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The Black Hole of National Security

Striking the Right Balance for the National Security Exception in International Trade

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EXECUTIVE SUMMARY

Article XXI of the General Agreement on Tariffs and Trade (GATT) reserves for members of the World Trade Organization (WTO) the legal authority to restrict trade in goods to protect members' "essential" security interests. Similar exceptions to WTO trade obligations exist in other WTO agreements. For more than seven decades, WTO members exercised self-restraint in invoking these exceptions, doing so only for narrow purposes and in truly exceptional circumstances to avoid pushing the boundaries of the law too far and thereby upending the delicate balance between members' legitimate pursuit of their security interests and their obligations to reduce barriers to trade. Yet, trade restrictions justified on national security grounds have proliferated in recent years and are increasingly subject to litigation in WTO dispute settlement. As a result, the national security provisions

contained within the WTO agreements, as well as fundamental questions about the nexus between trade and national security, are set to be tested and clarified by WTO jurists—a less than ideal outcome that could lead to the further undermining of WTO dispute settlement and the rules-based international trading system more broadly. This paper explains the origins of the national security exceptions in the GATT and the WTO agreements and the history of their invocation, summarizes recent litigation that has clarified these exceptions, discusses current developments and upcoming litigation that could prove pivotal to our understanding of the trade-security nexus and the future of the world trading system, and offers some concluding thoughts on the options available to WTO members for striking a balance between trade liberalization and the defense of national security.



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INTRODUCTION

The Russian invasion of Ukraine has raised numerous questions about the efficacy of international law. One question involves the mounting number of trade sanctions that have been imposed on Russia in response to its egregious actions. How can a long-standing exception to the basic rule of nondiscrimination in trade law—for measures taken for reasons of “national security”—be respected without permitting it to turn the world trading system into a black hole of an exception that becomes the new rule? And further: how can this be accomplished while maintaining the multilateralism that has long been the hallmark of that rule-based system, which is overseen by the WTO?

“International trade has been increasingly viewed in numerous countries not only as a mundane matter of buying and selling goods and services across international borders but also as a vital matter affecting national defense.”

Even before Russia invaded Ukraine on February 24, 2022, the “national security” exception had been increasingly invoked in recent years, principally by the U.S. government under former president Donald Trump. International trade has been increasingly viewed in numerous countries not only as a mundane matter of buying and selling goods and services across international borders but also as a vital matter affecting national defense. Many factors have led to this change in perspective. First, more and more WTO members turned inward and away from further trade liberalization in the wake of the global financial crisis that began in 2008. Second, the final collapse of the Doha Development Round of WTO trade negotiations in Nairobi in 2015 further slowed liberalization. Third, commercial and security issues became increasingly blurred with the development of new technologies amid rising geopolitical competition between China and Russia on the one hand and the United States, the other NATO countries, Japan, and their global allies on the other.

With Russia’s criminal aggression against Ukraine, this gradual trend has suddenly been accelerated by a spate of

retaliatory trade sanctions imposed by NATO and other countries on a panoply of Russian goods and services, and all of the sanctions are claimed to be actions taken for reasons of national security.¹ Banning and otherwise putting imports of Russian products at a disadvantage in competition with imports of like traded products from other WTO members is inconsistent with the fundamental most-favored-nation obligation in the WTO treaty. The sanctions are therefore excused under international trade law only if they fit within the bounds of the national security exceptions in the treaty.

Member nations’ increasing reliance on the WTO’s national security exceptions marks a profound change for the WTO. For three quarters of a century, the world trading system flourished almost entirely without disputes over the nexus between trade and national security. Today, more than a dozen international disputes are pending in the WTO dispute settlement system in which the national security exception has been invoked, most of them challenging unilateral steel and aluminum tariffs applied by the former Trump administration for what it claimed were national security reasons.² In resolving these pending disputes by clarifying the meaning of the national security exception, WTO jurists must, of course, acknowledge the sovereign right generally of WTO members to make their own determinations about what is best for their national security. Yet, they must do so in a way that acknowledges and affirms the treaty obligation that such determinations must remain *exceptions*. These actions must not become the norm. If that happens, the very foundation of the multilateral trading system will be undermined and international trade will plummet into a black hole in which the exceptions will become the rules.

THE NATIONAL SECURITY EXCEPTIONS

Article XXI of the General Agreement on Tariffs and Trade (GATT), which relates to trade in goods and is part of the WTO treaty, provides in full:

Security Exceptions

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.³

Two largely identical provisions are found elsewhere in the WTO treaty: Article XIVbis of the General Agreement on Trade in Services (GATS), relating to services trade, and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), relating to the treatment of intellectual property. GATT Article XXI has been in force since the original agreement on the GATT in 1947. GATS Article XIVbis and TRIPS Article 73 were added in 1995 when the scope of the trading system was broadened to include services and intellectual property.⁴ For the most part, until recently, all three of these treaty provisions have not been the subject of clarification in WTO dispute settlement. Members have invoked the exceptions—for example, in required member notifications or Trade Policy Reviews—but narrowly and not in ways that caused any major disagreements among members (such as during actual armed conflicts or to restrict trade in weapons and related technologies).

The exceptions offer affirmative defenses in WTO dispute settlement. A WTO member claiming the defense will do so in response to a legal complaint that the member's actions are inconsistent with its obligations under the WTO treaty. As with other exceptions to WTO obligations, the member claiming the defense has the burden of proving it is entitled to it. Thus, the defense has relevance only in the context of dispute settlement. Before it can be asserted, another member must first begin legal proceedings based on that member's contention that there is a treaty violation. Historically, members of the multilateral trading system have hesitated to initiate such

legal actions in WTO dispute settlement in deference to the fundamental significance of questions of national security and national sovereignty.

THE ORIGINS OF THE EXCEPTION AND LONG-STANDING PRACTICE

The modern debate over the intersection of trade and national security began during and immediately after World War II as the United States and its allies conceived and constructed the architecture of the postwar liberal international economic order. GATT Article XXI is one pillar of that architecture. In the United States, the internal debate at the time was about where to set the line between ensuring the opportunity for American goods to have more access to foreign markets while reserving an appropriate amount of discretion for necessary actions to safeguard American national security. This internal debate occurred in parallel with some of the first internal U.S. deliberations on what would soon become the Cold War with the Soviet Union.

“The negotiating parties, including the United States, assumed that the availability of the national security exception would be a question for determination under the terms of the new trade agreement.”

Indeed, it was the United States that played by far the largest role in crafting the language that ultimately became Article XXI. Most of the 22 other original contracting parties to the GATT had no difficulty in accepting the text for the exception proposed by the United States. The historical record reflects that the negotiating parties, including the United States, assumed that the availability of the exception in any specific instance would be a question for determination under the terms of the new trade agreement. It is clear from the negotiating history that, at the time, the United States did not view the Article XXI exception as a mechanism to excuse all restrictions on trade that might be labeled by the country imposing them as national security measures.⁵ Quite the opposite. As Daria Boklan and Amrita Bahri wrote in the *World Trade Review*:

The drafting history of GATT Article XXI shows that most contracting parties engaged in GATT negotiations, including the U.S. negotiators, had never intended the security exception to be construed in a purely self-judging manner. On the contrary, they advocated that national security and trade liberalization should co-exist in a balanced manner and national security should not be construed in a subjective manner so as to allow free flow of trade between members.⁶

The crux of the dilemma over the national security exception, then and now, was perhaps best expressed by one of the lead American negotiators on the GATT back in 1947, who said at the time: “It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures *which are needed purely for security reasons*. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”⁷ In other words, despite what the United States is insisting now, there is no blanket national security exception. The language of the exception in the treaty is meant to reflect a balancing of two potentially competing and conflicting interests: lowering barriers to trade and maintaining national security.

The balance that the GATT negotiators struck in crafting the national security exception for trade in goods remains today in the language of Article XXI. Unavoidably, determining how to strike that balance in particular instances includes an element of judgment that is left to independent and impartial WTO jurists. Yet, having even the most objective of trade jurists making judgments on matters ostensibly relating to national security is less than ideal. For that reason, the GATT contracting parties, and later the members of the WTO, long did all they could to make such judgments unnecessary. They attempted to resolve any trade-related national security questions through negotiations outside the trade dispute settlement process and by keeping express invocations of national security exceptions to a minimum.

Mutual restraint is too little valued as essential ballast for upholding the rule of law, domestically and internationally. Judicial restraint is much to be valued; but so, too, is restraint by those who would compel judges to make judgments—especially on the most difficult legal questions. It is best not to test the outer boundaries of any international

agreement—not to pursue the extreme case. In making decisions about how far to go legally when trying to prevail in any one dispute, short-term political pressures should yield to long-term considerations about preserving the rule of law and the institutional system that strives to uphold it. It is tempting to want to prevail in the trade dispute at hand, but doing so by pushing rules to the outer bounds of their legal limits may not always be the best course overall and for the long term, including for the complainant in that dispute.

“For many decades, mutual restraint was exercised on GATT Article XXI. The nexus between trade and national security did not become an issue in the world trading system largely because the members of the system refused to allow it to become one.”

For many decades, mutual restraint was exercised on GATT Article XXI. The nexus between trade and national security did not become an issue in the world trading system largely because the members of the system refused to allow it to become one.⁸ They understood that, with respect to the nuances of the terms of international agreements, some questions are better left unasked, for if they are not asked, they will never need to be answered. This was true for many years regarding the national security exception. Having struck a balance in the language of the exception, the members of the trading system did not want to test that balance. They were content to not know the answers to the unasked questions. It would have been best if this restraint had continued for another 75 years. But that did not happen. Instead, where that balance lies is now at the center of the global trade debate.

RECENT WTO DISPUTE SETTLEMENT ON THE NATIONAL SECURITY EXCEPTION

The Trump steel and aluminum tariffs are mostly responsible for moving the national security exception to center stage in trade—an outcome that WTO members,

including the United States, had spent decades trying to avoid. Those unilateral tariffs did not, however, give rise to the first WTO dispute leading to a judgment on the nature of the exception. Instead (and interestingly, given recent events) that first dispute was brought by Ukraine against Russia over Russian measures imposed between 2014 and 2018 that restricted Ukraine from using transit routes across Russia for traffic destined for markets in Central Asia. Ukraine claimed the Russian actions were inconsistent with Russian obligations under Article V of the GATT, which requires freedom of transit for traffic in traded goods.⁹ Russia did not deny this or bother to address Ukraine’s factual and legal claims. Instead, Russia simply claimed the shelter of the GATT exception for national security. In 2019, a WTO panel ruled in favor of Russia by acknowledging Russian entitlement to the national security defense based on the facts of that dispute.¹⁰

More important than the outcome of this dispute between Ukraine and Russia, however, was the way in which the panel reached its conclusions. Some of the unanswered questions about Article XXI were answered in the panel report. Others were not. In some respects, the answers the panel gave raised still more questions about other legal nuances of the exception. In the aftermath of this panel ruling, the contentious disputes about the meaning of Article XXI have by no means ended. Given the backload of similar disputes still winding their way through the WTO dispute settlement system, these disputes are only beginning. Yet, for the most part, the legal reasoning and legal rulings by the panel in the *Russia—Measures concerning Traffic in Transit (Russia—Traffic in Transit)* dispute provide a firm foundation for further clarification of Article XXI.

Perhaps the most important question that was resolved by the panel in the *Russia—Traffic in Transit* dispute was the threshold question of whether a WTO panel has the legal authority to judge a WTO trade dispute when the affirmative defense of the national security exception is invoked by a WTO member responding to a legal complaint by another member. Russia claimed that the national security exception is self-judging—that a WTO member cannot be second-guessed by WTO jurists when the member claims it is acting in defense of its national security. Therefore, Russia argued that only Russia could decide what was necessary to protect its own security interests, a decision the panel should, in Russia’s view, accept.¹¹

The United States, a third party to the dispute, agreed with Russia, despite what the U.S. GATT negotiators had said when the GATT was written about the need for a balance in the exception between national security and commercial interests.¹² In contrast to its original view, the bipartisan view of the United States in recent decades has been that such disputes are nonjusticiable in the WTO because, the United States contends, WTO jurists do not have the authority to question trade restrictions when the country imposing them maintains that they are imposed for national security reasons; the mere invocation of the defense is sufficient to establish it. The four most recent American presidential administrations, two from each party, have agreed—the second Bush administration, the Obama administration, the Trump administration, and now the Biden administration.

“If the national security exception is self-judging, then why bother to limit the circumstances in which it is available in the text of Article XXI? For that matter, if this exception is self-judging, why is Article XXI in the treaty at all?”

For their part, Australia, Brazil, China, the European Union, Japan, and other third parties to the dispute between Ukraine and Russia disagreed.¹³ They contended that the panel did have the legal authority to rule in the dispute, although they urged the panel to proceed carefully because such a sensitive systemic matter was at issue. As some of the third parties essentially did, one might ask the following question in response to the assertion that Article XXI is self-judging: If the national security exception is self-judging, then why bother to limit the circumstances in which it is available in the text of Article XXI? For that matter, if this exception is self-judging, why is Article XXI in the treaty at all? The customary rules of interpretation of public international law must be used when clarifying the obligations in the WTO agreement in WTO dispute settlement. This is required by the dispute settlement rules written by the WTO members as instructions for WTO jurists. These customary rules dictate that if a provision is included in a treaty, it must

have a meaning, and that meaning must be accorded to it by those who are entrusted with clarifying it. In the WTO, those so entrusted are the WTO jurists.

The panel in the *Russia—Traffic in Transit* dispute decided that the Russian measures at issue were justified under Article XXI because of the fraught factual circumstances that existed at the time between Ukraine and Russia, and it determined that the measures were “taken in a time of war or other emergency in international relations.” But the panel disagreed with Russia and the United States on the preliminary question of the justiciability of the dispute. The panel agreed with Ukraine and the third parties mentioned previously that it had the legal authority to decide the case.¹⁴ While acknowledging that WTO members have very broad discretion in invoking Article XXI, the panel ruled that such invocations are nevertheless subject to review by WTO panels. Acknowledged implicitly in this ruling is that the balance struck in the text of Article XXI can only be upheld if such a measure (characterized as a national security measure by the member imposing it) can be reviewed in WTO dispute settlement. If this were not so, then, as Peter Van den Bossche and Werner Zdouc have expressed, Article XXI would be “prone to abuse without redress.”¹⁵

“A basic principle of public international law is that international agreements must be carried out in good faith. Indeed, it is ‘perhaps the most important principle, underpinning many international legal rules.’”

WTO law is not self-contained; it is a part of broader public international law.¹⁶ A basic principle of public international law is that international agreements must be carried out in good faith.¹⁷ Indeed, it is “perhaps the most important principle, underpinning many international legal rules.”¹⁸ In addition to ruling that it had the authority to judge the case, the panel in the *Russia—Traffic in Transit* dispute reasoned that, while WTO members have much discretion in invoking the national security defense, that discretion is not without bounds. It has limits under the international legal requirement of good faith. The panel ruled that this principle of good

faith mandates that Article XXI not be used as a means of circumventing WTO obligations.¹⁹

In relying on the good faith principle, the panel in the *Russia—Traffic in Transit* dispute was not embarking on new legal ground in the WTO. It was echoing previous statements by WTO jurists, including the WTO Appellate Body, which has declared the good faith principle to be:

A general principle of law and a general principle of international law, [which] controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights. . . . An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Member so acting.²⁰

With this principle of good faith in fulfilling the terms of international agreements in mind, recall the most relevant language in Article XXI:

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.²¹

Based on its close reading of this treaty language, the panel in the *Russia—Traffic in Transit* dispute concluded that the phrase “which it considers necessary” confirms that a WTO member has the sole discretion in “taking any action . . . for the protection of its security interests.” Significantly, though, the panel ruled that this singular discretion under the introductory language of Article XXI(b) does not extend to the determination of the circumstances in the subparagraphs under (b).²² Thus, it does not extend to a determination under subparagraph (iii) of whether such a measure is “taken in a time of war or other emergency in international relations.” That is a question that can be judged; it is a question for a legal determination by a WTO panel when the issue is raised in WTO dispute settlement. In the *Russia—Traffic in Transit* dispute, the panel judged that the Russian

action was justified; in another dispute involving different facts, another panel could reach another result.

Significantly, too, the panel in the *Russia—Traffic in Transit* dispute observed that “war is one example of the larger category of ‘emergency in international relations,’” and that an emergency in international relations encompasses “all defense and military interests, as well as maintenance of law and public order interests.” The panel emphasized that “political or economic differences between members are not sufficient, of themselves, to constitute an emergency in international relations for the purposes of subparagraph (iii) . . . unless they give rise to defense and military interests, or maintenance of law and public order interests.”²³ In effect, then, the *Russia—Traffic in Transit* panel excluded political and economic differences from the scope of “essential security interests.”

In addition, the panel ruled that there must be some nexus between the measure taken and the “essential security interest” that the member seeks to serve by applying it. One element of good faith is that the restrictive trade measure in dispute must not be an “implausible” means of protecting the security interest in question.²⁴ Not just any measure restricting trade can be employed to pursue an “essential security interest.” The measure must help further the “essential security interest.” (Thus, it appears that former president Trump and his administration were overreaching—to say the least—in contemplating trade restrictions on imports of automobiles from two of America’s allies, Germany and Japan, for supposed reasons of national security. If Americans can trust these countries to stand with us in times of military conflict, if we can trust them to risk their very lives for us, then why can we not trust them to sell us automobiles?)²⁵

With its rulings in the *Russia—Traffic in Transit* dispute, the panel did not, technically, establish precedents. There is no law of precedent in the WTO or in other public international law. Yet, in keeping with their obligation under the WTO dispute settlement understanding to provide “security and predictability to the multilateral trading system,” WTO jurists generally try to maintain consistency in clarification of WTO obligations.²⁶ If they did not, uncertainty about the meaning of trade rules—or worse, conflicting interpretations of them—would impede the flow of world trade. Products are more likely to be traded if WTO members have certainty about how their products will be treated by their

trading partners. Minimizing uncertainty about the meaning of the rules to ease and speed the flow of trade, and thereby increase the volume of trade, was the motivation of WTO members in stressing the necessity for providing “security and predictability” in the world trading system through the dispute settlement rules in the WTO treaty.

“The *Russia—Traffic in Transit* panel excluded political and economic differences from the scope of ‘essential security interests’ and ruled that there must be some nexus between the measure taken and the ‘essential security interest’ that the member seeks to serve by applying it.”

Although the panel ruling in the *Russia—Traffic in Transit* dispute was not appealed to the WTO Appellate Body, the panel was chaired by a distinguished former member of the Appellate Body, Georges Abi-Saab, who is also one of the world’s most prominent scholars on public international law—adding further credence to the ruling. Furthermore (and surely not coincidentally), the reasoning of the panel in that dispute is in many respects persuasive, and thus it seems likely that much the same line of reasoning will be followed by other WTO jurists in pending and forthcoming WTO disputes involving Article XXI. So far, this is what has occurred. In the one dispute since the *Russia—Traffic in Transit* ruling involving a national security defense assertion that was resolved in WTO dispute settlement, the WTO panel largely followed the reasoning of the previous panel.

In 2017, before *Russia—Traffic in Transit*, the government of Saudi Arabia cut off all contact between it and the citizens and firms of Qatar, which the Saudis claimed was harboring and supporting terrorists. Among other results, the “anti-sympathy” measures the Saudis imposed on Qatar prevented Qatari holders of intellectual property rights from having access to Saudi courts to protect those rights when they were abused by a Saudi company. In the *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* dispute,

Qatar claimed that this refusal of access, in effect, denied its IP right holders the due process and other protections they are accorded under the TRIPS Agreement. Saudi Arabia invoked the national security defense under Article 73 of the TRIPS Agreement.²⁷ The relevant language of TRIPS Article 73 is identical to the relevant language of GATT Article XXI, namely:

Nothing in this Agreement shall be construed . . .

(b) to prevent a Member 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.²⁸

In its ruling, which was rendered after that in the *Russia—Traffic in Transit* dispute, the panel in the dispute between Saudi Arabia and Qatar echoed the reasoning of that previous panel: it acknowledged the extent of the breadth of the discretion reserved in the TRIPS national security exception for a determination by a WTO member of what “it considers necessary for the protection of its security interests.” The panel found that, because the Saudi measures had been taken during a time of severed relations between the two countries, they had been “taken in time of . . . emergency in international relations.” The panel concluded, however, that the Saudis had not demonstrated that their refusal to apply criminal remedies to a Saudi company for violation of the IP rights of a Qatari company was plausible as a necessity to their “essential security interest” of protecting themselves from terrorism and extremism. It found “no rational or logical connection” between the two.²⁹ Thus, in the first rejection of an assertion of a national security defense by a member of the WTO, the panel ruled in favor of the claimant, Qatar.

As one reason for its ruling, the panel pointed to multiple third-party submissions in the dispute by WTO members whose rights were also affected by the challenged Saudi measure. Thus, the panel evidently found third-party arguments such as the following made by the European Union to be persuasive:

When assessing the necessity of the measure, and particularly the existence of reasonably available alternatives, the Panel should ascertain whether the

interests of third parties which may be affected were properly taken into consideration. Thus, the European Union would appreciate if Saudi Arabia could provide a plausible explanation of the reasons why “it considers necessary” to allow the systematic infringement of the intellectual property rights of EU right holders in order to protect its essential security interests.³⁰

It can be expected that future panels will follow the same or similar reasoning when third-party rights are affected.

“In the wake of the Russian invasion of Ukraine, numerous WTO members have imposed economic sanctions—including trade sanctions—against Russia. These range from higher tariffs to outright trade bans to a complete repeal of normal trade relations.”

Notably, like the *Russia—Traffic in Transit* panel, the *Saudi—IP* panel rejected the argument that the matter of national security is nonjusticiable by WTO jurists. The United States reiterated the argument it had made in the previous dispute that the panel had no legal authority to rule in the new dispute. However, of the 13 WTO members that filed third-party submissions, only Bahrain agreed with the United States. The *Saudi—IP* panel adopted the same line of reasoning on this threshold issue as did the previous panel, and it appears likely that future panels will do the same, no matter how ardently the United States may continue to contend this point (again, contrary to its original position).

THE TRADE SANCTIONS AGAINST RUSSIA

In the wake of the Russian invasion of Ukraine, numerous WTO members have imposed economic sanctions—including trade sanctions—against Russia. These range from higher tariffs to outright trade bans to a complete repeal of normal trade relations. These discriminatory trade sanctions

are generally inconsistent with various WTO obligations, including the basic obligation of each WTO member to provide most-favored-nation treatment to like imported products of every other WTO member.³¹ That raises the issue of whether the trade sanctions against Russia can be excused because they fall within the boundaries of the national security exception in the WTO treaty.

Yes, they can. Indeed, these sanctions seem tailor-made to fit within those legal boundaries. This is not a situation involving ostensibly ominous Mercedes-Benz automobile imports into the United States from America's longtime ally, Germany. This is not former president Trump's pretend prosperity and peace. This is a situation of grave global concern. With military conquest in mind, and in violation of the Charter of the United Nations, Russian troops have been sent into the neighboring country of Ukraine by Russian president Vladimir Putin.³² They have engaged in scorched-earth warfare there against Ukrainian soldiers and civilians alike, and, despite recent Ukrainian successes in turning the Russians back, they remain there now, occupying cities, continuing their aggression, and reportedly engaging in war crimes.³³ The Russians have a large arsenal of nuclear weapons, and Putin has made increasingly bellicose threats to use them.³⁴

“The Russian trade sanctions pose a new challenge for the WTO, but this challenge can be met within the legal framework of the existing trade dispute settlement system.”

Without question, these are circumstances in which any other country in the world could reasonably consider that trade and other economic sanctions are “necessary for the protection of its essential security interests.” Without question, too, these are circumstances that constitute a “time of war or other emergency in international relations.” So long as there is some legitimate nexus between the measure taken and the “essential security interest” that the member applying the trade sanction against Russia seeks to serve by applying it, that member should be able to meet the burden of proving its entitlement to the national security exception in WTO dispute settlement.

The very existence of GATT Article XXI (and its companions in the services and intellectual property agreements) is evidence that, in conceiving and writing the rules in the WTO treaty, member nations clearly contemplated that a situation such as the one the trading system faces now might occur and that trade sanctions against an errant member could be the result. The proliferation of trade sanctions against Russia is therefore not a harbinger of the breakup of the WTO-based multilateral trading system; rather, it is an event that fits within the legal framework of that system, highly regrettable for the system but nevertheless clearly foreseen in its construction. The Russian trade sanctions pose a new challenge for the WTO, but this challenge can be met within the legal framework of the existing trade dispute settlement system.³⁵

Whether Russia will file any legal complaints against these trade sanctions in WTO dispute settlement is, at the time of writing, not yet known. Russia threatened at one point to withdraw from the WTO, but the Russian Foreign Ministry has since said that withdrawal is not being considered.³⁶ In June 2022, Russia threatened to respond to Lithuania's ban on the shipment of Russian goods by rail through Lithuania to the Russian Baltic city of Kaliningrad. The response Russia had in mind, though, appeared to be the imposition of retaliatory trade sanctions against Lithuanian products, and not legal action in WTO dispute settlement.³⁷ Regardless of what Russia may do in engaging in WTO dispute settlement, any WTO cases brought by Russia that challenge the current trade sanctions Russia faces will not be the next cases to clarify further the national security exception in WTO dispute settlement.

STRIKING THE RIGHT BALANCE ON THE NATIONAL SECURITY EXCEPTION

The next WTO cases to address the national security exception will be a series of pending cases against the United States. All the questions about the availability and scope of the national security exception will gain clarity when WTO panels render their rulings in the pending disputes against the United States arising from former president Trump's unilateral steel and aluminum tariffs. It is long past due for WTO panels to render these rulings. If they have been procrastinating in the hope that the geopolitical context would improve, that hope has been in vain.

These long-awaited panel rulings are a sword of Damocles hanging over the WTO: if the rulings are against the United States, it is not at all clear that the Biden administration will accept them. In such an event, Biden's trade team may be reduced to reiterating some of the dubious claims by the previous administration about the supposed misdeeds of WTO jurists, further poisoning the view of the WTO held by Congress and, thanks to much misinformation, widespread in the country as a whole. A refusal by the United States to comply with the rulings by removing the steel and aluminum tariffs would only further embolden all the destructive forces that seek to undermine trade multilateralism. The door would be opened anew to the rule of power instead of the rule of law in international trade.

“The alternative to litigation is negotiation. Conceivably, WTO members could come together to identify what they perceive as the balance contained in the national security exception.”

In all likelihood, the United States—having emptied the bench of the Appellate Body of any judges because of its bipartisan frustration that the Appellate Body will not do its bidding in trade remedies and other cases—will nevertheless and hypocritically exercise its right to appeal any rulings against it. That will put these disputes into a legal abyss, because the members of the WTO will be unable to adopt those panel rulings. The U.S. treaty violations will likely continue even if they have been found by WTO jurists not to be justified by a national security defense. This may be one reason why the Biden administration continues to be reluctant to engage seriously with other WTO members on appointing new members to the Appellate Body.

Should the United States refuse to comply with an adverse WTO panel ruling on national security, the stability and integrity of the WTO dispute settlement system will be further undermined. The United States will be the culprit. Yet, it was the United States that led the way in creating the system and, despite what a growing number of American politicians in both parties may think, the United States has

as much interest in maintaining the success of the system as any other member of the WTO, if not more. Membership in the WTO system has boosted annual U.S. GDP by about \$87 billion since the establishment of the WTO—more than for any other country.³⁸ Further undermining the WTO dispute settlement system will further undermine the institution as a whole. The WTO will be shunted still further from its rightful place at the center of world trade.

This raises the obvious and crucial question: How to prevent the potential undermining of the dispute settlement system and avoid the consequent marginalization of the WTO.

Clearly, the inclination of most members of the WTO is toward inertia—continuing to present claims of national security defenses on a case-by-case basis in dispute settlement. In the two cases brought against Russia and Saudi Arabia, WTO jurists have shown that they are capable of judging such cases and that they can reach the right result. Overall, their line of reasoning seems appropriate. Even so, as Simon Lester and Inu Manak have written, “To some extent, a Member’s declaration that a measure is for national security purposes could be taken as a statement that it will not change the measure even in the face of a WTO DSB [Dispute Settlement Body] ruling against it. As a result, there may be limits to the effectiveness of litigation in this area.”³⁹ The cumulative institutional cost to the WTO from resolving such disputes through litigation will be considerable.

Despite the sensitivities involved in such disputes, some WTO members may be inclined to accept adverse WTO judgments when their assertion of an exception for national security is declined by WTO jurists. In their own national utilitarian calculation, they will conclude that the costs of not complying with such a judgment will outweigh the benefits. But this will likely be the exception. In most cases, a member facing an adverse judgment will likely ignore it or render it moot by appealing the decision to an Appellate Body that is not there because it has no appointed judges. If the United States (or China, the European Union, or some other large trading country) chooses not to comply with a WTO judgment against it when it claims a defense of national security, other WTO members will do the same. Assertions of national security defenses will continue to proliferate and a black hole created by the national security exception will beckon as more and more

WTO obligations will be overridden by what is meant to be only an exception.

The alternative to litigation is negotiation. Conceivably, WTO members could come together to identify what they perceive as the balance contained in the national security exception. Lester and Manak have suggested that negotiations should establish an ongoing Committee on National Security as part of the institutional structure of the WTO “to address the growing challenges to the trade regime presented by national security measures.” More specifically, they have noted: “One solution that is always available is to rebalance the obligations as between the parties involved in the conflict, in the form of compensation and suspension of concessions or other obligations as temporary measures.” Toward this end, they point to the rebalancing that is permitted in the context of safeguard measures restricting imports, which (as their advocates generally neglect to mention) are applied in the absence of any allegation of an unfair trade practice.⁴⁰ Indeed, China and the European Union have treated the unilateral U.S. steel and aluminum tariffs as though they are safeguard measures and, on that basis, have, in response, “rebalanced” by imposing restrictions on U.S. imports.

“Increasingly, the line between domestic economic and national security measures has been blurred in the 21st century global economy as continued technological advances have had important national security and commercial implications.”

Clearly, negotiation is the preferred approach to finding a solution that will be satisfactory for all WTO members. But how likely is negotiation? Russia is in limbo in the WTO, a *de facto* pariah, pointedly ignored by virtually all other WTO members in WTO councils.⁴¹ The United States may also cling to its current insistence that the WTO has no say whatsoever whenever a WTO member invokes a national security defense. It is hard to imagine any circumstances in which the United States would then be willing to negotiate about the national security exception. And what of China? The

Chinese government has joined with others as a third party in the two disputes and has thus far taken the position that the national security exception is not self-judging. Whether China will maintain its current position when it wishes to assert a national security defense remains to be seen.

One critical question that ought to be addressed through negotiation instead of further litigation is whether there is any circumstance besides actual war and other martial conflict that could conceivably be considered an “emergency in international relations.” The ruling by the panel in the *Russia—Traffic in Transit* dispute that the scope of such emergencies includes “all defense and military interests, as well as maintenance of law and public order interests” omits all purely economic measures. This is the most cautious clarification of the national security exception, and there are good reasons to think it is the correct one.

Yet are these wholly noncommercial military situations truly the only kinds of emergencies in international relations that fall within the legal scope of the national security exception? Increasingly, the line between domestic economic and national security measures has been blurred in the 21st century global economy as continued technological advances have had important national security and commercial implications. Dispute settlement is less than ideal for discerning this line. But could negotiation help identify the right balance and add clarity to how the line is reflected in the national security exceptions in the WTO treaty—or will that task continue to be left to WTO jurists in further dispute settlement, with unforeseeable consequences? This is merely one of the many critical and complex questions that must be asked and answered by the WTO, ideally through negotiations.

CONCLUSION

It is far better to negotiate than to litigate. Indeed, it would have been far better to have negotiated on these and other important nuances of the national security exception some time ago when it first became apparent that, after decades of mutual restraint, WTO members were beginning to contemplate seriously the widespread use of such trade restrictions for the first time. Perhaps some of the current consternation could have then been avoided and the WTO members might not have found themselves caught in a geopolitical vise between the illegal

Trump tariffs on one side and the legal trade sanctions against Russia on the other. Nor would they be squeezed as they are now by competing understandings of the limits imposed by the exceptions on actions taken by WTO members for what they see as national security reasons. But that opportunity was missed.

In 2015, two years before Donald Trump became president of the United States and began to set aside what had long been the U.S. policy of restraint on invoking the national security exception, another member of the WTO

“requested that WTO members engage in negotiations on the scope of the rights and obligations under Article XXI of the GATT 1994 and Article XIV^{bis} of the GATT and adopt by June 2016 a General Council decision on the interpretation of these provisions.”⁴² At the time, the other WTO members declined to engage in the requested negotiations. In yet another irony given the circumstances within the trading system today, the WTO member that made that request was Russia. Perhaps, belatedly, WTO members will now change their minds and negotiate.

NOTES

1. Michelle Toh et al., “The List of Global Sanctions on Russia for the War in Ukraine,” *CNN Business*, February 28, 2022.

2. Recent WTO disputes involving national security elements include eight complaints against the United States in *United States—Certain Measures on Steel and Aluminum Products*, filed in 2018 by China (DS544), India (DS547), the European Union (DS548), Norway (DS552), Russia (DS554), and Switzerland (DS556). Cases challenging the U.S. steel and aluminum tariffs brought by Canada (DS550) and Mexico (DS551) have been settled. In addition, there have been five complaints involving Qatar as a complainant or a respondent, two filed in 2019 (DS567 and DS576), one filed in 2018 (DS526), and two filed in 2017 (DS527 and DS528); four disputes between Russia and Ukraine, one filed in 2020 (DS499), one filed in 2019 (DS512), and two filed in 2017 (DS525 and DS532); and a complaint, filed in 2019, by South Korea against Japan (DS590). For a thoughtful exploration of the rationale of the United States in using Section 232 of the Trade Expansion Act of 1962 in applying the unilateral trade restrictions challenged in these pending WTO disputes, see Scott Lincicome and Inu Manak, “Protectionism or National Security? The Use and Abuse of Section 232,” *Cato Institute Policy Analysis* no. 912, March 9, 2021.

3. The General Agreement on Tariffs and Trade (GATT), Article XXI. Emphasis added.

4. World Trade Organization (WTO), General Agreement on Trade in Services, Article 14^{bis}; and WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 73.

5. For a thorough and enlightening historical account of the negotiation and approval of GATT Article XXI, see Mona Pinchis-Paulsen, “Trade Multilateralism and U.S. National

Security: The Making of the GATT Security Exceptions,” *Michigan Journal of International Law* 41, no. 1 (2020): 109–93.

6. Daria Boklan and Amrita Bahri, “The First WTO’s Ruling on National Security Exception: Balancing Interests or Opening Pandora’s Box,” *World Trade Review* 19 (2020): 132.

7. “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, at 2.30 P.M. in the Palais de Nations, Geneva,” United Nations Economic and Social Council, E/PC/T/A/PV/33, July 24, 1947, p. 21. Emphasis added.

8. Although national security was invoked on several occasions before 2019, no panel report on the topic was ever adopted.

9. The GATT, Article V. Ukraine also claimed the Russian measures were inconsistent with Article X of the GATT, which requires the transparency of rules and regulations, and with several provisions of the Russian accession agreement to membership in the WTO.

10. “Russia—Measures concerning Traffic in Transit,” Report of the Panel, World Trade Organization, WT/DS512/R, April 5, 2019.

11. “Russia—Measures concerning Traffic in Transit,” p. 38, para. 7.57.

12. “Russia—Measures concerning Traffic in Transit,” Report of the Panel, Addendum, World Trade Organization, WT/DS512/R/Add. 1, April 5, 2019, pp. 106–110.

13. “Russia—Measures concerning Traffic in Transit,”

Addendum, pp. 69–110.

14. “Russia—Measures concerning Traffic in Transit,” p. 51, para. 7.104.

15. Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2017), p. 620.

16. See “United States—Standards for Reformulated and Conventional Gasoline,” Report of the Appellate Body, World Trade Organization, WT/DS52/AB/R, April 29, 1996.

17. The Latin phrase for this principle is *pacta sunt servanda*.

18. Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2003), p. 97.

19. “Russia—Measures concerning Traffic in Transit,” p. 56, paras. 7.132–7.133.

20. “United States—Import Prohibition of Certain Shrimp and Shrimp Products,” Report of the Appellate Body, World Trade Organization, WT/DS58/AB/R, October 12, 1998, pp. 61–62, para. 158.

21. The GATT, Article XXI.

22. “Russia—Measures concerning Traffic in Transit,” p. 50, para. 7.101.

23. “Russia—Measures concerning Traffic in Transit,” p. 41, paras. 7.72 and 7.74–7.75.

24. “Russia—Measures concerning Traffic in Transit,” p. 57, para. 7.138.

25. Paul Krugman, “Trump Is Abusing His Tariff Power, Too,” *New York Times*, January 23, 2020.

26. Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), Article 3.2.

27. “Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights,” Report of the Panel, World Trade Organization, WT/DS567/R, June 16, 2020.

28. The GATT, Article XXI.

29. “Saudi Arabia—Measures concerning the Protection of

Intellectual Property Rights,” p. 123, para. 7.292.

30. “Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights,” Report of the Panel, Addendum, World Trade Organization, WT/DS567/R/Add. 1, p. 64, para. 21.

31. The GATT, Article I.

32. Charter of the United Nations, Article 4.2. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

33. Glenn Thrush, “Garland, Visiting Ukraine, Names Prosecutor to Investigate Russian War Crimes,” *New York Times*, June 21, 2022.

34. David E. Sanger and William J. Broad, “Putin’s Threats Highlight the Dangers of a New, Riskier Nuclear Era,” *New York Times*, June 1, 2022.

35. For some interesting observations on these legal issues, see Mona Pinchis-Paulsen, “Characterizing War in a Trade Context,” *Opinio Juris* (blog), March 10, 2022.

36. “Russia’s Withdrawal from the WTO Not Being Considered,” *Interfax*, June 16, 2022.

37. “Russia Vows to Respond to Lithuania’s Ban on Goods Transit,” Associated Press, June 21, 2022.

38. Gabriel Felbermayr, Yoto V. Yotov, and Erdal Yalcin, “The World Trade Organization at 25: Assessing the Economic Value of the Rules Based Global Trading System,” Bertelsmann Stiftung, November 2019, p. 33.

39. Simon Lester and Inu Manak, “A Proposal for a Committee on National Security at the WTO,” *Duke Journal of Comparative and International Law* 30 (2020): 272.

40. Lester and Manak, “A Proposal for a Committee on National Security at the WTO,” pp. 269 and 272.

41. Sarah Anne Aarup and Ashleigh Furlong, “Russia Takes First Steps to Withdraw from WTO, WHO,” *Politico*, May 18, 2022.

42. Van den Bossche and Zdouc, *Law and Policy of the World Trade Organization*, p. 622.

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