The problems of interpreting GATT Article XXI(b)(iii) in *Russia – Traffic in Transit*

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Abstract

Purpose – This paper aims to further study the panel report in *Russia – Traffic in Transit* regarding the interpretation and application of 1994 general agreements on tariffs and trade (GATT) Article XXI(b). It analyses the threshold applied by the panel in applying Article XXI(b)(iii) and further discusses the potential problem that may arise in the future dispute. This study also investigates the notion of emergency and security interest and its development in international law.

Design/methodology/approach – This normative research uses a qualitative legal methodology. This study conducts desk analysis of primary legal materials and existing literature to assess the concept of security interest within the World Trade Organization (WTO) framework.

Findings – This paper finds that the panel in *Russia – Traffic in Transit* applied subjective and objective test in reviewing Russia's invocation of GATT Article XXI(b)(iii). Despite the adjectival self-judging clause and the political tension of the dispute, the panel is capable to review its application. This study further finds that the term security interest and emergency in international relations still leaves the possibility of open interpretation.

Research limitations/implications – Because of the normative research approach, the research results lack empirical data and implications. Therefore, future research is encouraged to inquire on the empirical research.

Originality/value – This paper fulfils the need to study and explore security exception clause within the WTO framework as a normative rule of law and in the wider conceptual notion of security and emergency in international law.

Keywords WTO, Interpretation, *Russia – Traffic in Transit*, security exception

Paper type Case study

1. Introduction

1994 general agreements on tariffs and trade (GATT) legal framework is designed to facilitate its state parties ability to respond to situations beyond international trade (Messerlin, 2005). In situation of emergencies – such as natural disasters, pandemic, financial crisis and war – rules that would apply in normal circumstances cannot always be upheld, especially if the emergency threatened the existence of the State (Garcia-Santaolalla, 2021). GATT facilitates its state parties' ability to respond to unexpected situation through its "escape clauses," where conducts that would otherwise be inconsistent with GATT are precluded if acted pursuant to the requirement of the escape clause. This delicate balance between performance of treaty obligation and flexibility to respond to unexpected situation is at the core interest of GATT (Pelc, 2009).

While the escape clause under GATT Article XIX (*safeguards*) and Article XX (*general exception*) had developed in the jurisprudence of World Trade Organization (WTO) Dispute Settlement Body ("WTO-DSB"), the security exception contained in Article XXI had not received further discussion. Scholars and WTO member were particularly concerned with

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the potential misuse and abuse of the article because of the unilateral nature of the article, which reads as follows:

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

The provisions above stipulate that if a state party considers its security interests to be threatened, it may take action that would otherwise be inconsistent with its GATT obligations to protect its essential security interests. Article XXI(b) is categorized as a self-judging clause because it contains the adjectival clause "which it considers" (Schill and Briese, 2009). In other words, the article takes into account the State's subjective determination as its requirement. Debate and discussion among scholars and WTO member were primarily concerned with the interpretation of this adjectival clause (Lindsay, 2003; Bogdanova, 2019). If the discretion of the State is to be given effect, then it must be controlled, because leaving the discretion solely to the State means that there will be no mechanism to control its invocation (Hahn, 1991). Concern with this self-judging adjectival clause was caused by the text of the article that does not provide clear limitations on the extent of State's consideration. Thus, distinguishing genuine act of necessity for emergency from abusive exercise of treaty rights becomes a difficult task.

On the other hand, States had refrained from relying on Article XXI (Bogdanova, 2019). The article had been referred several times under GATT 1947 on the instances of war and armed conflict in the context of cold war between the USA and the Soviet Union. The USA had invoked the security exception to justify its embargo and restrictive trade measures towards Czechoslovakia, Cuba and Nicaragua, which serves as economic pressure to the communist regime of those State (WTO, 2021). The UK also imposed an embargo towards Argentina in the Falkland War and used the article as justification. The use of Article XXI in those cases did not result in an interpretation of its scope and application. The conflicts were resolved through mechanism of consultations and negotiations, with the exception of *US – Nicaragua* case. The panel was established, but the panel report was not adopted.

The circumstances show that at the time of GATT 1947, security interest and economic measures were distinct from each other. This would change, however, as States increasingly relied on security exception as a part of its economic policy in the recent years. The development of economic and domestic policy starting from 2016 caused an intertwining aspect between security and trade. Public attention was mostly drawn by protective economic policy of Trump's administration and the subsequent trade war between the USA and China. In the case of *US – Steel and Aluminium*, 22 State participated as observers while seven States argued as applicants. The issue of national security interests in international trade has received significant amount of attention [1]. Therefore, the jurisprudence on the use Article XXI is particularly important.

The panel report in *Russia – Traffic in Transit* is the first instance in which security exception clause under Article XXI(b) of GATT was applied in dispute resolution [2]. The case of *Russia – Traffic in Transit* was initiated by Ukraine against restrictive trade measures enacted by Russia in the light of deteriorating relationship between the two States

in 2014. The conflict escalated from the occupation of Crimea which at the time was part of Ukraine's territory and the subsequent secession of Crimea through referendum. The conflict originally involves the use of armed forces by Russia and is a topic discussed in International Humanitarian Law. However, the conflict crept to the economic and trade measures within the WTO as Russia enacted various measures that restricted the transit of goods originating from Ukraine. In defence of Ukraine's claim, Russia invoked GATT Article XXI(b)(iii) to justify its action, stating that the measures are necessary to protect Russia's security interest. At its core, the dispute concerns the relationship between the ability of the State to protect its security interest with the maintenance of multilateral trade promoted by WTO. The concern of WTO member regarding the interpretation of GATT Article XXI made its way to the WTO-DSB. Further, the lack of jurisprudence caused uneasy observation by scholars and WTO member alike (Voon, 2019; Boklan and Bahri, 2020; Akpofure and Bossche, 2020).

2. Analysis of the panel report in *Russia – Traffic in Transit*

2.1 Factual background

The case of *Russia – Traffic in Transit* is a continuation of the military conflict between Russia and Ukraine in 2014 which was triggered by Russia's occupation of Ukrainian territory on the Autonomous Republic of Crimea. Russian troops and armed militia groups from the territory of Eastern Ukraine occupied and controlled the Crimea peninsula in 2014 (The Geneva Academy, 2021). Under the occupation, the Russian-backed Ukrainian government opposition group seceded from Ukraine and joined the Russian Federation through a referendum (Bebler, 2015). In the referendum, Crimea declared independence and signed an agreement to be integrated into Russia (BBC News, 2014). This incident ignited massive condemnation and further damaged the relationship between Russia and Ukraine, as well as NATO member such as the USA and the European Union.

It should be noted that until 2014, the Ukrainian economy was heavily dominated by Russian influence (Dragneva and Wolczuk, 2016). Ukraine and Russia were parties to the Commonwealth of Independent States Free Trade Agreement along with Belarus, Kazakhstan, Kyrgyz, Tajikistan, Moldova and Armenia. Ukraine was also one of the parties to the negotiations for the establishment of the Treaty on the Establishment of the Eurasian Economic Union (EaEU Treaty). With the deteriorating relations between Ukraine and Russia after the occupation of Crimea, Ukraine shifted towards integration with European Union by forming the EU-Ukraine Association Agreement. Economic cooperation in the EU-Ukraine Association Agreement was implemented through the Deep and Comprehensive Free Trade Agreement which was provisionally applied on 27 June 2014 [3]. In the light of Ukraine's policy to integrate with the sphere of European Union, Russia implemented economic measures that were intended to serve as economic pressures to Ukraine.

In *Russia – Traffic in Transit,* Ukraine challenged the legality of Russia's transit restriction on Ukrainian goods pursuant to Decree of President No. 1 and its amendment in Decree of President No. 319 in 2016 [4]. The measures were imposed towards goods transiting through rail and road routes across the Ukraine–Russia border destined for Kazakhstan and Kyrgyz Republic. Specifically, the restriction imposes additional procedural requirement for some categories of product, while others were outright prohibited from transiting through Russia at all, described as follows [4]:

1. Resolution No. 778 was enacted following the USA and NATO's economic sanction in response to Russia's occupation of Crimea and its involvement in the war in Eastern Ukraine. The resolution listed categories of agricultural product banned from being

imported to the territory of Russian Federation. In response to economic agreement between Ukraine and the European Union, Ukraine was added to the list of banned country.

2. Transit bans towards goods subjected to non-zero import duties according to the Common Customs Tariff of the Eurasian Economic Union.

2. Decree No. 1 requires goods originating from Ukraine transiting to Russian Federation territory through a designated checkpoint in Belarus. Those goods are subjected to procedural requirement: cargoes.

3. Decree No. 319 amended *Decree No. 1* by extending the duration of transit restriction and imposed same procedural requirement to Ukrainian goods destined for Kyrgyz Republic. In addition, *Decree No. 319* prohibited categories of products listed in *Resolution No. 778* and *Non-zero duty* products from entering or transiting through the territory of Russian Federation.

In establishing the factual background, the panel noted that the dispute must be seen in the context of the serious deterioration of relationship between the two States in 2014, that is, the occupation of Crimea and Russia's involvement in the war in Eastern Ukraine [5]. Although both States were cautious in making reference to the conflicts and do so minimally when asked, the panel ultimately considers the conflicts as crucial to the case.

2.2 Proceedings in the WTO-Dispute Settlement Body

In 14 September 2016, Ukraine filed a request for consultation with Russia to the WTO-DSB. Ukraine stated that Russia had implemented a policy that limits the traffic of goods from Ukraine transiting through Russian territory and destined to Central and East Asia and the Caucasus region. This policy has caused economic losses to Ukraine as indicated by a decrease in trade flows by 35.1% in the period January to June 2016 [6].

Ukraine claimed that Russia's transit restriction violated GATT Articles V:2, V:4 and V:5. Ukraine argued that the Belarus transit requirement removed "the freedom to choose the most convenient route" because it restricted the entry and exit point for transiting goods and made certain most convenient routes unavailable [7]. Further, the additional transit procedure imposed an additional burden that effectively prohibits traffic in transit because of its burdensome nature [8]. Ukraine also raised claims pursuant to Article X regarding the publication and administration and also alleged violation of Russia's WTO Accession Protocol.

Russia as the respondent State did not raise any substantive defence against Ukraine claims, nor denying the presented factual background. Aside from objection on the inconsistencies of Ukraine's categories of measures, Russia relied solely on GATT Article XXI(b)(iii) by claiming that the measures were necessary for the protection of Russia's security interest in the time of emergency [9]. Russia further argued that WTO panel is incapable of adjudicating invocation of State's security interest as it falls outside of an ordinary economic dispute.

At its core, the dispute concerns the interpretation of GATT Article XXI(b). Russia interpreted the term "which it considers" in the chapeau of GATT Article XXI(b) as granting full discretion to the State in protecting its security interest and that such discretion should not be doubted by external entity [10]. In this interpretation, the article serves as defence on the jurisdictional issue. Because of this argument, panel began its order of analysis by considering first the interpretation of Article XXI(b) GATT and whether the article bars the panel from adjudicating its invocation.

2.3 Interpretation and application of GATT Article XXI(b)(iii)

2.3.1 Justiciability and jurisdictional issue. Having established the factual background of the case, the panel first began its interpretation by addressing the inquiries on whether it is barred from adjudicating the invocation of GATT Article XXI(b). Russia's argument on this

issue can be distinguished into two points. First, the phrase "which it considers" in the *chapeau* of GATT Article XXI(b) grants full and unreviewable discretion to the invoking State. Second, that its conflict with Ukraine is "political" in its nature, and thus, WTO as an economic organization is unable to resolve the issue [11]. The USA as the observer in this dispute supported the view that the dispute is "non-justiciable" [12].

In its analysis, the panel did not distinguish between the term "jurisdiction" and "justiciability" as advanced by Russia and the USA. Instead, the panel began its consideration from the "inherent jurisdiction" by the virtue of its adjudicative function. While this inherent jurisdiction grants the panel a margin of discretion in exercising its adjudicative function, refusal to exercise a properly established jurisdiction shall impair the rights of the State seeking for remedies [13]. As the Appellate Body in *India – Patent (US)* had stated, the panel neither have the authority to modify nor disregard the substantive provision of the DSU [14]. As in this case, the panel recalled that Ukraine had satisfied procedural requirement pursuant to the DSU and that the dispute is within the term of reference of the panel. Further, there are no additional rules that would bar the panel from adjudicating the invocation of GATT Article XXI(b). The panel then concluded that it needs to proceed with interpretation of GATT Article XXI(b) to further address the meaning of the term "which it considers."

2.3.2 Interpretation of self-judging clause: the objective and subjective requirements. The panel advanced three hypotheses by the virtue of differing interpretation of the self-judging nature of Article XXI(b) to test Russia's claims: 1) that the self-judging clause qualifies only the term "necessary"; 2) that the self-judging clause qualifies for the entirety of the *chapeau* of GATT Article XXI(b); and 3) that the self-judging clause qualifies the fulfilment for the entirety of GATT Article XXI(b) [15]. Taking into account the rule of treaty interpretation and the extensive use of *travaux preparatoires* to confirm its interpretation, the panel concluded that the adjectival self-judging clause qualifies only the *chapeau* of GATT Article XXI(b). The panel came to this conclusion by first examining on whether the sub-paragraph (i)–(iii) of the article would facilitate a purely subjective discretion by the invoking State.

The panel recalled that the phrase "relating to" in sub-paragraphs (i) and (ii) has been interpreted in WTO jurisprudence to require an objective relationship between the ends and means. Furthermore, the term "war" in sub-paragraph (iii) is equivalent to the term "armed conflict" in which the threshold is at the core of international humanitarian law, particularly in determining when does the protection afforded by humanitarian law apply. International humanitarian law requires that the existence of an armed conflict must be based on an objective assessment. (Ferraro, 2012) Neither the opinions nor the view of the State is relevant in determining the situation of armed conflict (Paulus, 2009). It is concluded that all the subject matters enumerated in the sub-paragraphs require the existence of objective facts and therefore amenable to objective determinations [16].

Further emphasizing upon the interpretation of emergency in international relations as the grounds for Russia's argument, the panel considered that it must be addressed with the context of other interest in the enumerated paragraphs. Considering the proximity of the term "war" and the use of conjunction "or," "other emergency in international relations" is understood as situation that give rise to interest relating to defence and military force of a State [17]. Moreover, the use of term "other emergency" shows that war and armed conflict is considered as situation of emergency at a much larger and defined scale.

Regarding the interpretation of *chapeau* of GATT Article XXI(b), it follows that subjective determination qualifies to fulfil its requirement. In particular, the terms "necessary" and "essential security interest" are subjects to the determination of the invoking State [18]. Indeed, the panel did not touch upon the inquiries on whether

Russia's transit restrictions were necessary and thus leaving it purely to Russia's subjective determination [19]. This is considered as the State's right granted under GATT Article XXI(b) and such is the consequences if the adjectival clause were to be given effect at all. In addressing the meaning of essential security interest, however, the panel asserted that even by the State's determination, not all issues could be elevated to become security interest [20]. To properly invoke the requirement under the *chapeau*, the State are required to exercise its determination with *good faith*.

Good faith in the exercise of State discretion requires the State to not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994 [21]. The invoking State is then required to sufficiently articulate the essential security interest arising out of the situation of emergency or other situation enumerated in sub-paragraphs. The sufficiency of the articulation shall depend upon the novelty of the situation, where one that resembles a situation of armed conflict requires less specificity in its articulation. In contrast, a situation that is further removed from an armed conflict or an unrest that would upset law and order requires the State to articulate the said interest in greater detail [22]. Further, *good faith* standard also requires the invoking State to prove the existence of "plausible" connection between the security interest and the measures taken under Article XXI(b). In other words, it must meet the minimum requirement that the measures taken are plausibly capable to protect the proffered interests [23].

The panel applied the analysis on the legality of Russia's invocation of Article XXI(b)(iii) in two steps. First, the panel established the existence of "emergency in international relations" as an objective requirement in the sub-paragraph (iii) and whether Russia's measures were taken in the time of the aforementioned emergency. Second, the panel then applied the *good faith* standard to establish whether the requirement of the *chapeau* is fulfilled. In determining the existence of the objective requirement, the panel takes into account Russia's identification of the emergency as involving the annexation of Crimea and the war in Eastern Ukraine in 2014. The panel recalled that the relationship between Ukraine and Russia as "deteriorated to such degree" that it became a matter of concern for the international community, as evident in the United Nations General Assembly Resolution condemning the situation as an armed conflict [24]. The panel then concluded that Russia's transit restrictions were taken in time of emergency in international relations.

In determining the fulfilment of requirements in the *chapeau* of Article XXI(b), the panel identifies that the situation involving Russia and Ukraine as close to a "hard core" armed conflict affecting the security of Ukraine–Russia border. The panel noted that in this regard, Russia's articulation of its security interest is "minimally satisfactory" but still accepted it as sufficient to fulfil the good faith obligation. In regards to the nexus between measures taken and the security interest, the panel concluded that the measures are not so remote from the situation of emergency arising out in 2014. Taking into account the facts that the categories of measures in the term of reference were all implemented in the Ukraine–Russia border, it is therefore plausible that the measure correlated with the proffered interest.

It is concluded that Russia had satisfied the requirements under GATT Article XXI(b)(iii) and that the three categories of measures are covered by the article. The panel also concluded that Ukraine has made prima facie case that the Russia's measures were inconsistent with the first sentence of GATT Article V:2 [25]. However, the violation is precluded because the measures had met the conditions set forth in GATT Article XXI(b)(iii).

3. Good faith as standard of review for self-judging clause

One of the main issues addressed in *Russia – Traffic in Transit* concerns the self-judging nature of Article XXI of GATT because of the phrase "which it considers" within the article

and the highly political nature of the dispute. Major concern among the scholars and Member State of WTO revolves around limiting and controlling the abuse of the article because the text does not provide clear limitation. The application of *good faith* standard in this case served an important role in preventing the potential abuse of Article XXI.

Good faith itself is not a principle that is exclusively available only for self-judging clause. It is a fundamental principle of international law that underlies the conduct of State and is primarily concerned with controlling the abuse of treaty rights or malicious intent. In the context of exercise of treaty rights and interpretation, good faith is contained in the Article 31 of 1969 Vienna Convention on the Law of Treaties. The International Law Commission further explained that good faith demands treaty interpreter to advance an interpretation that would enable the appropriate effect of the treaty pursuant to its object and purpose (International Law Commission, 1966).

A reasonable and bona fide exercise of a right is one which is appropriate and necessary for the purpose of the right. However, the exact requirement in which the good faith may be breached, or when a conduct is considered as *mala fide* is difficult to establish. For instance, the ICJ had pronounced that an exercise of rights that is allowed or foreseen by the treaty may not be considered as depriving its object and purpose [26]. Further, the Court had also stated that good faith is not a source of obligation where none would exist [27]. Therefore, doctrines that are linked to good faith, such as *abus de droit* and principle of effectiveness, are concretizations of an otherwise abstract principle (Briese and Schill, 2009). *Good faith* as standard of review applied in *Russia – Traffic in Transit* is one form of such concretization and is considered as a useful method of evaluating the use of self-judging clause (Schill and Briese, 2009).

Jurisprudence of international tribunal in adjudicating self-judging clause was sparse. While self-judging clause is contained in many international agreements, none has provided guidance on how such clause shall operate. Particularly when a self-judging clause does not have a clear limitation in the text of the agreement, such as the one contained in Article XXI(b) of GATT. For example, the only instance in which the International Court of Justice was asked to interpret a self-judging clause was in the *Question of Mutual Assistance* in 2008. In *Questions of Mutual Assistance*, the ICJ ruled on France invocation of self-judging clause contained in article 2(c) of the *Convention concerning Judicial Assistance in Criminal Matters*, which reads as follows:

> The requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, security, ordre public or other essential interests of the requested State.

The subjective criteria in the article are indicated by the adjectival clause "if it considers," followed by interests that can be invoked as the basis for refusal. With regard to the fulfilment of Article 2(c) of the Convention on Assistance in Criminal Matters, the Court applied *good faith* as a threshold for adjudicating self-judging clause in reference to Article 26 of the VCLT. This iteration was important for two reasons. First, prior to the judgment in *Questions of Mutual Assistance,* the Court had implied that self-judging clauses shall have different threshold compared to clauses that does not contain the adjectival self-judging clause [28]. Nevertheless, the standard was never explicitly stated until the aforementioned judgment was delivered. Second, while good faith is widely recognized as a fundamental principle of international law, the judgment was the first iteration in which good faith imposes conditions for the invoking State.

Although the panel in *Russia – Traffic in Transit* does not refer to the *Question of Mutual Assistance* judgment, the substance and analysis of good faith closely resembles the

threshold set forth by the ICJ in reviewing self-judging clause. Both Article XXI GATT and Article 2(c) of *Convention concerning Judicial Assistance in Criminal Matters* concern the issue of security exception. Prior to the judgment, both articles accommodate interpretation where the State is granted with the ability determine its own security interest without clear limitation. In its analysis, both jurisprudences proceed with the same inquiries in which the invoking State is required to "show" or "articulate" the security interest. The State is then required to show the nexus between the interests and the measures taken. The analysis only begins to differs in the issue of objective qualification specific in Article XXI(b) GATT.

Ultimately, these jurisprudences confirm that the adjectival self-judging clause grants a significant amount of discretion for the invoking State. Even under the controlling mechanism of *good faith* review, the burden of proof is minimal and expected to vary on case-by-case basis. This mechanism does prevent a far-reaching claims in situations that do not resemble a conventional threat to security such as armed conflict or unrest. As the panel in *Russia – Traffic in Transit* mentioned, such novelty shall require the State to specify its interest in greater detail and its correlations with the measures taken to protect its interest. On the other hand, the panel refrains from taking into account whether the measures taken are necessary, leaving it to the discretion of the invoking State. This is in contrast to the high threshold of "necessity" that is frequently used, for example, in GATT Article XX(g).

The element of "necessity" in GATT Article XX(g) is not followed by adjectival self-judging clause and therefore needs to be reviewed in much greater restrictions. It demands the invoking State to take alternative measures before relying on the article, even if the alternatives would be more costly [29]. Only after those alternatives measures are exhausted can the measure be considered 'necessary' in the meaning of GATT Article XX(g) (Alcaraz, 2016). Furthermore, other tribunals had applied necessity in much more restrictive manner, that is, by relying on the elements of necessity under customary international law (Waibel, 2007). It emphasized that the exception is not an easy option for the State in justifying its breach of obligations. In contrast with the example above, element of necessity that is followed by adjectival self-judging clause grants wider margin of appreciation for the State. Instead of considering whether alternative measures were already considered, the State is only required to plausibly demonstrate that the measures correlate to the threatened security interest.

4. Widening scope of security interest and emergency

The fear of collision between State's security interest and international economic activity is well-known and documented in the negotiating history of the GATT. Concluded two years in the aftermath of the Second World War, the term "security" was understood in its traditional meaning, that is, involving defence and military interest of the State [30]. Furthermore, at institutional level, the negotiating parties were adamant to separate political interest addressed to the then newly formed United Nations and economic interest designed to be addressed to the International Trade Organization.

Delegates of the State participating in the negotiation were concerned with the all-encompassing and open-ended meaning of "security" and "emergency" [31]. Indeed, in the following years, new forms of threat to State's security arise and consequently expanded the meaning of security international law. In its traditional meaning, security interest concerns the ability of the State to defend itself from external threats, pertaining to the use of force and armed force from other States (Kurtz, 2008). However, it is also greatly expanded to include terrorism, transnational crime and economic crises. It also encompasses actor-less threat, such as pandemic and climate change (Heath, 2020). While these inclusions were introduced in the domestic policy of the State, it nonetheless played a significant role in the

meaning of security interest in international treaties. After all, tribunals had interpreted the meaning of a treaty "evolutionarily" by acknowledging that meaning of treaty term may evolve depending on the knowledge and consensus of the community at the time (Djeffal, 2016; Marceau, 2018).

Security exception clause in international treaties raised an alarming concern because of the broadness in its meaning. While many treaties contain clause allowing for derogation on the ground of national security, there is only a handful of jurisprudence in international tribunals that had the opportunity to discuss the issue. The ICJ in *Oil Platforms* and *Military and Paramilitary Activities* had adjudicated the invocation of security interest clause by the USA in the context of use force and hence did not address the meaning of "security" itself. Instances where tribunal was tasked to interpret the meaning of security interest outside of its conventional issue of defence and military interest was in the event of Argentine financial crisis in 2001–2002 and the subsequent claims by American company in the ICSID tribunal.

In the financial crisis of 2001–2002, Argentina enacted emergency economic and monetary measures that were subjected to claims for violation of BIT in the ICSID tribunal (Burke-White, 2008). Claims were brought by foreign investors and resulted in five different awards. In all of the five cases, Argentine invoked the security exception pursuant to Article XI of the US–Argentina BIT by stating that the emergency law was necessary for the protection of Argentina's essential security interests. Although the awards applied different threshold for the "necessity" of the measures, all of it confirmed that financial crisis may threaten the essential security interest of a State (UNCTAD, 2009).

The tribunal in *LG&E* v. *Argentina* stated that when a State's economic foundation was under siege, the severity of the impact could potentially equal that of any military invasion [32]. This remark is important as it confirmed the openness of the term "security interest" in dispute settlement, although it can be argued that this openness is specific to the text of Article XI of the US–Argentina BIT. Where GATT Article XXI confines its essential security interest within the context of its sub-paragraph, Article XI of US–Argentina BIT is broader in its security terminology as it does not have any limitative clause. The tribunals did look upon the economic, political and social impact of the crisis despite the varying degree of severity in each of the awards. From this practice, it is clear that security interest of State is intertwined with its obligation under economic instrument. The awards are the only instance where tribunals were tasked to interpret the meaning of essential security interest outside its traditional context.

As discussed *supra*, the term "security" is open to diverse interest and therefore may conflict with obligation imposed by a treaty. The panel in *Russia – Traffic in Transit* did limit the scope of security interest in Article XXI. The panel reasoned that the scope of security interest must be connected with one of the sub-paragraph, and in this context, the claimed interest must give rise to the security issue relating to defence and military interests, as well as maintenance of law and public order interests as enumerated in the sub-paragraph [33]. The panel goes further in its reasoning that "emergency in international relations" must therefore elicit the same interest and that political and economic conflict between States must also give rise to such interest to fulfil the meaning of "emergency in international relations" [34].

Although the panel had established the sub-paragraph of Article XXI(b) as limiting both the scope of the article and subjected it to the good faith in assessing the security interest, it still leaves the possibility of open interpretation. The panel's interpretation certainly narrowed the much broader readings of Article XXI(b) prior to the case. The problem therefore shifted from the scope of security interest to the meanings of the limitative clauses. Namely, in the definition of emergency in international relations. In this regard, the panel

had acknowledged that the boundaries of "emergency" are not clearly defined compared to the elements of war. For example, in the context of International Human Rights Law, the scope of emergency includes armed conflicts, natural disasters, mass demonstrations containing elements of violence or industrial accidents (UNHRC, 2001). Scholars had also pointed out that situations of pandemics that affect the ability of a state to maintain law and public order could also be deemed as an "emergency in international relations" (Oke, 2021). This demonstrates that although emergency in international relations is an objective requirement, the situations covered by the term are not exhaustive and are yet to be clearly defined.

5. Conclusion

Panel report in *Russia – Traffic in Transit* continues to spark debates surrounding State's security interest within the framework of WTO regime, particularly of those contained in Article XXI of GATT, Article XVI of GATS and article 73 of TRIPs. The report itself addresses extraordinary issues of balancing State's ability to protect its own security interest and maintaining the integrity of multilateral trade, while at the same time clarifying ambiguity and providing threshold specific to the aforementioned articles.

Both parties to the dispute had adopted the report on 26 April 2019 without further appeal. Ukraine stated that it would not pursue further action, noting that while the resulting report dismissed Ukraine's claims, it is favourable to Ukrainian's cause in Crimea. The panel's interpretation and analysis of Article XXI(b) plays a crucial role in the following security interest case. The panel in *Saudi Arabia – Protection of IPRs (DS567)* extensively refers to the interpretation of the panel in *Russia – Traffic in Transit*.

Critics had pointed at the flaws of the panel report that Russia had minimally, if not at all, made an argument on the merits of Article XXI(b) (Voon, 2020). Indeed, the panel seems to facilitate Russia's elusive description of the crisis in 2014 despite the fact that burden of proof lies in the State invoking the exception. The panel instead based its assessment on the UN General Assembly (2016) Resolution as evidence that the situation is known to the public and that its nature is of a "hardcore armed conflict" to conclude that Russia had lower threshold for its burden of proof.

It could be argued that Russia's reluctance to address the situation in Crimea as basis for its justification is facilitated by Article XXI(a), and that Russia is not required to disclose information that it considers would threaten its essential security interest. In this case however, no reference is made regarding Article XXI(a) at all. This issue may raise another loophole when the invoking State refuses to provide information on its chosen measures, which yet again leaves substantial discretion for the State invoking security exception to make the case more advantageous for them.

It is likely that *good faith* shall serves as a useful guidance to evaluate the issue of Article XXI(a). If future dispute would address the issue, good faith may be used as a standard to review its invocation, considering the fact that Article XXI(a) is similarly worded with the chapeau of Article XXI(b). In a situation that requires higher burden of proof, that is, the situation that does not resemble an armed conflict, this inquiry shall bear even greater importance.

The interpretation of essential security interest and emergency in international relations still leaves the possibility of open interpretation. The concept of security and emergency in international relations are not confined within the situation of armed conflict or conventional military and defence interest. Article XXI(b) does not provide any exhaustive list of the situation of emergency, and therefore the threshold is expected to vary in each cases.

Notes

1. To date, cases that refer to security exceptions under WTO covered agreement are the *United Arab Emirates – Goods, Services and IP Rights* (DS526), *Japan – Products and Technology* (Korea) (DS590) and *US – Steel and Aluminum* (DS544, 547, 548, 552, 554, 556 and 564).
2. The provision also contained *mutatis mutandis* in Article XIVbis of GATS and Article 73 of TRIPs.
3. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7.
4. WTO, *Russia – Measures Concerning Traffic in Transit: Request for Consultation by Ukraine*, WT/DS512/1, p. 1.
5. Panel Report, *Russia – Traffic in Transit* para. 7.5
6. Request for Consultation, *Russia – Traffic in Transit* p. 2.
7. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158.
8. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para 7.159.
9. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para 7.22.
10. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para 7.29.
11. This line of argument was raised several times in the International Court of Justice and is now known as "political question." See, e.g. Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America* v. *Iran*) [1980] ICJ 1; Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua* v. *United States of America*); Advisory Opinion for the Threat or Use of Nuclear Weapons, 1 ICJ Rep 226 (1996).
12. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158.
13. WTO Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, 6 March 2003, para. 46.
14. WTO Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, 19 December 1997, para. 92.
15. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13.
16. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.69.
17. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.72.
18. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.131.
19. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.146.
20. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.132.
21. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para. 7.133.

22. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para. 7.135.
23. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.138.
24. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para. 7.122; UN General Assembly, *Resolution No. 71/205: Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, UN. Doc. A/RES/71/205, 2016, https://undocs.org/en/A/RES/71/205 (Accessed 14 February 2021).
25. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.183.
26. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Judgment) (1986) ICJ Rep 14, para. 222.
27. Border and Transborder Armed Actions (Nicaragua v. Honduras) [1988] ICJ Rep 69, para 94.
28. *Supra* 28, para. 222.
29. US – Section 337; World Trade Organization, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes: Report of the Panel*, DS10/R - 37S/200, www.wto.org/english/tratop_e/dispu_e/gatt_e/90cigart.pdf (Accessed 13 April 2021), para. 223.
30. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para. 7.92.
31. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para. 7.90.
32. ICSID, *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v The Argentine Republic*, ICSID case no. ARB/02/1, 3 October 2006, para. 238.
33. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, Para 7.130.
34. WTO, *Russia – Measures Concerning Traffic in Transit: Report of the Panel* (5 April 2019) WT/DS512/R, para. 7.7., Para 7.158, Para. 7.13, para. 7.75.

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