agreements may differ in ways that can be relevant to the nature and scope of the exception it provides for. See for example, Article 23.2 of the *United States - Korea Free Trade Agreement*. The wording of this provision may be read to indicate that it is *not* justiciable. For examples of national security provisions worded

nature and the scope of Article XXI of the GATT 1994, and specifically paragraph (b)(iii) thereof, which currently raises most concerns of abuse of the GATT national security exception.

### *From self-restraint to proliferation of use*

The GATT national security exception was available to GATT Contracting Parties as from 1948 but was explicitly invoked on few occasions and was seldom the subject of a legal dispute.<sup>11</sup> Throughout the first two decades of the WTO, its Members were equally cautious in invoking the national security exception of Article XXI of the GATT 1994 and eager to avoid any related dispute or to settle such dispute ‘out of court’.<sup>12</sup>

In September 2016, this seven-decade long era of self-restraint on the part of GATT Contracting Parties and WTO Members came to an end when the first of seven national security cases was filed. On 14 September 2016, Ukraine requested consultations with Russia regarding alleged restrictions on traffic in transit from Ukraine, through Russia, to Kazakhstan and other countries. The panel in *Russia – Traffic in Transit* (DS512) was established on 21 March 2017. The importance of this case was clearly indicated by the fact that no less than seventeen WTO Members intervened in the panel proceedings as third parties. The panel report became the first report examining the nature and scope of the national security exception of Article XXI. It was adopted by the WTO Dispute Settlement Body on 26 April 2019, which made it final and legally binding.

Since the adoption of the panel report in *Russia – Traffic in Transit* (2019), a panel in another national security case, namely *Saudi Arabia – Protection of IPRs* (DS567), circulated its report on 16 June 2020.<sup>13</sup> In this case, Saudi Arabia invoked the national security exception under the *TRIPS Agreement*, i.e. Article 73 thereof, in response to claims by Qatar that Saudi Arabia failed to provide protection for IP rights of companies from Qatar, in violation of Saudi Arabia’s obligations under the *TRIPS Agreement*. The panel in this case followed closely reasoning of the panel in *Russia – Traffic in Transit* (2019), but its report was appealed by Saudi Arabia. Since Appellate Body is currently paralysed due to the United States’ obstruction of the appointment of appellate judges, this appeal remains pending, and the DSB will not be able to adopt this report to make it final and legally binding.<sup>14</sup>

In three other cases in which the respondent invoked, or is expected to invoke, a national security exception, namely *United Arab Emirates – Goods, Services and IP Rights* (DS526) (complaint by Qatar), *Japan – Products and Technology (Korea)* (DS590) (complaint by Korea) and *US – Steel and Aluminium* (DS544, 547, 548, 552, 554, 556 and 564) (complaints by China, India, European Union, Norway, Russia, Turkey, and Switzerland), the panel proceedings are ongoing.<sup>15</sup> Of these pending cases, *US – Steel and Aluminium* is of particular importance, albeit that the resulting panel reports may also be appealed to the paralysed Appellate Body and thus never become final and legally binding.<sup>16</sup> The importance of this case is illustrated not only by the fact that

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very similarly to Article XXI of the GATT 1994, see Article 27 of the *Protocol on Goods in the African Continental Free Trade Agreement* and Article 29.2 of the *Comprehensive and Progressive Agreement of Transpacific Partnership* (‘CPTPP’).

<sup>11</sup> See Akande and Williams (2002), 373-376.

<sup>12</sup> See in the regard, the WTO dispute *United States – The Cuban Liberty and Democratic Solidarity Act* (DS38), commonly referred to as *United States – Helms-Burton Act*. In this dispute the European Communities, the complainant, requested the panel to suspend the proceedings and subsequently reached an out-of-court understanding with the United States on the implementation of the Helms-Burton Act. This understanding defused the dispute. For GATT disputes in which the national security exception was raised but a panel ruling on the nature and scope of this exception was deliberately avoided, see *Sweden – Import Restrictions on Certain Footwear* (L/4250, dated 11 November 1975) and *United States – Trade Measures Affecting Nicaragua* (L/6053, dated 13 October 1986). In the latter case, the parties excluded Article XXI from the terms of reference of the panel.

<sup>13</sup> See [http://worldtradelaw.net/document.php?id=reports/wtopanels/saudiarabia-iprights\(panel\).pdf](http://worldtradelaw.net/document.php?id=reports/wtopanels/saudiarabia-iprights(panel).pdf).

<sup>14</sup> See also above, footnote 3.

<sup>15</sup> In *Japan – Products and Technology (Korea)* (DS590), the panel was established on 29 July 2020, but has not yet been composed. Also note that in *Qatar – Certain Measures Concerning Goods* (DS576) (complaint by the UAE), the fifth national security case filed since 2016, a panel was established on 28 May 2019 but the UAE communicated to the DSB on 8 August 2019 that it would further pursue its case since the measures at issue in this case had been withdrawn by Qatar. See WT/DS576/3.

<sup>16</sup> Initially there were nine complainants, but Canada (DS550) and Mexico (DS551) reached a mutually agreed solution with the United States and withdrew their complaints. The remaining seven complainants had their panels established on 21 November and 4

there are no less than seven complainants but that also another 22 WTO Members intervene in the panel proceedings as third parties. These cases concern additional customs duties which the United States imposed on steel and aluminium products on grounds of national security under Section 232 of the Trade Expansion Act of 1962. This cold war provision allows the US President to restrict the imports of products when an investigation by the US Department of Commerce finds that these imports threaten US national security.<sup>17</sup> In February 2018, the US Department of Commerce found that the imports of steel and aluminium were detrimental to the US economy and therefore to its national security as defined under Section 232.<sup>18</sup> Based on this finding, President Trump imposed in March 2018 the additional customs duties on the imports of steel (25 percent) and aluminium (10 percent), which are the measures at issue in *US – Steel and Aluminium*.<sup>19</sup>

Finally, note that the national security exception of Article XXI of the GATT 1994 may be expected to be an issue in *US – Measures Relating to Trade in Goods and Services* (DS574) (complaint by Venezuela), a dispute in which the establishment of a panel was requested by Venezuela on 14 March 2019, but in which a panel has not yet been established. In addition, there are a number of disputes not (yet) brought to WTO dispute settlement, but in which a WTO national security exception is likely to be invoked, such as the dispute between Pakistan and India on the latter's withdrawal of MFN status from the former.<sup>20</sup>

### ***Abuse of national security exceptions and its impact on the global trading system***

The proliferation of the use of WTO national security exceptions since 2016 raises legitimate concerns that these exceptions are being abused. For almost 7 decades, first GATT Contracting Parties and later WTO Members commonly regarded Article XXI of the GATT in particular as a Pandora's box which was best kept closed, due to the high potential for abuse of this provision. The danger is indeed that Article XXI and other WTO national security exceptions can be used by countries to give themselves '*carte blanche*' freedom to flout their obligations under the WTO agreements.<sup>21</sup> Over the years, trade officials and policy makers have warned repeatedly against the dangers of abuse of national security exceptions for the protection of domestic industry and have acknowledged that such abuse constitutes a serious threat to the global trading system.<sup>22</sup> In 2006, the Democratic Members of the United States House of Representatives asked in a letter to the United States Trade Representative:

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December 2018. Seven panels were composed by the WTO Director General on 25 January 2019 and have all the same composition. See WT/DSB/M/421.

<sup>17</sup> See 19 U.S.C. 1862 (US-1); Section 232 Regulations, 15 C.F.R., Part 705 (US-2). See also Jaemin Lee, 'Commercializing National Security: National Security Exceptions' Outer Parameter under Gatt Article XXI Special Issue on Revisiting Exceptions under International Economic Law', (2018) *Asian Journal of WTO and International Health Law and Policy*, 282-4.

<sup>18</sup> See 'Secretary Ross Release Steel and Aluminum 232 Reports in Coordination with the White House', Press Release, U.S. Dept. of Commerce, at <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination>, last accessed 11 September 2020.

<sup>19</sup> See Donald J. Trump, 'Presidential Proclamation on Adjusting Imports of Steel into the United States', White House (Mar. 8, 2018), para. 11(2), at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/>. See also Donald J. Trump, 'Presidential Proclamation on Adjusting Imports of Aluminum into the United States', White House (Mar. 8, 2018), para. 10(2), at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/>, last accessed 11 September 2020. Note that the seven complainants in *United States – Steel and Aluminium* contend that the additional tariffs on steel and aluminium, the measures at issue, are *safeguard measures*, adopted to provide for protection from import competition to the US steel and aluminium industry, and that these safeguard measures are inconsistent with the requirements of Article XIX of the GATT 1994 and the *Agreement on Safeguards*. According to the complainants, the measures at issue are *not* measures taken for the protection of national security under Article XXI of the GATT 1994, as the United States contends. See the European Union, First Written Submission *United States – Steel and Aluminium* (DS548) at paras. 6-8.

<sup>20</sup> See Sujata Kumari Muni and Sanjeeb Pahigrahi, 'Repercussions of MFN Status Withdrawal', *The Statesman* (March 2019), at <https://www.thestatesman.com/business/repercussions-of-mfn-status-withdrawal-1502738723.html>, last accessed 11 September 2020.

<sup>21</sup> See Michael Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception', (1991) *Michigan Journal of International Law*, 559. See also Daria Boklan and Amrita Bahri, 'The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?', (2020) *World Trade Review*, 126.

<sup>22</sup> See e.g. EU statement at the Dispute Settlement Body meeting of 21 November 2018, WT/DSB/M/42, para. 7.2.

If the U.S. [...] for any reason that it deems ‘necessary to its essential security interests’ can invoke a self-defining ‘essential security’ exception, what is to prevent other countries from using this exception to block U.S. exports or other U.S. rights such as enforcement of intellectual property rights without ample justification?<sup>23</sup>

The obvious answer is: not much. A proliferation of inappropriate use of national security provisions clearly endangers the global trading system. Such development can only be avoided when national security provisions are correctly applied and this correct application can be monitored, if not ensured, through binding dispute settlement. Focussing primarily on Article XXI of the GATT 1994, and in particular paragraph (b)(iii) thereof, this paper therefore addresses two questions of great importance: (1) is there a role for WTO dispute settlement in disputes in which a national security exception is invoked? and (2) what are the requirements for a correct application of a WTO national security exception?

## The Role of WTO Dispute Settlement

The first question to address is whether there is a role for WTO dispute settlement in disputes in which the respondent invokes a WTO national security provision, and in particular Article XXI of the GATT 1994. This is a highly controversial question which can be, and has been, asked in two ways. The first, is by asking whether a panel has *jurisdiction* in disputes in which the respondent invokes Article XXI, and the second, is by asking whether disputes in which Article XXI is invoked are *justiciable*.<sup>24</sup> If the panel has *no jurisdiction* then it cannot entertain the dispute at all. Whereas the argument on *justiciability* revolves around whether the subject matter of the dispute is capable of being reviewed by the panel. While in the latter case the panel may have jurisdiction over the dispute, the subject matter might be such that it cannot make any decisions on it. However, for all ‘practical’ purposes, the difference is often of little significance.

In *Russia – Traffic in Transit (2019)*, Russia argued that the panel had no jurisdiction since Article XXI had been invoked.<sup>25</sup> In other words, for Russia there was no role for WTO dispute settlement in disputes in which a respondent invoked Article XXI to justify a violation of GATT obligations. While the United States, as a third party in this case, initially also argued that the panel did not have jurisdiction, in the course of the proceedings it changed its argument and contended that while the panel had jurisdiction, the dispute was non-justiciable since Article XXI is totally self-judging.<sup>26</sup> Hence, also according to the United States, there was no role for WTO dispute settlement in disputes in which Article XXI is invoked.<sup>27</sup> As discussed below in detail, the panel in *Russia – Traffic in Transit (2019)* rejected both Russia’s and the United States’ argument on the role of WTO dispute settlement in Article XXI disputes.<sup>28</sup> The panel in *Saudi Arabia – Protection of IPRs*, similarly confirmed the role of WTO dispute settlement in disputes in which a WTO national security exception, in casu Article 73 of the TRIPS Agreement, is invoked.<sup>29</sup> The panel found that it had jurisdiction on the basis of the

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<sup>23</sup> U.S House Democrat’s Letter on Peru to the U.S Trade Representative dated 22 September 2006.

<sup>24</sup> Akande and Williams (2002), 379, 381.

<sup>25</sup> See Panel Report, *Russia - Traffic in Transit (2019)*, para. 7.28.

<sup>26</sup> On the change of the US position, see Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.51-52.

<sup>27</sup> At best, the United States envisions that the panel may only take cognizance that a Member has successfully raised Article XXI as valid justification – without analyzing the merits - and proceed with the complaint as a non-violation case. See U.S. First Written Submission, *U.S – Steel and Aluminum, (DS548)*, paras. 1 and 9.

<sup>28</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.102-103.

<sup>29</sup> See Panel Report, *Saudi-Arabia – Protection of IPRs*, para. 7.23. This panel report is currently under appeal. Note that in this case, Saudi Arabia did not present the panel with arguments in terms of terms ‘jurisdiction’ or ‘justiciability’, but rather made the argument that the panel should not make any rulings or recommendations in this case because: (i) that the dispute was a “political, geopolitical, and essential security” dispute; (ii) Article 3.4 of the DSU constituted a legal impediment because no ruling by the panel could achieve a satisfactory settlement of the matter and; (iii) any panel findings would be inconsequential to the resolution of the matter. The panel, however, considered, and treated, Saudi Arabia’s argument as similar to the jurisdiction/justiciability arguments made by Russia and the United States in *Russia – Traffic in Transit (2019)*. See *ibid.*, paras. 7.8-7.10.

fact that the claims before it fell within its terms of reference.<sup>30</sup> In the ongoing panel proceedings in *US –Steel and Aluminium*, however, the United States persists in arguing that Article XXI is self-judging and that disputes in which the respondent invokes Article XXI are thus ‘non-justiciable’. Parties in other disputes invoking Article XXI reportedly take a similar defiant position. At the DSB meeting of 21 November 2018, i.e. at the very start of the panel proceedings in *US –Steel and Aluminium*, the United States said:

Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by the European Union. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further.

... it is simply not the role of the WTO to review a sovereign nation's judgment of its essential security interests ...<sup>31</sup>

and issued a thinly veiled threat by stating:

if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO itself. Infringing on a sovereign's right to determine what is in its own essential security interest would run exactly contrary to the WTO reforms that are necessary in order for this organization to maintain any relevancy.<sup>32</sup>

Much along the same lines, the United States argued in its First Written Submission in *United States –Steel and Aluminium* that:

It would undermine the legitimacy of the WTO and its dispute settlement system if a WTO panel were to undertake review of a Member's invocation of Article XXI(b) and a Member's assessment of its own essential security interests.<sup>33</sup>

From these comments by the United States, it is clear that the stakes are high and that there is significant pressure on the panel in *US –Steel and Aluminium* to ‘get it right’. If not, the WTO and its dispute settlement system might not survive, as far as the United States is concerned. Some authors have expressed similar views and concern over the WTO's capacity to adjudicate on matters of national security of a state. Some suggest that even if a panel can hear disputes raising issues of national security, other alternative means to tackle such issues should be utilised instead.<sup>34</sup> Their concern is not unwarranted because national security touches on the core essentials of a state and is argued to be a purely political issue, calling into question the right of an international court of law to debate over such an issue.<sup>35</sup> However, many would agree that in order to prevent abuse of national security exceptions, there ought to be at least some control over the invocation of such exceptions. This paper argues that the panel in *Russia Traffic in Transit (2019)* struck the correct balance between, on the one

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<sup>30</sup> See Panel Report, *Saudi-Arabia – Protection of IPRs*, paras. 7.16 and 7.23. The panel also responded to the various arguments advanced by Saudi Arabia (listed in footnote 30 above) as to why the panel should not make any rulings or recommendations, but found that it was unable to exclude jurisdiction on the basis of these arguments. See *ibid.*, paras 7.17-7.23.

<sup>31</sup> Statement by the United States, Minutes of the DSB meeting of 21 November 2018, WT/DSB/M/421.

<sup>32</sup> *Ibid.*

<sup>33</sup> U.S. First Written Submission, *US – Steel and Aluminum (DS548)*, para. 7.

<sup>34</sup> See Huan Zhu and Simon Lester, ‘A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions’, (2019) *Fordham International Law Journal*, 1461-66. See also Tania Voon, ‘The Security Exception in WTO Law: Entering a New Era’, (2019) *American Journal of International Law*, 49-50. and Simon Lester and Inu Manak, ‘A Proposal for a Committee on National Security at the WTO’, (2020) *Duke Journal of Comparative & International Law* 271-3.

<sup>35</sup> See Akande and Williams (2002), 366. The authors disproved this argument stating that ‘matters relating to national security are not by that very fact excluded... from consideration of international tribunals.’ Citing as an example the *Nicaragua* case at the International Court of Justice (ICJ), where the latter rejected the argument that an on-going armed conflict was unsuitable for adjudication by international tribunals. See *Military and Paramilitary Activities (Nicaragua. v. U.S.)*, 1984 I.C.J. 392, 436-38 (Nov. 26) (Jurisdiction and Admissibility).

hand, the sovereign right of Members to determine what their security interests are and how to protect these interests, and, on the other hand, the inherent need for the WTO to avoid abuse of national security exceptions.

The remainder of this part of the paper, we discuss how the panel in *Russia – Traffic in Transit (2019)* interpreted Article XXI, in particular Article XXI(b)(iii), and determined whether the power to decide that the requirements of Article XXI(b)(iii) are met is *exclusively* with the WTO Member invoking this provision *or* whether a panel retains the power to review such decision and address instances of (alleged) abuse. The panel in *Russia – Traffic in Transit (2019)* examined the ordinary meaning of the terms of Article XXI(b)(iii) in their context and in light of the object and purpose of the GATT 1994 and the *WTO Agreement*, and looked carefully into the negotiating history of the GATT national security exception. On the basis of this textbook approach to treaty interpretation that panel concluded that Article XXI(b)(iii) is *not* totally self-judging, therefore, it had jurisdiction in a dispute in which Article XXI is invoked (thus rejecting Russia’s argument) and a dispute in which Article XXI is invoked is not ‘non-justiciable’ (thus rejecting the argument made by the United States as third party).<sup>36</sup> The interpretation of Article XXI(b)(iii), which led the panel to this conclusion on jurisdiction and justiciability, deserves detailed examination, but before engaging in this examination, it is appropriate to look first at the unconventional and controversial order of analysis the panel adopted.

### ***Order of Analysis***

Rather than begin by evaluating the merits of the claims of WTO inconsistency made by Ukraine, the complainant, before examining any defences invoked by the respondent, Russia, as is the norm, the panel began its analysis of the case by reviewing and interpreting Article XXI and determining whether the requirements for the invocation of Article XXI(b)(iii) were met. This is most unusual.<sup>37</sup> Because Russia contested the panel’s jurisdiction to hear the case, the panel considered that it could not embark on an analysis of the merits of the claims of inconsistency made by Ukraine without first establishing its jurisdiction.<sup>38</sup> In response to Russia’s objection to the panel’s jurisdiction, the panel started out by stating that it had “inherent jurisdiction” as a result of the exercise of its adjudicative function and its articles of establishment, namely Article 7, Article 1.2 and Appendix 2 of the DSU.<sup>39</sup> The panel correctly noted that these articles in no manner excluded Article XXI from the purview of WTO provisions subject to dispute settlement.<sup>40</sup> The panel could, and in our opinion, should have concluded the examination of its jurisdiction with these considerations and finding.<sup>41</sup> It did not. It went on to examine the merits of the defence.<sup>42</sup> It undertook a full-fledged interpretation of Article XXI, determined what are the requirements for a successful invocation of this provision, and reviewed whether the measures at

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<sup>36</sup> Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.102-103.

<sup>37</sup> See also Tania Voon, ‘Russia—Measures Concerning Traffic in Transit’ (2020) *American Journal of International Law*, 100.

<sup>38</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.53.

<sup>39</sup> See *ibid.*, paras. 7.54-57. Article 7.1 of the DSU states that panels are “[t]o examine, in the light of the relevant provisions... *the matter referred to the DSB by [any party]... and to make such findings as will assist the DSB in making recommendations or in giving rulings...*” (emphasis added). Article 7.2 of the DSU also states that “Panel shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”. In addition, Article 1.2 of the DSU provides that the “rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as identified in Appendix 2 to this Understanding.” Accordingly, Appendix 2 does not contain any special rule excluding disputes in which the respondent invokes Article XXI of the GATT from the jurisdiction of panels.

<sup>40</sup> See *ibid.*

<sup>41</sup> Note that the complainants in *US – Steel and Aluminium* share this view. See e.g. EU First Written Submission, *US - Steel and Aluminium (DS548)*, para. 558 ff.; Switzerland First Written Submission, *US - Steel and Aluminium (DS556)*, para. 505; and Norway First Written Submission, *US - Steel and Aluminium (DS552)*, para. 52. As the European Union argues, there are no exceptions to the jurisdiction given under Art 1.1 and 1.2 or Appendix 2 of the DSU that exempts Article XXI from the scope of review by the Panel (see EU First Written Submission, *US - Steel and Aluminium (DS548)* para. 558); and a self-judging security exception will not be compatible with Article 7 of the DSU and the terms of reference of the panel and would hinder the capacity of the panel to make an objective assessment pursuant to Article 11 DSU (para. 559).

<sup>42</sup> As to why the panel considered this appropriate, see also Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.108-109.

issue met these requirements.<sup>43</sup> The panel found that the Russian measures at issue did meet the requirements for a successful invocation of Article XXI, and thus concluded that the measures were justified under Article XXI.<sup>44</sup> Only after the panel had concluded that the measures at issue were justified under Article XXI, it examined whether these measures were WTO inconsistent and in need of justification in the first place. The panel still examined the consistency with the GATT, and in particular with Article V thereof, as well as with the Protocol of Accession of the Russian Federation, for the eventuality that the panel's findings on Article XXI may be overturned on appeal and the Appellate Body would require factual findings to be able complete the legal analysis.<sup>45</sup>

While a WTO panel has a large margin of discretion to determine which order of analysis to adopt,<sup>46</sup> according to well-established case law regarding the general exceptions under Article XX of the GATT, a panel must first establish that the measure at issue is inconsistent with a GATT obligation, before it examines whether such inconsistent measure can be justified under Article XX.<sup>47</sup> The panel's unconventional order of analysis in *Russia – Traffic in Transit (2019)* has been criticized, and quite rightly so, by parties or third parties in their submissions in subsequent national security cases, such as *Saudi Arabia – Protection of IPRs* and *US – Steel and Aluminium*.<sup>48</sup> In *Saudi Arabia – Protection of IPRs*, the panel took note of this criticism and reverted to orthodoxy regarding the order of analysis. It first established that it had jurisdiction based on the corresponding Articles 1.1 and 1.2 of the DSU, then assessed whether the measures at issue were inconsistent with various obligations under the *TRIPS Agreement*, before it examined whether the TRIPS-inconsistent measures could be justified under Article 73 of the *TRIPS Agreement*, i.e. the national security exception.<sup>49</sup> In *US – Steel and Aluminium*, the United States still maintains that the panel in that case should adopt the unconventional order of analysis adopted by the panel in *Russia – Traffic in Transit (2019)*.<sup>50</sup> For the United States, it would suffice for the panel to simply recognise that the United States has invoked Article XXI and that it would be consistent with the DSU to make no findings concerning the claims raised by the complainants.<sup>51</sup> Hence, according to the United States, the panel ought to begin by recognizing the national security defence made by the United States. The complainants in *US – Steel and Aluminium* perceive the issue of the order of analysis quite differently, and consider that Article XXI is an affirmative defence, therefore, it can only be addressed by the panel after a GATT violation is found.<sup>52</sup> The panel in *US – Steel and Aluminium* would be well advised to adopt this conventional approach to the order of analysis, and to stay clear of the approach adopted by the panel in *Russia – Traffic in Transit (2019)*.

Having made these remarks on the order of analysis, we can return to the core question in this first part of the paper, namely whether there is a role for WTO dispute settlement in disputes in which a WTO national security exception, and in particular Article XXI(b)(iii) of the GATT, is invoked. It is clear that there would be no role

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<sup>43</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, paras.7.58-101, 7.111-125, and 7.127-7.148. The panel justified its approach by referring to the fact that Russia contended on the basis of its interpretation of Article XXI(b)(iii) that the panel lacked jurisdiction. See *ibid.*, paras. 7.57-58.

<sup>44</sup> See *ibid.*, para. 7.125.

<sup>45</sup> See *ibid.*, paras. 7.153-4.

<sup>46</sup> There is no provision in the DSU or the working procedures stating the method, form or order in which a panel's legal analysis should take place. See also Voon (2020), 100.

<sup>47</sup> See already Panel Report, *US – Section 337 Tariff Act (1989)*, para. 5.9.

<sup>48</sup> See e.g. EU Second Written Submission, *US – Steel and Aluminium (DS548)*, paras. 34-37; and Norway Third Party Submission, *Saudi Arabia – Protection of IPRs*, paras. 4-5.

<sup>49</sup> WTO Panel Report, *Saudi Arabia – Protection of IPRs* paras. 7.4-6.

<sup>50</sup> See US Second Written Submission, *US - Steel and Aluminium (DS548)*, paras. 225-226.

<sup>51</sup> See *ibid.*

<sup>52</sup> See EU Second Written Submission, *US - Steel and Aluminium (DS548)*, paras. 23-24. See also Tatiana Lacerdas Prazeres, 'Trade and National Security: Rising Risks for the WTO', (2020) *World Trade Review*, 138: "Article XXI(b) lends itself to an affirmative defense in WTO disputes, which means that the defendant responds to a challenge by claiming that the provision authorized it to derogate from other GATT 1994 obligations. In other words, rather than maintain that its measures comply with WTO rules, a Member can argue that any alleged deviation was backed by the exception provision".

or at best a very limited role, if, as argued by Russia and the United States in *Russia – Traffic in Transit (2019)* and is still argued by the United States in *US – Steel and Aluminium*, Article XXI(b)(iii) is a self-judging exception. As already mentioned above, the panel concluded that this is not the case. In its interpretative effort, which led to this conclusion, the panel first looked at the terms of Article XXI(b)(iii) in their context.

### ***The terms of Article XXI(b)(iii) and their context***

The meaning of Article XXI(b) is not necessarily easy to understand on the mere basis of its terms. Prior to the panel decision, scholars interpreted paragraph (b) of Article XX in different ways. For some, this provision is partly self-judging and partly subject to objective determination, while others viewed the provision as totally self-judging.<sup>53</sup> The chapeau of Article XXI(b) states that nothing in the GATT 1994 shall prevent any WTO Member from taking any action “*which it considers necessary for the protection of its essential security interests*”. As Roger Alford noted, the phrase ‘which it considers’ implies that at least part of the defense may be up to the Member to decide, but it is “not clear whether those words modify all or part of Article XXI(b)”.<sup>54</sup>

A first possible reading of Article XXI(b) is that the phrase ‘which it considers’ qualifies only the term ‘necessary’, implying the other elements, i.e. ‘essential security interests’ and the conditions in the subparagraphs, are not self-judging but subject to objective determination. A second possible reading is that the phrase ‘which it considers’ qualifies both the terms ‘necessary’ and ‘essential security interests’, rendering only the subparagraphs (i)-(iii) capable of objective determination. A third and final possible reading is that the phrase ‘which it considers’ qualifies all elements of the provision, leaving the decisions on the ‘action ... necessary’, the ‘essential security interests’ and the conditions of the subparagraphs (i)-(iii) totally up to the Member and not subject to objective determination by a panel. Under this third reading, Article XXI(b) would be totally self-judging and would leave no role for WTO dispute settlement.<sup>55</sup> This is the reading of Article XXI(b) championed by Russia and the United States in *Russia – Traffic in Transit (2019)*,<sup>56</sup> whereas Ukraine opted for the second reading, contending that it was up to the panel, and not the invoking Member, to determine whether the conditions under the subparagraphs (i), (ii) or (iii) had been met.<sup>57</sup> The European Union, as a third party in *Russia – Traffic in Transit (2019)*, argued for the first reading. According to the European Union, “while ‘essential security interests’ should be interpreted so 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”.<sup>58</sup> Furthermore, the European Union considered that a panel must also review, albeit with due deference, a Member’s determination that a measure is ‘necessary’ for the protection of its essential security interests.<sup>59</sup>

The panel in *Russia - Traffic in Transit (2019)* considered all three possible readings of Article XXI(b) and noted that “the mere meaning of the words and the grammatical construction” of this provision could

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<sup>53</sup> For instance, Raj Bhala took the position that the provision was totally self-judging. See Raj Bhala, ‘National Security and International Trade Law: What the GATT Says and What the United States Does’, (1998) *University of Pennsylvania Journal of International Economic Law*, 268–69; whereas Akande and Williams support a part self-judging/part objective reading, see Akande and Williams (2002), 403. See also Hahn (1991), 596-7, who takes the latter view.

<sup>54</sup> Roger Alford, ‘The Self-Judging WTO Security Exception’, (2011) *Utah Law Review*, 706. See also Mona Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions’, (2020) *Michigan Journal of International Law*, 114: “The language of Article XXI does not precisely define what elements of the article are self-judging”.

<sup>55</sup> See *ibid.*

<sup>56</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.29. This view was also supported by Canada and Singapore. See *ibid.*, paras. 7.40 and 7.49.

<sup>57</sup> See *ibid.*, para. 7.32. Third parties Brazil and Japan also took this view. See *ibid.*, paras. 7.37 and 7.45.

<sup>58</sup> *Ibid.*, para. 7.43.

<sup>59</sup> See *ibid.*

accommodate an interpretation based on the third reading, i.e. the reading championed by Russia and the United States.<sup>60</sup> However, it rejected this reading of Article XXI(b), arguing that:

if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances.<sup>61</sup>

The panel reasoned that if the invocation of Article XXI(b) were completely self-judging, what then would be the purpose of setting out in subparagraphs (i) to (iii) specific circumstances in which Article XXI(b) may be invoked? In other words, interpreting Article XXI(b) as totally self-judging on the basis of the phrase ‘which it considers’ would deprive the sub-paragraphs of any use, i.e. *effet utile*, and thus it can obviously not be a correct interpretation of this provision.<sup>62</sup>

The panel further considered the subject-matter of each of the subparagraphs of Article XXI(b), and in particular in sub-paragraph (iii), and queried whether that subject-matter “lends itself to a purely subjective discretionary determination”.<sup>63</sup> Subparagraph (iii) refers to action ‘taken in time of war or other emergency in international relations’. The panel started by observing that ‘taken in time of’ means taken *during* and that chronological concurrence is an objective fact, open to objective determination.<sup>64</sup> Also, the existence of ‘war’ is an objective fact “clearly capable of objective determination”.<sup>65</sup> With regard to ‘emergency in international relations’, the panel conceded that the confines of this subject-matter are less clear than those of ‘war’ and the subject-matters of subparagraph (i) and (ii), but it found that:

it is clear that an "emergency in international relations" can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination.<sup>66</sup>

Accordingly, the panel in *Russia – Traffic in Transit (2019)* found that “the existence of an emergency in international relations is an objective state of affairs” and therefore, “the determination of whether the action was ‘taken in time of’ an ‘emergency in international relations’ under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination”.<sup>67</sup>

In *US – Steel and Aluminium*, the United States maintains its argument that the phrase ‘which it considers’ shows that Members intended to reserve the right to assess when a measure is necessary for the protection of its security interests. The United States contends that:

Article XXI(b) refers to “any action which it [a Member] considers necessary for the protection of its essential security interests”, reflecting the desire of WTO Members to reserve an assessment of the necessity of an invocation of security interests to the Member taking the action. Each WTO Member likewise must determine whether a situation implicates “its security interests,” and whether the interests at stake are “essential” to that Member.<sup>68</sup>

The United States further supports this interpretation by referring to the French and Spanish texts of Article XXI(b) which use the terms ‘*estime*’ and ‘*estimera*’ to show that the *action taken* “reflects the beliefs” of the

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<sup>60</sup> See *ibid.*, para. 7.65.

<sup>61</sup> *Ibid.*, para. 7.65. Emphasis added.

<sup>62</sup> See *ibid.*

<sup>63</sup> *Ibid.*, para. 7.66.

<sup>64</sup> See *ibid.*, para. 7.70.

<sup>65</sup> *Ibid.*, para. 7.71.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, para. 7.77. See also Akande and Williams (2002), 399-401; Hahn (1991), 584, 586-87; and Hannes L Schloemann and Stefan Ohlhoff, “‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence”, (1999) *American Journal of International Law*, 445.

<sup>68</sup> US First Written Submission, *US - Steel and Aluminium (DS548)*, para. 20.

invoking Member.<sup>69</sup> However, as discussed further below, these views are not contrary to the panel’s decision in *Russia – Traffic in Transit (2019)*. The panel *largely* leaves the determination of what are ‘essential security interests’ and whether the measures taken are ‘necessary’ to the invoking Member.

Moreover, the United States disputes that the subparagraphs of Article XXI(b) limit the exercise of ‘essential security interests’, and argues instead that the subparagraphs (i) and (ii) are types of ‘essential security interests’, and subparagraph (iii) a “temporal circumstance that Members considered could lead to action under Article XXI(b)”.<sup>70</sup> In this manner, the subparagraphs are simply guides to Members on how to exercise Article XXI but do not qualify this right. However, it could also be argued that had the negotiators intended the subparagraphs to merely be a guide or illustrative list in Article XXI(b) of ‘essential security interests’, the chapeau of Article XXI(b) would contain the word ‘including’. It does not.

The United States also contrasts the construction of Article XXI(b) with several other provisions in the GATT 1994, and their interpretations, in support of its position that Article XXI(b) is totally self-judging. In that respect, it analyses Article XXI(a) and (c), noting that Article XXI(a) contains similar language to Article XXI(b), ‘which it considers [necessary/contrary]’ and ‘its security interests’. Where the construction of Article XXI(a) cannot be read – at least according to the United States – to have any qualifying characteristic, the same should be said of Article XXI(b). The United States further notes that, in contrast to Article XXI(a) and (b), Article XXI(c) does not contain the phrase ‘which it considers [necessary/contrary]’. According to the United States, the phrase ‘which it considers’ should not be reduced to ‘inutility’ and meaning should be given to the fact that these terms are or are not included in a provision.<sup>71</sup> However, this argument leaves one wondering whether United States considers Article XXI(c) not to be self-judging, while it is commonly seen to take the view that Article XXI, in its entirety, is self-judging.

The United States also refers to the wording of Article XX of the GATT, and in particular, the wording of paragraphs (a), (b) and (d), which contain the term ‘necessary’. It notes that the chapeau of Article XX, because it contains the qualifier ‘subject to’, limits the discretion of a Member invoking Article XX, and thus makes such invocation subject to review. Unlike Article XX(a), (b) and (d), Article XXI(b) includes ‘which it considers’ before the word ‘necessary’ and the chapeau of Article XXI(b) does not contain the qualifier ‘subject to’. It follows, according to the United States, that while the invocation of Article XX is subject to review, the invocation of Article XXI is not.<sup>72</sup> Finally, the United States also refers to several WTO provisions with the term ‘considers’, that clearly relegates certain decision-making authority to Members.<sup>73</sup> According to the United States, the phrase ‘which it considers’ in Article XXI likewise relegate the decision-making role under that provision totally to the Members.

The United States’ interpretation of Article XXI(b)(iii) is not an entirely untenable one. As discussed above, the panel in *Russia – Traffic in Transit (2019)* acknowledged that “the mere meaning of the words and the grammatical construction” of this provision could accommodate the interpretation championed by the United States.<sup>74</sup> However, the panel considered that such an interpretation (under which Article XXI(b)(iii) is totally self-judging) renders the subparagraphs redundant, and for that reason cannot be the correct interpretation.<sup>75</sup> Moreover, the panel found that “the existence of an emergency in international relations is an objective state of affairs” and therefore, “the determination of whether the action was ‘taken in time of’ an ‘emergency in international relations’ under

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<sup>69</sup> See *ibid.*, para. 26.

<sup>70</sup> *Ibid.*, para. 34.

<sup>71</sup> See *ibid.*, para. 35.

<sup>72</sup> See *ibid.*, paras. 36-37.

<sup>73</sup> See *ibid.*, paras. 38-39 and 41. E.g. Article 14.4 of the *TBT Agreement* with states “dispute settlement provisions... can be invoked in cases where a Member *considers* that another Member...”; or Article 26.1 of the DSU which states “[w]here and to the extent such party *considers* ...”. Emphasis added.

<sup>74</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.63.

<sup>75</sup> See *ibid.*, para. 7.65.

subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination”.<sup>76</sup> The panel thus found based on the text and context of Article XXI(b)(iii) that this provision is not, and cannot be, totally self-judging.

### ***Object and purpose of the GATT 1994 and the WTO Agreement***

As a proper interpretation under Article 31(1) of the *Vienna Convention on the Law of Treaties* (‘VCLT’) requires, in order to determine the ordinary meaning of Article XXI(b)(iii), the panel in *Russia – Traffic in Transit (2019)* subsequently considered the object and purpose of the GATT 1994 and the *WTO Agreement*. Does this object and purpose support an interpretation of Article XXI(b)(iii) which mandates an objective review of the invocation of this provision?

As repeatedly stated by the Appellate Body, the object and purpose of the *WTO Agreement* and the GATT 1994 is “to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade”.<sup>77</sup> The panel in *Russia – Traffic in Transit (2019)* thus found that:

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 obligations to a mere expression of the unilateral will of that Member.<sup>78</sup>

In other words, an interpretation of Article XXI(b)(iii) as a totally ‘self-judging’ provision would be irreconcilable with the object and purpose of the *WTO Agreement* and the GATT 1994.

According to the United States, however, the panel’s use of the object and purpose of the *WTO Agreement* as ‘support’ for its interpretation of Article XXI(b)(iii) constituted a wrongful use of the customary rules of treaty interpretation. For the United States, the ‘self-judging’ security exceptions in the WTO agreements were part of the ‘bargain struck’ by the WTO Members between, on the one hand, accepting obligations, and, on the other hand, preserving regulatory space for Members to protect security interests.<sup>79</sup> However, it is clear that if Article XXI(b)(iii) was to be interpreted as ‘self-judging’, and thus as giving Members a free pass to renege on their commitments, it would undermine the very fabric of the trading system.<sup>80</sup>

### ***Subsequent practice***

Article 31(3)(b) of the VCLT further requires a treaty interpreter to take into account any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The International Law Commission (‘ILC’) Second Report on Subsequent Agreements and Subsequent Practice defined subsequent practice as “any measure taken on the basis of the interpreted treaty”.<sup>81</sup> And it includes practice by the international institutions “more or less *explicitly* endorsed” by the member states of the organisation.<sup>82</sup>

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<sup>76</sup> *Ibid.*, para. 7.77.

<sup>77</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.79, referring to Appellate Body Reports, *EC – Computer Equipment (1998)*, para. 82; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* (2008), para. 433; *Argentina – Textiles and Apparel (1998)*, para. 47; and *EC – Chicken Cuts (2005)*, para. 243.

<sup>78</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.79.

<sup>79</sup> See US First Written Submission, *US – Steel and Aluminium (DS548)*, paras. 159–60, 164.

<sup>80</sup> See Boklan and Bahri (2020), 126. See also Akande and Williams (2002), 402–3, stating that an interpretation granting unilateral action undermines the institution and leaves a big hole in the trading system.

<sup>81</sup> International Law Commission, ‘Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’ UN Doc A/CN.4/671 (26 March 2014) (hereinafter cited as Second Report) by Georg Nolte, Special Rapporteur, para. 4.

<sup>82</sup> Stefan Kadelbach, ‘International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT’, (2018) *Questions of International Law*, at <http://www.qil-qdi.org/international-law-commission-and-role-of-subsequent-practice-as-a-means-of-interpretation-under-articles-31-and-32-vclt/>, last accessed 11 September 2020. Emphasis added.

Consequently, the panel in *Russia – Traffic in Transit (2019)* carried out a survey of the action taken and pronouncements made by GATT Contracting Parties and WTO Members regarding Article XXI but found that it revealed “difference in positions” and “the absence of a common understanding” on the meaning of Article XXI.<sup>83</sup> As noted earlier, under the GATT and later the WTO regime there has been a culture of self-restraint as to invocation of Article XXI. This self-restraint is shown in several instances where Article XXI had been invoked but no panel was constituted or the measure was withdrawn.<sup>84</sup> Though several Members voiced opinions on the nature of the national security exception, there has been no consensus that it is self-judging.<sup>85</sup> Not surprisingly, the panel thus concluded that there is no subsequent practice establishing an agreement between the WTO Members regarding the meaning of Article XXI.<sup>86</sup>

Additionally, the panel in *Russia – Traffic in Transit (2019)* observed that “a significant majority” of the instances in which Article XXI(b)(iii) was invoked, concerned situations of armed conflict and acute international crisis, where tensions could lead to armed conflict.<sup>87</sup> While it explicitly stated that it did not assign any legal significance to this observation, it noted:

It ... appears that Members have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes.<sup>88</sup>

Past practice shows that the national security exception was not commonly used to address issues of pure trade or economic import. There are other WTO provisions that allow Members to address such issues.<sup>89</sup>

In *US – Steel and Aluminium*, the United States refers to subsequent practice in support of its interpretation of Article XXI, but whereas the panel in *Russia – Traffic in Transit (2019)* examined a broad range of statements on, and instances concerning, Article XXI (b)(iii), the statements and instances examined by the United States are self-servingly selective in an effort to hide the lack of agreement among GATT Contracting Parties and WTO Members on the meaning of Article XXI(b)(iii). For example, the United States does not refer to the imposition by the United States in 1951 of import controls on dairy products “necessary for the protection of national security interest and economy”, which the United States conceded in 1952 to be GATT inconsistent and which led the GATT Council to authorize the Netherlands to impose retaliation measures on the United States.<sup>90</sup> It also does not refer to the 1970 statement by a GATT Working Group that “there was a ‘divergence of view as to the meaning and scope of certain essential concepts in the GATT, in particular ... the scope of some of the exceptions ... especially Articles XX and XXI’”.<sup>91</sup>

Note that in *US – Steel and Aluminium*, the United States also argues that there is a ‘subsequent agreement’ on the meaning of Article XXI, which must pursuant to Article 31(3)(a) of the VCLT be considered in the interpretation of the GATT national security exception. According to the United States, this subsequent agreement is the decision by GATT Contracting Parties in *United States – Export Restrictions*, in which the

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<sup>83</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.80. See also the Appendix to the Report.

<sup>84</sup> See note accompanying fn 12 referring to *Sweden – Import Restrictions on Certain Footwear (1975)* and *United States – Trade Measures Affecting Nicaragua (1986)*.

<sup>85</sup> See Akande and Williams (2002), 374.

<sup>86</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.80.

<sup>87</sup> *Ibid.*, para. 7.81.

<sup>88</sup> *Ibid.*

<sup>89</sup> See e.g. Article XIX of the GATT and the *Agreement on Safeguards*.

<sup>90</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, Appendix, paras. 1.11-14, referring to GATT Contracting Parties, United States Import Restrictions on Dairy Products, Draft Resolution, L/59; and GATT Contracting Parties, Seventh Session, Summary Record of the Sixteenth Meeting held on 8 November 1952, SR.7/16.

<sup>91</sup> *Ibid.*, Appendix, para. 1.15, referring to Committee on Trade in Industrial Products, Draft Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), Revision, Spec (70)48/Rev.1, para. 4; and Committee on Trade in Industrial Products, Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), COM.IND/W/49, para. 5. 5.

United States invoked Article XXI.<sup>92</sup> In this decision, the GATT Contracting Parties dismissed a claim brought by Czechoslovakia against the United States that the latter had violated its GATT obligations.<sup>93</sup> The United States argues that in this decision Article XXI was accepted to be self-judging, and that this decision constitutes a subsequent agreement on the interpretation of Article XXI.<sup>94</sup> This argument by the United States is somewhat perplexing for two reasons. First, Czechoslovakia explicitly expressed its disagreement with this decision and several other Contracting Parties abstained, indicating that there was no consensus on the interpretation of Article XXI.<sup>95</sup> Second, the United States has consistently taken the position that decisions in dispute settlement cases are only binding between the parties to the case. It is therefore surprising that the United States would consider a GATT dispute settlement decision to be a subsequent agreement on the interpretation of Article XXI, binding all WTO Members.

### *Negotiating history*

To confirm its interpretation of Article XXI, the panel in *Russia – Traffic in Transit (2019)* had recourse to the negotiating history of the GATT, as a supplementary means of interpretation under Article 32 of the VCLT. The panel examined in particular documents pertaining to the negotiations of the 1948 Havana Charter of the International Trade Organization (‘ITO Charter’). While the ITO Charter never entered into force, key provisions of this Charter, including its national security provision, were also included in the GATT, which was negotiated in parallel with the ITO Charter. The negotiating history of the ITO Charter is therefore an important part of the negotiating history of the GATT.

A national security exception was first included in the draft of the ITO Charter discussed during the February 1947 negotiating session in New York.<sup>96</sup> Initially, this national security exception was grouped together with other public policy exceptions, such as e.g. the public morals and public health exceptions, but was in May 1947 separated from these public policy exceptions, and put in a different clause at the end of the draft Charter.<sup>97</sup> In *US – Steel and Aluminium*, the United States argues that the reason for this separation was to make the national security exception self-judging, which the other public policy exceptions are not.<sup>98</sup> The panel in *Russia – Traffic in Transit (2019)* recognized that the separation of the national security exception and the other public policy exceptions indicates that the negotiators considered that these exceptions had a different character.<sup>99</sup> However, it may be argued that the reason for the separation was mainly to ensure that the national security exception was available to all provisions of the ITO Charter, and not only to the provisions of the Charter’s Chapter on General Commercial Policy.

The panel in *Russia – Traffic in Transit (2019)* also considered relevant statements made during the negotiations of the ITO Charter by the delegate for the United States. In response to a question by the delegate for the Netherlands on the meaning of the terms ‘time of war’ and ‘emergency in international relations’, the US delegate said:

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<sup>92</sup> See US First Written Submission, *US - Steel and Aluminium (DS548)*, para. 47.

<sup>93</sup> See Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949).

<sup>94</sup> See US First Written Submission, *US - Steel and Aluminium (DS548)* para. 54.

<sup>95</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, Appendix, para. 1.8; and International Law Commission, ‘First report on subsequent agreements and subsequent practice in relation to treaty interpretation’ UN Doc A/CN.4/660 (9 March 2013) by Special Rapporteur Georg Nolte, para. 79: “A ‘subsequent agreement’ in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention is one between ‘the parties’, that is, between *all* the parties to the treaty.” Emphasis added.

<sup>96</sup> See Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34, 31-32.

<sup>97</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.89. See also Pinchis-Paulsen (2020), 146–47 and fn. 258.

<sup>98</sup> See US First Written Submission, *US - Steel and Aluminium (DS548)*, paras. 62-4.

<sup>99</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.98.

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a *great danger of having too wide an exception* and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" because, that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real essential security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.<sup>100</sup>

The US delegate's answer suggests that the United States did not intend this national security provision to be totally self-judging. In response to a question asked by the delegate for Australia concerning the applicability of the dispute settlement provisions, the US delegate responded that the dispute settlement provisions were clearly intended to cover the national security exception. The US delegate said:

I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35 [predecessor to Articles XXII and XXIII of the GATT 1947 concerning dispute settlement]. Article 35 is very broad in its terms, and I think probably *covers any action* by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article."<sup>101</sup>

The panel in *Russia – Traffic in Transit (2019)* observed that the negotiating history demonstrates: (1) that Members sought to strike a 'balance' between, on the one hand, the need to preserve the right of Members to take measures necessary for the protection of security interests and, on the other hand, the need to prevent abuse of such a right; and (2) that in the light of this balance, the national security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.<sup>102</sup> Thus, the panel's analysis of the negotiating history confirmed its interpretation of Article XXI(b)(iii) "as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself".<sup>103</sup> In other words, the panel's analysis of the negotiating history confirmed its interpretation of Article XXI(b)(iii) as not being totally self-judging.

In *US – Steel and Aluminium*, the United States continues to argue that the negotiating history shows that Article XXI(b)(iii) is meant to be self-judging. It also argues that the only complaint that can be brought against a measure with regard to which Article XXI(b)(iii) is invoked, is a non-violation complaint.<sup>104</sup> According to the United States, the answer of the US delegate to the question asked by the Australian delegate, referred to above, makes this point.<sup>105</sup> The answer can indeed be read in this way and the panel in *Russia – Traffic in Transit (2019)* may have misread this answer.<sup>106</sup>

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<sup>100</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A, held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20-21. Emphasis added.

<sup>101</sup> *Ibid.*, pp. 26-27. Emphasis added.

<sup>102</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.98.

<sup>103</sup> *Ibid.*, para. 7.100.

<sup>104</sup> See US First Written Submission, *US - Steel and Aluminum (DS548)*, para. 78. On non-violation complaints, see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017), 180-1.

<sup>105</sup> US First Written Submission *U.S – Steel and Aluminum (DS548)* paras. 5-6, 68-71. The US also refutes the Panel's use of Vandeveldel's notes on U.S internal documents as negotiating history because such notes were at the time confidential and thus had no bearings on the negotiations itself. See *ibid.*, paras. 13 and 172.

<sup>106</sup> See *contra* Pinchis-Paulsen (2020), 175, who noted that "if the U.S. negotiators drafting article 94 had believed that 'no Member shall bring any complaint in respect of measures taken pursuant to Article 94,' they would have provided for this in a 'clear and explicit provision'".

In its examination of the negotiating history, the panel in *Russia – Traffic in Transit (2019)* also considered a 2017 study by Kenneth Vandeveld, which *inter alia* discusses, on the basis of internal documents of the US delegation negotiating the ITO Charter, how the United States came to its position on the national security provision to be included in the Charter.<sup>107</sup> As appears from these internal documents, the US negotiators were divided “between those who wanted to preserve the United States’ freedom of action in relation to its security interests by providing that each ITO member would have independent power to interpret the language of the exception, and those who believed that such a means for unilateral action would be abused by some countries and destroy the efficacy of the entire Charter”.<sup>108</sup> The latter group of negotiators took the view that “some elements of the security exceptions should be subject to review by the Organization considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter”.<sup>109</sup> After a vote among the US negotiators, this view prevailed.<sup>110</sup> The United States criticises the use of these internal documents by the panel in *Russia – Traffic in Transit (2019)* since these documents were not publicly available at the time of the negotiations, and should therefore not be considered to be part of the negotiating history.<sup>111</sup> Moreover, according to the United States, the panel misunderstood and mischaracterized the internal discussions of the US delegation negotiating the ITO Charter.<sup>112</sup> The United States argues that the position taken by the US delegation was not based on any concern as to the risk of abuse of the national security provision but the belief that the text was ‘already sufficient to establish the self-judging nature’ of the provision.<sup>113</sup> Contrary to the United States, however, we read the internal documents as indicating that the United States did not consider the freedom of action under the security exception to be unfettered.<sup>114</sup>

In its Second Written Submission in *US – Steel and Aluminium*, the United States also refers to the history of the Uruguay Round negotiations (1986-1994). During these negotiations, proposals were tabled to remove from Article XXI of the GATT the phrase ‘which it considers’ and add a language that limits the scope of Article XXI, for example, by introducing a chapeau similar to Article XX of the GATT. These proposals were all rejected. The United States concludes from this that they were rejected in order to keep Article XXI self-judging, as it had been applied and interpreted by the Contracting Parties up to that point.<sup>115</sup> However, as the panel in *Russia – Traffic in Transit (2019)* found, there was no consensus among the Contracting Parties during the GATT years on whether Article XXI was self-judging or not.

While the use of negotiating history by the panel in *Russia – Traffic in Transit (2019)* may not be without flaw, it is important to note that the panel based its conclusion that Article XXI(b)(iii) is not totally self-judging and that there is therefore a role for WTO dispute settlement in disputes in which Article XXI(b)(iii) is invoked, on the text and the context of this provision and the object and purpose of the GATT 1994 and the *WTO*

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<sup>107</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.89 ff, referring to K. Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017), 145-154.

<sup>108</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.89.

<sup>109</sup> *Ibid.*, para. 7.90.

<sup>110</sup> See *ibid.*, para. 7.91.

<sup>111</sup> Although the list of supplementary means of interpretation is open-ended, some tribunals limited supplementary means to information that is written and publicly available. See generally Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Bloomsbury Publishing 2016), Chapter II. See also Panel Report, *EC – IT Products (2010)*, paras. 7.156-7; Panel Report, *Chile – Price Band System (2002)*, footnote 596; and Appellate Body Report, *EC – Chicken Cuts (2005)*, paras. 282-309, on the importance of official publication and public availability of materials in order to be considered. While such internal documents may indeed not be negotiating history in the strict sense of the word, they may nevertheless be of help to shed light on the meaning of treaty provisions.

<sup>112</sup> U.S. First Written Submission, *US – Steel and Aluminum (DS548)*, paras. 56, 81 ff, 105 and 165. The United States argues that the panel refers to a discussion that related to a text that was not the final version found in the GATT, but a text ‘which it may consider’. See US Second Written Submission, *US – Steel and Aluminum (DS548)*, para. 90.

<sup>113</sup> See *ibid.*, para. 100-101.

<sup>114</sup> See also Pinchis-Paulsen (2020), 175 and 177–78. Pinchis-Paulsen observed that in internal meetings the US negotiators felt that “[if] the U.S. had a ‘bona fide national security problem,’ the ITO would ‘not be able to do otherwise than make a finding in our favour...’. [It] appeared to show that objective analysis was acceptable to the U.S. negotiators, as the ITO could not deny a Member recourse to the security exceptions for bona fide security concerns”.

<sup>115</sup> See US Second Written Submission, *US – Steel and Aluminum (DS548)*, para. 68.

*Agreement*. The panel referred to the negotiating history only for confirmation of this interpretation and found sufficient indications in the negotiating history for such confirmation.

## The Requirements of Article XXI(b)(iii) of the GATT 1994

Having concluded that there is a role for WTO dispute settlement in disputes in which Article XXI(b)(iii) is invoked, the panel in *Russia – Traffic in Transit (2019)* turned to the question what are the requirements for a correct application of Article XXI(b)(iii). Read together with its chapeau, Article XXI(b)(iii) states:

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; ...

In this second part of the paper, we will first discuss the requirements set out in Article XXI(b)(iii) itself and then the relevant requirements found in the chapeau of Article XX(b).

### Article XXI(b)(iii)

For a measure to be justified under Article XXI(b)(iii) of the GATT 1994: (1) there must be a ‘war’ or ‘other emergency in international relations’; and (2) the measure must be ‘taken in time of’ such war or other emergency in international relations. With regard to the latter requirement, the panel in *Russia – Traffic in Transit (2019)* found that ‘taken in time of’ implied a chronological connection between the measure and the situation of ‘war’ or ‘other emergency in international relations’. The panel understood “this phrase to require that the action be taken *during* the war or other emergency in international relations”.<sup>116</sup> With regard to the term ‘war’, the panel found that “war refers to armed conflict”, and that “armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)”.<sup>117</sup> With regard to the term ‘emergency in international relations’, the panel acknowledged that this term was less clear than its counterpart ‘war’.<sup>118</sup> The panel noted that the dictionary definition of ‘emergency’ includes a “situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action”, and a “pressing need ... a condition or danger or disaster throughout a region”.<sup>119</sup> The panel also noted that ‘international relations’ is generally defined as “world politics”, or “global political interaction, primarily among sovereign states”.<sup>120</sup> Moreover, the panel noted that “the use of ‘or’ with ‘other’ in the phrase ‘war or other emergency in international relations’ indicates that war is one example of the larger category of ‘emergency in international relations’”.<sup>121</sup> To determine the meaning of ‘emergencies in international relations’, the panel also considered the broader context of Article XXI(b)(iii), and in particular Article XXI(b)(i) and (ii). These subparagraphs of Article XXI(b) concern fissionable materials, traffic in arms, ammunition and implements of war, and traffic in goods and materials for the purpose of supplying a military establishment. The panel observed that the interests that are addressed in Article XXI(b)(i) and (ii), like the interests that arise from a situation of war in subparagraph (iii) itself, are “all defence and military interests, as well as maintenance of law and public order interests”.<sup>122</sup> According to the panel, an ‘emergency in international relations’ must be understood “as eliciting the same type of interests as those

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<sup>116</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.70. As discussed above, the panel considered that “this chronological concurrence is also an objective fact, amenable to objective determination”. *Ibid.*

<sup>117</sup> *Ibid.*, para. 7.72.

<sup>118</sup> See *ibid.*, para. 7.71.

<sup>119</sup> *Ibid.*, para. 7.72.

<sup>120</sup> *Ibid.*, para. 7.73.

<sup>121</sup> *Ibid.*, para. 7.72.

<sup>122</sup> *Ibid.*, para. 7.74.

arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b)”.<sup>123</sup> The panel thus concluded that an ‘emergency in international relations’ is a “situation of armed conflict and latent armed conflict, or heightened tension or crises, or of general instability engulfing a member state”.<sup>124</sup> While some of the terms used by the panel in this definition of ‘emergency in international relations’, such as ‘heightened tension or crisis’ and ‘general instability’ may be capable of broad interpretation,<sup>125</sup> the meaning given by the panel to ‘emergency in international relations’ may seem rather narrow. An ‘emergency in international relations’ must relate to defence or military interests or the maintenance of law and public order. Hence, political or economic differences between Members are not sufficient, of themselves, to constitute an ‘emergency in international relations’.<sup>126</sup> While political or economic conflicts could well be “urgent or serious”, they are not an ‘emergency in international relations’ within the meaning of Article XXI(b)(iii), “unless they give rise to defence and military interests, or maintenance of law and public order interests”.<sup>127</sup> Although the panel leaves room for economic conflicts that affect defence and military interests or maintenance of law or public order interests, it remains unclear what kind of economic conflict would meet this condition, or just how severe an economic conflict must be to qualify as an ‘emergency in international relations’.<sup>128</sup> Not surprisingly, the United States has strongly criticized the narrow interpretation of the term ‘emergency in international relations’ given by the panel in *Russia – Traffic in Transit (2019)*. According to the United States, an ‘emergency in commercial or trade relations’ cannot be excluded from the coverage of ‘other emergency in international relations’. In *US – Steel and Aluminium*, the United States argues that “a Member may consider commercial or trade matters to be a matter of existential importance... that could constitute an emergency in international relations”.<sup>129</sup> Clearly, the alleged emergency in *US – Steel and Aluminium* is an emergency in commercial and trade relations, and not a situation of ‘armed conflict and latent armed conflict, or heightened tension or crisis, or of general instability engulfing a member state’. It is also unlikely that the United States can successfully argue that the alleged emergency concerns an economic conflict that gives rise to defence and military interests, or maintenance of law and public order interests.

In *Russia – Traffic in Transit (2019)*, Russia did not furnish substantial evidence on the ‘emergency in international relations’ which allegedly triggered the measures at issue in that case. Since Russia took the position that Article XXI(b)(iii) is totally self-judging and there was nothing for the panel to do in this case, this is perhaps not surprising. However, in the absence of substantial evidence, Ukraine, the complainant, argued that Russia had failed to meet its burden of proof on this important requirement for a successful invocation of Article XXI(b)(iii).<sup>130</sup> Nevertheless, the panel found that the situation between Russia and Ukraine, that existed since 2014, constituted an ‘emergency in international relations’ within the meaning of Article XXI(b)(iii).<sup>131</sup> The panel considered that there was enough evidence before it that, between early 2014 and the end of 2016, relations between Ukraine and Russia had “deteriorated to such a degree that they were a matter of concern to the international community”.<sup>132</sup> In this regard, the panel referred in this regard in particular to a 2016 Resolution of the UN General Assembly, in which the situation between Ukraine and Russia was recognized as involving armed conflict.<sup>133</sup> The panel also referred to the fact that a number of countries had imposed as from

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, para. 7.76.

<sup>125</sup> See also Mihai Ioachimescu-Voinea, ‘National Security Exceptions in the WTO – A Carte Blanche for Protectionism? Part I – Introduction, Negotiating History of Art. XXI of GATT, Russia – Traffic in Transit Panel’s Report, Law Review’, (2019) *Volume X International Journal of Law and Jurisprudence*, 25-6.

<sup>126</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.75.

<sup>127</sup> *Ibid.* This reasoning is contrary with rulings of other international tribunals that have found that a major economic crisis can give rise to essential security interests where the severity of the problem can be likened to that of a military invasion. See decision in *LG&E Energy Corp. v. Argentine Republic (ICSID ARB/02/1, 2006)* and *CMS Gas Transmission Co. v. Republic of Argentina (ICSID ARB/01/8)*. See also Boklan and Bahri (2020), 133.

<sup>128</sup> See also Prazeres (2020), 143.

<sup>129</sup> US Second Written Submission, *US - Steel and Aluminum (DS548)*, para. 34.

<sup>130</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.112-113.

<sup>131</sup> See *ibid.*, para. 7.123.

<sup>132</sup> *Ibid.*, para. 7.122. Note that the panel prudently refrained from labelling the nature of the tension in general international law terms or stating who bears responsibility for the conflict. See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.121.

<sup>133</sup> See *ibid.*, referring to UN General Assembly Resolution No. 71/205, 19 December 2016.

2014 economic sanctions on Russia in connection with the situation between Ukraine and Russia.<sup>134</sup> This was considered to be further evidence of the gravity of the situation. While few would dispute that the situation between Ukraine and Russia did indeed constitute an ‘emergency in international relations’, the low threshold that the panel laid for Russia’s burden of proof is, however, cause for concern. One can only hope that future panels will be more exigent.

In *Saudi Arabia – Protection of IPRs*, regarding the invocation of Article 73(b)(iii) of the *TRIPS Agreement*, the counterpart of Article XXI(b)(iii) of the GATTT 1994, Saudi Arabia, the respondent, argued that it cut off economic and trade relations with Qatar in June 2017 in order to protect its national security from terrorism and extremism.<sup>135</sup> The panel in that case agreed with Saudi Arabia that severing all relations with another country could be regarded as “the ultimate State expression of the existence of an emergency in international relations”.<sup>136</sup> The panel also quoted the United Arab Emirates, a third party in this case, which stated that with regard to the severance of relations between countries that “there are few circumstances in international relations short of war that constitute a more serious state of affairs”.<sup>137</sup> Furthermore, the panel noted that a situation where a country accuses another country of terrorism and extremism, in and of itself contributes to a ‘situation... of heightened tension or crisis’, and is not a mere economic or political conflict.<sup>138</sup> The panel thus disagreed with Qatar’s view that the situation which led Saudi Arabia to sever its relation with Qatar could be characterized as a mere economic or political conflict.<sup>139</sup> While the parties agreed that the determination of whether there exists ‘a war or other emergency in international relations’ is to be made ‘objectively’ by a panel, they disagreed on “whether a panel must grant any margin of ‘deference’ to a respondent's characterization of a situation as an emergency”.<sup>140</sup> This is a most interesting question. The panel, however, dodged this question by stating that this problem did not arise in the present case.<sup>141</sup> The panel in *Saudi Arabia – Protection of IPRs* concluded that the measures at issue, with regard to which Saudi Arabia invoked Article 73(b)(iii) of the *TRIPS Agreement*, were measures ‘taken in time of war or other emergencies in international relations’.<sup>142</sup>

In *US - Steel and Aluminium*, the United States does not provide any information concerning the emergency in international relations. In fact, the United States does not even identify or invoke Article XXI(b)(iii) or any other subparagraph of Article XXI(b), maintaining that it does not need to do so based on the self-judging nature of Article XXI.<sup>143</sup> It will be interesting to see how the panel in *US - Steel and Aluminium* will address this situation.

### ***Chapeau of Art XXI(b)***

For a measure to be justified under Article XXI(b)(iii) of the GATT 1994, it must not only be a measure ‘taken in time of war or other emergency in international relations’. As the chapeau of Article XXI(b) states, it must be a measure ‘which it [i.e. the invoking Member] considers necessary for the protection of its essential security interests’. As discussed above, the panel in *Russia – Traffic in Transit (2019)* found that the phrase ‘which it considers’ does *not* qualify the requirements of the subparagraphs of Article XXI(b), including the requirement that a measure is ‘taken in time of war or other emergency in international relations’.<sup>144</sup> This led the panel to conclude that Article XXI(b)(iii) is not totally self-judging. The panel in *Russia – Traffic in Transit (2019)* did

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<sup>134</sup> See *ibid.*

<sup>135</sup> See Panel Report, *Saudi Arabia – Protection of IPRs*, para. 7.258. This panel report is currently under appeal.

<sup>136</sup> *Ibid.*, para. 7.259.

<sup>137</sup> *Ibid.*

<sup>138</sup> See *ibid.*, para 7.263.

<sup>139</sup> See *ibid.*

<sup>140</sup> *Ibid.*, para. 7.267.

<sup>141</sup> See *ibid.*, para. 7.268. The panel stated that in light of its findings on the existence of an ‘emergency in international relations’, it did not consider it necessary to rule on certain issues raised by the parties about how a panel should proceed in a case where it is not persuaded that an ‘emergency in international relations’ exists, or is presented with an insufficient basis upon which to make any determination of that issue.

<sup>142</sup> See *ibid.*, para. 7.270.

<sup>143</sup> See US Second Written Submission, *US - Steel and Aluminum (DS548)*, paras. 26-29.

<sup>144</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.77.

find, however, that the phrase ‘which it considers’ qualifies both the terms ‘necessary’ and ‘essential security interests’ and that therefore it is within the discretion of the invoking Member to decide what its ‘essential security interests’ are as well as which measure is ‘necessary’ to protect these interests.<sup>145</sup> However, the panel considered that, in order to avoid abuse of the national security exception, the discretion given to the invoking Member cannot be, and is not, without limits.<sup>146</sup> We will first address the question of what can be considered to be ‘essential security interests’, and then the question of when measures are ‘necessary’ to protect those interests.

### *‘Essential security interests’*

The panel in *Russia – Traffic in Transit (2019)* first noted that Article XXI(b)(iii) refers to *essential* security interests and that the concept of ‘essential security interests’ is “evidently” a narrower concept than ‘security interests’.<sup>147</sup> The panel then proceeded to define ‘essential security interests’ as “those interests relating to the quintessential function of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.”<sup>148</sup> It is obvious that what these interests are “will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances”.<sup>149</sup> Therefore, as the panel found, “it is left, in general, to every Member to define what it considers to be its essential security interests”.<sup>150</sup> However, the panel immediately added that this does not mean that a Member invoking Article XXI(b)(iii) is free to consider *any* concern to be an ‘essential security interest’.<sup>151</sup> According to the panel in *Russia – Traffic in Transit (2019)*, the discretion of a Member invoking Article XXI(b)(iii) to consider a particular concern to be an ‘essential security interest’ is “limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith”.<sup>152</sup> Article 31(1) of the VCLT states that: “[a] treaty shall be interpreted in good faith ...” and Article 26 of the VCLT states that: “[e]very treaty ... must be performed [by the parties] in good faith”. Both these provisions codify the obligation of good faith which is a general principle of international law which applies to all Members in their interpretation and application of the WTO agreements, including the national security provisions thereof. Note that in the case law on the interpretation and application of other WTO provisions, panels and the Appellate Body have repeatedly referred to the obligation of good faith.<sup>153</sup>

An assessment of whether the obligation of good faith is met can take several forms.<sup>154</sup> First, it can be a purely administrative or procedural review.<sup>155</sup> Second, the assessment can go further by requiring an objective element such as the reasonability or the proportionality of the measure.<sup>156</sup> Lastly, the assessment can also be a method to control abuse by not allowing a party to exercise its rights in a manner that would undermine its treaty obligations.<sup>157</sup> The panel in *Russia – Traffic in Transit (2019)* opted for the last approach stating that:

[t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be... re labelling trade

<sup>145</sup> See *ibid.*, paras. 7.131 and 7.146.

<sup>146</sup> See *ibid.*, paras. 7.132 and 7.138.

<sup>147</sup> See *ibid.*, para. 7.130.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, para. 7.131.

<sup>150</sup> *Ibid.*

<sup>151</sup> See *ibid.*, para. 7.132.

<sup>152</sup> *Ibid.*

<sup>153</sup> See Andrew Mitchell, M. Sornarajah, and Tania Voon, *Good Faith and International Economic Law*, (Oxford University Press, 2015).

<sup>154</sup> See Andreas Ziegler and Jorun Baumgartner, *Good Faith as a General Principle of International Law*, (Oxford University Press, 2015), 9.

<sup>155</sup> See in this regard the Appellate Body Report, *US – FSC (2000)*, paras. 165-6, where the Appellate Body found that not bringing to the attention of the panel procedural deficiencies promptly constituted a failure to act in good faith. See also Heath (2020), 1074–5.

<sup>156</sup> See in this regard Appellate Body Report, *US – Shrimp (1998)*, para. 158, where the Appellate Body ruled that the chapeau of Article XX of the GATT 1994 is an expression of the obligation of good faith, which prevents abuse of Article XX by obliging Members to exercise their rights *reasonably*. See also Heath (2020), 1072.

<sup>157</sup> See *ibid.*, 1066–7; and Ziegler and Baumgartner (2015), 32–33.

interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.<sup>158</sup>

In order for a panel to be able to assess whether a Member invoking Article XXI(b)(iii) interprets and applies this provision in good faith, such Member must “articulate the essential security interests” it desires to protect, and it must do so “sufficiently enough to demonstrate their veracity”.<sup>159</sup> Whether this is a significant burden imposed on Members invoking Article XXI(b)(iii) remains to be seen. On the question of what qualifies as a sufficient level of articulation of the essential security interest, the panel stated that this will depend on the emergency in international relations at issue.<sup>160</sup> As the panel explained, the more an emergency in international relations is removed from armed conflict, or a situation of breakdown of law and public order, the higher the required level of articulation of the essential security interest concerned.<sup>161</sup> Conversely, when the emergency in international relations involves is closely related to armed conflict, or a situation of breakdown of law and public order, the required level of articulation of the essential security interest concerned is (much) lower. In other words, when the emergency in international relations is glaringly obvious, a Member invoking Article XXI(b)(iii) has a lighter burden to articulate its essential security interests.<sup>162</sup> In *Russia – Traffic in Transit (2019)*, Russia had not explicitly articulated its essential security interests, but as the emergency in international relations in that case was “very close to the ‘hard core’ of war or armed conflict” and Russia did refer in general terms to the security at the Russian-Ukraine border, the panel found Russia's articulation of its essential security interests, “despite its allusiveness”, to be “minimally satisfactory”.<sup>163</sup> In support of this finding, the panel further noted that there was nothing in Russia's expression of its essential security interests that would suggest that Russia invoked Article XXI(b)(iii) “simply as a means to circumvent its obligations under the GATT 1994”.<sup>164</sup> While the panel arguably made the right call in *Russia – Traffic in Transit (2019)*, future panels will hopefully be more ‘demanding’ as to the level of articulation of the essential security interests.

In *Saudi Arabia – Protection of IPRs Rights*, the panel readily accepted Saudi Arabia's articulation of its essential security interest as the protection against terrorism and extremism, and found that it genuinely referred to the quintessential functions of the state.<sup>165</sup> The panel noted that Saudi Arabia clearly exceeded the ‘minimally satisfactory’ articulation of essential security interests by Russia in *Russia – Traffic in Transit (2019)*.

In *US - Steel and Aluminium*, the United States does not provide any information concerning the essential security interests pursued.<sup>166</sup> It does, however, state that publicly available information “could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii)”.<sup>167</sup> Despite the low threshold for articulation established by the panel in *Russia Traffic in Transit (2019)*, it is unlikely that such general reference to publicly available information can be regarded as a sufficient articulation of the essential security interests pursued.

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<sup>158</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.133.

<sup>159</sup> *Ibid.*, para. 7.134

<sup>160</sup> See *ibid.*, para. 7.135.

<sup>161</sup> See *ibid.*

<sup>162</sup> Mihai Ioachimescu viewed this relationship between the ‘essential security interests’ and the ‘emergency in international relations’ as a ‘sliding scale’ test, which provides the panel a flexible tool to “adopt either a more deferential or stricter review, depending on the circumstances of the disputes”. See Ioachimescu-Voinea (2019), 29. See also Benton Heath, ‘Guest Post: Trade, Security and Stewardship (Part IV): A Variable Framework for Security Governance’, (2019) *International Economic Law and Policy Blog*, at <https://ielp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-iv-a-variable-framework-for-security-governance.html>, last accessed 13 September 2020.

<sup>163</sup> *Ibid.*, para. 7.137.

<sup>164</sup> *Ibid.*

<sup>165</sup> See Panel Report, *Saudi Arabia – Protection of IPRs*, para. 7.280.

<sup>166</sup> See US Second Written Submission, *US - Steel and Aluminum (DS548)*, paras. 26-28. As already noted in the context of the discussion on the requirement of an ‘emergency in international relations’, the United States does not identify or invoke Article XXI(b)(iii) or any other subparagraph of Article XXI(b), maintaining that it does not need to do so based on the self-judging nature of Article XXI.

<sup>167</sup> *Ibid.* para. 29.

Requiring a Member invoking Article XXI(b)(iii) to articulate the essential security interest(s) it desires to protect may, however, prove to be problematic in future cases. This is so because of Article XXI(a) of the GATT 1994, which states:

Nothing in this Agreement shall be construed:

- (a) To require any contracting party to furnish information, the disclosure of which it considers contrary to its essential security interests ...

This provision permits a Member to refrain from providing information that it considers could jeopardise its essential security interests. Unlike Article XXI(b), Art XXI(a) does not contain any subparagraphs or other qualifiers that limits the discretion of a Member invoking this exception. It is, therefore, of a more self-judging nature than Article XXI(b). As Hahn noted, the Article XXI(a) phrase ‘which it considers contrary to its essential security interests’ gives wide discretion to Members.<sup>168</sup> Hence, if a Member raises Article XXI(a) as a justification for not providing information on, and thus not articulating, its essential security interests under Article XXI(b)(iii), there may be little a panel can do in response. In *Russia Traffic in Transit (2019)*, Russia raised Article XXI(a) in justification for its refusal to provide more information than was contained in its first written submission. The panel, however, did not address the validity of this invocation of Article XXI(a), but, as discussed above, found that Russia’s articulation of its essential security interests was “minimally satisfactory”.<sup>169</sup> As also discussed above, in the panel’s view, the relationship between the essential security interests and the emergency in international relations is a relationship of interdependence. The more apparent the emergency in international relations, the lesser the obligation to demonstrate the essential security interests held, but where the emergency in international relations is not that obvious, a Member will have to articulate its essential interests in greater detail. However, a detailed articulation of essential security interests may be problematic when the relevant information is classified as highly sensitive or where there is limited information on the nature and the extent of the emergency in international relations, as may be the case for an emergency relating to cybersecurity.<sup>170</sup> In *Russia – Traffic in Transit (2019)*, the European Union suggested in its third party submission, that when a Member invokes Article XXI(a) to justify a refusal to articulate its essential security interests, a panel should draw adverse inference from such refusal in the context of its examination of Article XXI(b)(iii).<sup>171</sup> A similar position has been advocated by Lee, who referred to the ruling of the panel in *EC and certain member States – Large Civil Aircraft (2011)* that paragraph 7 of Annex V of the *SCM Agreement* permits a panel to draw adverse inferences in a situation of non-cooperation by a party to provide information.<sup>172</sup> However, note that Article XXI(a) and Annex V, paragraph 7 of the *SCM Agreement* are quite different provisions. The latter imposes an obligation on Members while the former expressly grants a right. A panel cannot draw adverse inferences from the exercise of right that has been explicit granted. A more useful approach for a panel to adopt is to examine whether Article XXI(a) is invoked in good faith, and, in particular, whether there is at least procedural fairness in determining the information of which the disclosure is considered contrary to essential security interests. However, unless there is clear evidence of bad faith, it would be fairly easy for members to meet this standard.<sup>173</sup>

In *Steel and Aluminium*, the United States argues that pursuant to Article XXI(a) a Member need not provide information to a WTO panel or other Members regarding essential security measures or the member’s

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<sup>168</sup> See Hahn (1991), 582–583.

<sup>169</sup> Panel Report, *Russia – Traffic in Transit (2019)*, paras. 7.129 and 7.137.

<sup>170</sup> See also Heath (2020), 1075–6.

<sup>171</sup> See Heath (2020), 1076, referring to EU Third Party Submission, *Russia – Traffic in Transit*, paras. 28–30.

<sup>172</sup> See Lee (2018), 289 and fn. 34., referring to Panel Report, *EC and certain Member States – Large Civil Aircraft (2011)*, para 7.1580. Along the same lines but arguable going even further, Hahn proposed that “the State refusing full participation would have to bear the disadvantage arising out of such omission and lose its protection provided by Article XXI.” See Hahn (1991), 616.

<sup>173</sup> See Hahn (1991), 583. Also see Heath (2020), 1076.

underlying security interests.<sup>174</sup> According to the United States, it follows from a Member's right under Article XXI(a) to withhold information that this Member cannot be required in the context of Article XXI(b)(iii) to give such information to articulate its essential security interests. The United States views this issue as a fundamental one, and one that further shows that the invocation of Article XXI is non-reviewable by a panel.<sup>175</sup> Unlike the panel in *Russia – Traffic in Transit (2019)*, the panel in *Steel and Aluminium* may not be able to dodge this issue of relevance of Article XXI(a) to the obligation to articulate sufficiently the essential security interests at issue.

*'Measures necessary for the protection'*

As discussed above, the panel in *Russia – Traffic in Transit (2019)* found that the phrase 'which it considers' qualifies both the terms 'necessary' and 'essential security interests'. It is therefore within the discretion of the invoking Member to decide whether a measure at issue is 'necessary'. However, as with regard to the discretion of a Member to decide on its 'essential security interests', the panel also found with regard to a Member's discretion to decide on the necessity of a measure that this discretion is subject to the obligation of good faith.<sup>176</sup> According to the panel, this obligation of good faith "is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests".<sup>177</sup> In other words, a Member's determination that a measure is 'necessary' to protect its essential security interest is in good faith when the measure is *not implausible* as a measure protective of these interests.<sup>178</sup> It is clear that this 'not implausible' standard does not impose a high burden on the Member invoking Article XXI(b)(iii).<sup>179</sup> On the contrary, it leaves much discretion, while still usefully limiting the room for abuse.

In applying the 'not implausible' standard to the facts of the case, the panel in *Russia – Traffic in Transit (2019)* further clarified that the measure at issue must not be "so remote from, or unrelated to" the emergency in international relations that "it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency".<sup>180</sup> The panel had no trouble finding that it was not implausible that Russia imposed the measures at issue to protect its essential security interests.<sup>181</sup>

The panel in *Saudi Arabia – Protection of IPRs* applied the 'not implausible' standard formulated by the panel in *Russia – Traffic in Transit (2019)*.<sup>182</sup> The panel examined whether the measures at issue "are so remote from, or unrelated to, the 'emergency in international relations' as to make it implausible that Saudi Arabia implemented the measures for the protection of its essential security interests arising out of the emergency".<sup>183</sup> The panel observed that Saudi Arabia's essential security interest was to protect its citizens from terrorism and extremism and that it aimed to protect this interest by ending all interaction between Saudi and Qatari nationals.<sup>184</sup> Consequently, the panel determined the first set of measures, namely the so-called anti-sympathy measures that prevented Qatari companies from obtaining legal redress in Saudi Arabian courts, could be plausibly related to the comprehensive measures Saudi Arabia took in June 2017 to prevent interactions

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<sup>174</sup> See US First Written Submission, *US - Steel and Aluminium (DS548)*, para. 139.

<sup>175</sup> See *ibid.*, para. 140.

<sup>176</sup> See *Russia – Traffic in Transit (2019)*, para. 7.138.

<sup>177</sup> *Ibid.*

<sup>178</sup> See *ibid.*

<sup>179</sup> See also Michael Woods and LaFortune, 'WTO Panel Sets Threshold Test for the National Security Exception – Slaw', at <http://www.slw.ca/2020/02/25/wto-panel-sets-threshold-test-for-the-national-security-exception/>, last accessed 14 September 2020.

<sup>180</sup> Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.139.

<sup>181</sup> See *ibid.*, para. 7.145. Note that the panel considered that evidence that bilateral trade was taking place between Russia and Ukraine during that time did not take away from the plausibility of the measures were taken by Russia for the protection of its essential security interests. See *ibid.*

<sup>182</sup> See Panel Report, *Saudi Arabia – Protection of IPRs*, para. 7.285.

<sup>183</sup> *Ibid.*

<sup>184</sup> See *ibid.*, para. 7.284.

between Saudi and Qatari nationals.<sup>185</sup> However, in respect to the second measure, that is the non-application of criminal measures to Saudi companies for the violation of IP rights of Qatari companies, the panel was unconvinced that these measures related to Saudi Arabia's interest in preventing interactions between citizens of the two states. Applying criminal penalties to Saudi companies by Saudi courts did not require any interaction between Qatari and Saudi citizens.<sup>186</sup> The panel's ruling in *Saudi Arabia – Protection of IPRs* shows that while a Member invoking a WTO national security exception has a very wide margin of discretion in determining the necessity of the measure at issue, this discretion has its limits.

In *US – Steel and Aluminium*, the United States continues to argue that since Article XXI is totally self-judging, there are no limits on a Member's discretion to determine whether a measure is 'necessary' to protect its essential security interests.<sup>187</sup> Regarding the 'not implausible' standard applied by the panels in *Russia – Traffic in Transit (2019)* and *Saudi Arabia – Protection of IPRs*, the United States argues that a panel cannot assess whether a measure is not implausible to protect the essential security interests pursued without determining what constitutes a Member's 'essential security interests' and what it would consider necessary for the protection of those interests.<sup>188</sup> Unsurprisingly, the United States thus also rejects the 'not implausible' standard to assess whether a Member determined in good faith that the measure at issue is 'necessary'.

## Conclusions

There is no doubt that national security exceptions, such as Article XXI(b)(iii) of the GATT, are indispensable in WTO law, and that Members must be given a wide margin of discretion in the interpretation and application of these exceptions. As Adam Smith already noted, national security is "of much more importance than opulence", and it touches on the core essentials of a state. The danger of abuse of national security exceptions is, however, evident, especially in the current times of abrasive economic nationalism, anti-globalism and populist unilateralism. The recent proliferation in the use of national security exceptions by WTO Members, and the justification (or absence thereof) of this use, has raised serious concerns regarding such abuse.

The panel in *Russia – Traffic in Transit (2019)* did an admirable job in striking a balance between, on the one hand, the need to leave WTO Members a wide margin of discretion in deciding on what needs to be done to protect essential security interests, and, on the other hand, the need to avoid abuse of national security exceptions, and in particular Article XXI(b)(iii) of the GATT 1994. It did so in two ways.

First, it preserved a role for WTO dispute settlement in cases in which a Member invokes Article XXI(b)(iii), by rejecting the contention of Russia and the United States that Article XXI(b)(iii) is totally 'self-judging' because of the phrase 'which it [i.e. the invoking Member] considers' in the chapeau of Article XXI(b). The panel found that the phrase 'which it considers' does *not* qualify the requirements of the subparagraphs of Article XXI(b), including the requirement in Article XXI(b)(iii) that a measure is 'taken in time of war or other emergency in international relations'. This requirement is thus not self-judging but is subject to objective determination by a panel.<sup>189</sup> According to the panel in *Russia – Traffic in Transit (2019)*, the phrase 'which it considers' does, however, qualify both the terms 'necessary' and 'essential security interests' in the chapeau of Article XXI(b). Therefore, it is within the discretion of the Member invoking Article XXI(b)(iii) to decide what its 'essential security interests' are as well as which measures are 'necessary' to protect these interests.<sup>190</sup> However, the panel considered that, in order to avoid abuse of the national security exception, the discretion

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<sup>185</sup> See *ibid.*, paras. 7.286-88.

<sup>186</sup> See *ibid.*, para. 7.289.

<sup>187</sup> See US First Written Submission, *US - Steel and Aluminum (DS548)*, para. 46.

<sup>188</sup> See US Second Written Submission, *US - Steel and Aluminum (DS548)*, para. 119.

<sup>189</sup> See Panel Report, *Russia – Traffic in Transit (2019)*, para. 7.77.

<sup>190</sup> See *ibid.*, paras. 7.131 and 7.146.

given to the invoking Member cannot be, and is not, without limits.<sup>191</sup> Pursuant to Articles 31(1) and 26 of the *Vienna Convention on the Law of Treaties*, WTO Members have to interpret and apply Article XXI(b)(iii) as well as all other WTO national security exceptions in *good faith*. The good faith interpretation and application of a national security exception by a WTO Member invoking such exception can be challenged by any other WTO Member and it will be for a panel to determine whether the invoking Member meets its obligation of good faith. With regard to a Member's decision on what its 'national security interests' are, a Member will be considered to have acted in good faith when that Member does not use the national security exception "as a means to circumvent" its obligations under the *WTO Agreement*. In order for a panel to be able to assess whether an invoking Member meets its good faith obligation in this respect, such Member must "articulate the essential security interests" it desires to protect, and it must do so "sufficiently enough to demonstrate their veracity". With regard to Member's decision on which measures are necessary to protect its national security interests, a Member will be considered to have acted in good faith when the measure taken is *not implausible* as a measure protective of these interests.

*Second*, the panel in *Russia – Traffic in Transit (2019)* struck the correct balance between, on the one hand, the wide margin of discretion to be left to Members invoking a national security exception, and, on the other hand, the need to avoid abuse of such exception, by ruling that an 'emergency in international relations' is a "situation of armed conflict and latent armed conflict, or heightened tension or crisis, or of general instability engulfing a member state".<sup>192</sup> The panel explicitly stated that political or economic conflicts could well be "urgent or serious" but they are not an 'emergency in international relations', "unless they give rise to defence and military interests, or maintenance of law and public order interests".<sup>193</sup>

While giving a wide margin of discretion to any Member invoking Article XXI(b)(iii), a panel will be mandated – in order to avoid abuse of this exception – to examine and determine:

- whether there is a war or other emergency in international relations?
- whether the measure at issue is taken in times of such war or emergency?
- whether the invoking Member's decision on what its 'essential security interests' are is taken in good faith, i.e. not as a means to circumvent its obligations under the GATT; and?
- whether the measure at issue is so remote from, or unrelated to, the 'emergency in international relations' that it is implausible that the Member implemented the measures for the protection of its essential security interests?

In *Saudi Arabia – Protection of IPRs*, which concerned the invocation of the national security exception of the *TRIPS Agreement*, i.e. Article 73 thereof, the panel in that case followed the lead of the panel in *Russia – Traffic in Transit (2019)*. While this report has been appealed by Saudi Arabia to the now paralyzed Appellate Body and will therefore not become legally binding, it is nevertheless important that this report confirmed the approach adopted by the panel in *Russia – Traffic in Transit (2019)* (except for the latter's erroneous order of analysis). All the issues addressed in *Russia – Traffic in Transit (2019)* are currently again addressed by the panel in *United States – Steel and Aluminium*. In the latter case, the United States strongly contests the approach adopted by the panel in *Russia – Traffic in Transit (2019)* and persists in arguing that the national security provision at issue, Article XXI(b) is totally self-judging and that disputes in which this provision is invoked are not justiciable. The panel in *United States – Steel and Aluminium* as well as the WTO as a whole are under intense political pressure from the United States not to follow the lead of the panel in *Russia – Traffic in Transit (2019)*. It remains to be seen whether the panel will hold firm and preserve the credibility of the WTO as a forum for dispute settlement and with it the rules-based multilateral trading system.

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<sup>191</sup> See *ibid.*, paras. 7.132 and 7.138.

<sup>192</sup> *Ibid.*, para. 7.76.

<sup>193</sup> *Ibid.*

## Relevant GATT and WTO cases and case law

Short Title	Full Title
<i>Argentina – Textiles and Apparel (1998)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R adopted 22 April 1998,
<i>Chile – Price Band System (2002)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
<i>China – Publication and Audiovisual Products (2010)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Raw Materials (2012)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>China - Rare Earths (2014)</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
<i>EC – Bananas III (Article 21.5 – Ecuador II)</i>  <i>EC – Bananas III (Article 21.5 – US)</i> (2008)	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008  <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA, adopted 22 December 2008
<i>EC – Chicken Cuts (2005)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<i>EC – Computer Equipment (1998)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
<i>EC – IT Products (2010)</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III
<i>EC and certain Member States –</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011

<i>Large Civil Aircraft (2011)</i>	
<i>EC and certain Member States – Large Civil Aircraft (2011)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R
<i>Japan – Products and Technology (Korea) (DS590)</i>	<i>Japan – Measures Related to the Exportation of Products and Technology to Korea</i> , WT/DS590
<i>Qatar – Certain Measures Concerning Goods (DS576)</i>	<i>Qatar – Certain measures concerning goods from the United Arab Emirates</i> , WT/DS576
<i>Russia – Traffic in Transit (2019)</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R, adopted 26 April 2019
<i>Saudi Arabia – Protection of IPRs (DS567)</i>	Panel Report, <i>Saudi Arabia - Measures concerning the Protection of Intellectual Property Rights</i> , WT/DS567/R, 16 June 2020, (unadopted).
<i>Sweden – Import Restrictions on Certain Footwear</i>	<i>Sweden – Import Restrictions on Certain Footwear</i> (L/4250, dated 11 November 1975)
<i>United Arab Emirates – Goods, Services and IP Rights (DS526)</i>	<i>United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights</i> , WT/DS526
<i>United States – The Cuban Liberty and Democratic Solidarity Act (US - Helms Burton Act)</i>	<i>United States – The Cuban Liberty and Democratic Solidarity Act</i> , WT/DS38
<i>United States – Trade Measures Affecting Nicaragua</i>	GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i> , L/6053, 13 October 1986 (unadopted)

<i>US – FSC (2000)</i> ,	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/R, adopted on 20 March 2000
<i>US – Section 337 Tariff Act (1989)</i>	GATT Panel report, <i>United States – Section 337 of the Tariff Act of 1930 and Amendments thereto</i> , (L/6439 - 36S/345), adopted on 7 November 1989
<i>US – Shrimp (1998)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Steel and Aluminium</i>	<i>United States – Certain Measures on Steel and Aluminium Products</i> , WT/DS544, WT/D547, WT/D548, WT/D552, WT/D554, WT/D556 and WT/D564

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Short Title	Full Title
<i>LG&amp;E Energy Corp. v. Argentine Republic</i>	International Centre for Settlement of Investment Disputes, <i>LG&amp;E Energy Corp. v. Argentine Republic</i> , (ICSID ARB/02/1, 2006)
<i>Military and Paramilitary Activities (Nicaragua. v. U.S.)</i>	International Court of Justice, <i>Military and Paramilitary Activities (Nicaragua. v. U.S.)</i> , 1984 I.C.J. 392, 436-38 (Nov. 26) (Jurisdiction and Admissibility).
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