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Trade Sanctions against Russia and their WTO Consistency: Focusing on Justification under National Security Exceptions

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Abstract

In the wake of Russia's 2022 invasion of Ukraine, around 40 countries/economies, including G7 members, responded to impose a wide range of economic, including trade-related, sanctions on Russia. The question immediately arises as to whether such sanctions violate the WTO agreements or are justified under the relevant national security exceptions. After introducing the material facts of the economic sanctions against Russia as well as the development of WTO jurisprudence on national security exceptions – particularly Article XXI(b)(iii) of the GATT –, this article goes on to analyse the WTO consistency of these trade sanctions against Russia, on a country-by-country and a measure-by-measure basis. From the standpoint of the "war or other emergency in international relations" and "its essential security interests" requirements, countries are categorised according to their geographic proximity and relationship (e.g., military alliances, customs unions, etc) to the belligerents, while measures are categorised by their nature and aim from the standpoint of the "necessary to protect" requirement.

Keywords

war in Ukraine – trade sanctions – WTO – GATT – security exceptions

1 Introduction

In response to the Russian invasion of Ukraine on February 24, 2022, about 40 countries/economies such as the Group of Seven (hereinafter "G7") countries, have since imposed a wide range of economic sanctions on Russia. Such sanctions include, among others, trade measures such as import and export bans, and the suspension of the most-favoured-nation (MFN) treatment. As the countries imposing trade sanctions as well as the target country, Russia, are all Members of the World Trade Organization (WTO), at first glance, such sanctions may appear inconsistent with the WTO agreements, for example, the General Agreement on Tariffs and Trade (GATT). However, there is scope for such measures to be justified under the relevant security exception clauses, namely GATT Article XXI and Article XIV bis of the General Agreement on Trade in Services (GATS).

This article first introduces the material facts of the economic sanctions against Russia and discusses their position in international economic law (Section 2). It then briefly introduces the development of the jurisprudence on WTO security exceptions focusing on GATT Article XXI (Section 3). Applying the standards developed in the jurisprudence to the facts of the trade sanctions against Russia, it goes on to analyse the WTO consistency of such measures on a country-by-country and a measure-by-measure basis (4). From the standpoint of the "war or other emergency in international relations" and "its essential security interests" requirements, countries are categorised according to their position regarding their geographic proximity and particular relationship to the belligerents, such as military alliances, customs union and so on, while measures are categorised according to their nature and aim from the standpoint of the "necessary to protect" requirement.

2 Material Facts of Economic Sanctions against Russia and Their Positioning in International Economic Law

2.1 *Material Facts of Economic Sanctions against Russia*

A summary of the material facts of the economic sanctions against Russia is as follows.

2.1.1 Countries Concerned

Countries and economies imposing sanctions and countries targeted by them are listed in Table 1 below. All countries concerned are WTO Members.

TABLE 1 Countries/economies concerned as of August 2023

Imposing	G7 (i.e., Canada, France, Germany, Italy, EU (representing 27 Members including France, Germany, and Italy), Japan, the UK, and the US), Australia,[a] Iceland, Liechtenstein, Moldova, New Zealand,[b] Norway, Singapore, South Korea, Switzerland, Taiwan, Ukraine[c]
Targeted	Russia[d]

a *See e.g.*, https://www.standard-club.com/ja/knowledge-news/australian-and-new-zealand-sanctions-targeting-russia-4289/.

b New Zealand Foreign Affairs and Trade, Russia Sanctions, at https://www.mfat.govt.nz/en/countries-and-regions/europe/ukraine/russian-invasion-of-ukraine/sanctions.

c Letter of the Permanent Representative of Ukraine to the Chairman of the WTO's General Council, 2 March 2022 (notifying the decision to impose a complete economic embargo, "consistent with its national security rights under, inter alia, Article XXI of the GATT 1994, Article XIVbis of the GATS, and Article 73 of the TRIPS Agreement").

d Current sanctions also target Belarus which is supporting Russia, the self-proclaimed Donetsk People's Republic and the self-proclaimed Luhansk People's Republic. However, they are out of consideration in this article as they are not the WTO Members.

2.1.2 Sectors and Measures Concerned

Sectors that are covered by sanctions include trade in goods, trade in services, investment, settlement, and the movement of persons. In parallel, the types of measures adopted include import and export bans of goods, exclusion from the SWIFT international settlement network,[1] ban on investment in Russia,[2] ban on entry of persons, and so on.

2.1.3 Reasons for Sanctions

As is explained in more detail in 4.1, there is currently no United Nations Security Council resolution placing an obligation on States to impose sanctions against Russia in response to its aggression against Ukraine. Therefore, the reasons for imposing sanctions vary depending on the imposing party and the types of measures. That being said, seeking to prevent Russia's access to

1 Though it is far from straightforward to establish whether the ban on using SWIFT international settlement network is inconsistent with the WTO agreements, it potentially constitutes a violation of GATT Article XI:1 as well as GATS Article XI:1. This article does not explore this point further. For a similar opinion, *see* Kazuyori Ito "Economic Sanctions against Russia and International Law," International Issues, Dec. 2022, p. 27.

2 For ban on investment to Russia, *see* Dai Tamada, "War in Ukraine and Implications for International Investment Law," in this special issue.

revenue and weapons, as well as access to resources for weapon manufacture, may be regarded as the primary reasons (*See* 4.4.2, below).

The above facts are key to identifying with which provisions of the WTO agreements the sanctions concerned are inconsistent and whether they can be justified under the security exceptions.

2.2 *Positioning Economic Sanctions in International Economic Law*

For example, Japan, in alignment with G7 sanctions against Russia has imposed the following trade sanctions (Table 2).[3]

TABLE 2 Japan's trade sanctions against Russia as of August 2023

Date of publication	Contents
Feb. 26, 2022	Export ban on items subject to International Export Control
Mar. 1, 2022	Export ban to Russian military-related entities, Export ban on dual-use products including semiconductors
Mar. 8, 2022	Export ban on oil refinary machines, etc.
Mar. 16, 2022	Suspension of MFN
Mar. 25, 2022	Export ban on luxury products
Apr. 12, 2022	Import ban on coal, machinery, wooden products, vodka
May 10, 2022	Export ban on emerging technology products incl. quantum computing
June 7, 2022	Export ban on products contributing to strengthening industrial base incl. lorries and bulldozers
July 5, 2022	Import ban on gold
Sep. 26, 2022	Export ban on products related to chemical weapons, etc.; export ban to 21 designated entities
Dec. 5, 2022[a]	Setting the maximum price of oil originating in Russia
Jan. 27, 2023[b]	Export ban to 49 designated entities; export ban on dual-use products which can strengthen military capacities incl. tear gas, robot, laser welder
Feb. 28, 2023	Export ban to 21 designated entities

a https://www.mofa.go.jp/mofaj/press/release/press4_009542.html.
b https://www.mofa.go.jp/mofaj/press/release/press4_009599.html.

3 *See Prime Minister's Office*, "Measures in Response to Russian Aggression against Ukraine", at https://www.kantei.go.jp/jp/headline/ukraine2022/index.html; Ministry of Economy, Trade and Industry, "On Sanctions against Russia etc.", at https://www.meti.go.jp/policy/external_economy/trade_control/01_seido/04_seisai/crimea.html; Ministry of Economy, Trade and

TABLE 3 Positioning Economic Sanctions against Russia in International Economic Law

	Export ban	Import ban	Settlement	Investment	Entry ban
Provisions	GATT XI, I	GATT XI, I	GATT XI, GATS XI	–	– (GATS ?)
Justification	GATT XXI	GATT XXI	GATS XIV-2	–	–
Issues/ Comments	Depending on who imposes, reasons and content, etc.	Depending on who imposes, reasons and content, etc.	Only the EU imposes?	No violation of BITs	Targeted persons are non-service providers

Note: BITs = bilateral investment treaties

As all the above concern export and import restrictions applied only to products destined for, or originating in, Russia, preliminarily, it may be concluded that they are inconsistent with either or both Article I, paragraph 1[4] and Article XI, paragraph 1[5] of the GATT.

The foregoing may be summarized in Table 3.

3 Security Exceptions under GATT Article XXI

3.1 *Text of GATT Article XXI*

GATT Article XXI provides for as follows:

Industry, "METI's Supports and Measures related to International Circumstances surrounding Russian Aggression against Ukraine," at https://www.meti.go.jp/ukraine/index.html.

4 Art. I, para. 1: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. (footnote omitted).

5 Art. XI, para. 1: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XXI 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.

3.2 *GATT Article XXI Jurisprudence*

As witnessed below Table 4, there has been no panel report that interpreted security exceptions during the GATT era. However, about 28 years after the establishment of the WTO, four panel reports have so far interpreted GATT Article XXI(b)(iii) and its chapeau, as well as its identical provisions in the Agreement on Trade Related Aspects of Intellectual Properties (TRIPS), namely Article 73(b)(iii) and its chapeau.

However, the Panel Report on *Saudi Arabia – IPRs* (DS567) has not been adopted as the two disputing parties agreed to terminate the dispute following Saudi Arabia's appeal. Both Panel Reports on *US – Steel and Aluminium Products* (DS544, etc.) and *US – Origin Marking* (*Hong Kong, China*) (DS597) have yet to be adopted as they are currently subject to appeal (by the United States) and have not yet been adopted. The Panel Report on *Russia – Traffic in Transit* (DS512) is the only one that has formally been adopted by the Dispute Settlement Body (DSB). As such, the following subsections mainly focus on the Panel Report on *Russia – Traffic in Transit* (DS512), while also pointing out the commonalities and differences at play among the four panel reports.

TABLE 4 Cases on GATT Article XXI and related provisions

Year	Case	Actions
1970	*Arab Boycott against Israel*	No panel established
1982	*Falkland/Malvinas Islands Dispute*	No panel established
1985	*US – Embargo on Nicaragua*	Panel report but Art. XXI was outside the terms of reference
2016–	*Russia – Traffic in Transit* (DS512)	Panel report adopted in 2019
2018–	*Saudi Arabia – IPRs* (DS567)	Panel report; adoption not sought[a]
2018–	*US – Steel and Aluminium Products* (DS544, etc.)	Panel reports appealed
2020–	*US – Origin Marking* (*Hong Kong, China*) (DS597)	Panel reports appealed

a After Saudi Arabia's appeal of the panel report, on 21 April 2022, Qatar notified the DSB that it had agreed to terminate the dispute, and that it would not seek adoption of the panel report. *See* DS567: *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm.

3.2.1 *Russia – Traffic in Transit* (DS512)[6]

Since January 2016, Russia has introduced measures to restrict all international cargo transit from Ukraine to Kazakhstan through the Russian territory only via the Belarus-Russia border. Ukraine formally filed a complaint within the context of WTO dispute settlement, claiming that these measures were, among other things, in violation of GATT Article V:2. In response, Russia argued that the Panel lacked jurisdiction to evaluate the measures as it invoked security exceptions, namely, GATT Article XXI(b)(iii).[7]

3.2.1.1 *Panel's Jurisdiction*

The panel examined whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The phrase "taken in time of" in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understood this phrase to require

6 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R adopted 26 April 2019.

7 *Ibid.*, para. 3.2.

that the action be taken during the war or other emergency in international relations. This chronological concurrence is an objective fact, amenable to objective determination. Moreover, the existence of a war is clearly capable of objective determination. War is one example of the larger category of "emergency in international relations" and it is clear that an "emergency in international relations" can only be understood as belonging to the same category of objective facts that are amenable to objective determination.[8]

Taking into account, as context for the interpretation of an "emergency in international relations" in subparagraph (iii), the matters addressed by subparagraphs (i) and (ii) of Article XXI(b), like a situation of war in subparagraph (iii) itself, are all related to defence and military interests, as well as maintenance of law and public order interests. An "emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b). These contexts suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was "taken in time of" an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.[9] In sum, the Panel considered that the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[10] Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia. Consequently, Russia's argument that the Panel lacked jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail.[11]

8 *Ibid.*, paras. 7.66–7.73.
9 *Ibid.*, paras. 7.74–7.77.
10 *Ibid.*, para. 7.82.
11 *Ibid.*, paras. 7.102–7.103.

3.2.1.2 *Article XXI(b)(iii)*

There was evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation was the fact that, since 2014, a number of countries had imposed sanctions against Russia in connection with this situation. Consequently, the Panel was satisfied that the situation between Ukraine and Russia since 2014 constituted an emergency in international relations, within the meaning of GATT Article XXI(b)(iii). The Panel also concluded that each of the measures at issue was "taken in time of" an emergency in international relations, within the meaning of GATT Article XXI(b)(iii).[12]

3.2.1.3 *Chapeau of Article XXI(b)*

The Panel stated that the question remains whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking Member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.[13]

"Essential security interests", which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.[14]

The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.[15]

However, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Rather, the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good

12 *Ibid.*, paras. 7.122–7.126.
13 *Ibid.*, para. 7.128.
14 *Ibid.*, para. 7.130.
15 *Ibid.*, para. 7.131.

faith. The Panel recalled that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith …") and Article 26 ("[e]very treaty … must be performed [by the parties] in good faith") of the Vienna Convention.[16]

The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.[17]

It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.[18]

What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.[19]

In the case at hand, the emergency in international relations is very close to the "hard core" of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.[20]

Given the character of the 2014 emergency, as one that has been recognized by the UN General Assembly as involving armed conflict, and which affects the security of the border with an adjacent country and exhibits the other features identified by Russia, the essential security interests that thereby arise for

16 *Ibid.*, para. 7.132.
17 *Ibid.*, para. 7.133.
18 *Ibid.*, para. 7.134.
19 *Ibid.*, para. 7.135.
20 *Ibid.*, para. 7.136.

Russia cannot be considered obscure or indeterminate. Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances. Moreover, there is nothing in Russia's expression of those interests to suggest that Russia invokes Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994.[21]

The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.[22]

The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency (emphasis added, footnotes omitted).[23]

All of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia's relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict. In these circumstances, the measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency. The Panel found that Russia had satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.[24]

3.2.2 *Saudi Arabia – IPRs* (DS567)[25]

In June 2017, Saudi Arabia severed all relations with Qatar. In response, Qatar filed a complaint within the context of WTO dispute settlement claiming that, among other things, Saudi Arabia's acts and omissions resulting in Qatari nationals being unable to protect their intellectual property rights, violate Article 42 of the TRIPS Agreement, because they fail to make available

21 *Ibid.*, para. 7.137.

22 *Ibid.*, para. 7.138.

23 *Ibid.*, para. 7.139.

24 *Ibid.*, paras. 7.144–7.145, 7.148.

25 Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 (adoption not sought).

to Qatari nationals civil judicial procedures concerning the enforcement of intellectual property rights, including inter alia the right to be represented by independent legal counsel; and Article 61 of the TRIPS Agreement, because they fail to provide for the application of criminal procedures and penalties to the wilful commercial scale piracy of a Qatari broadcasting company (beIN)'s copyrighted material. Saudi Arabia counterargued that its actions were justified under Article 73(b)(iii) of the TRIPS Agreement, wording of which is identical to that of GATT Article XXI(b)(iii).

After finding that Saudi Arabia has acted in a manner inconsistent with Articles 42 and 61 of the TRIPS Agreement,[26] the Panel almost followed the interpretations by the Panel in *Russia – Traffic in Transit* regarding i) "war or other emergency in international relations" and ii) "taken in time of" in Article 73(b)(iii) of the TRIPS Agreement, as well as iii) the obligation to sufficiently articulate relevant "essential security interests" in the chapeau of Article 73(b) and iv) the link between the actions concerned and the protection of the invoking party's essential security interests,[27] as both parties interpreted Article 73(b)(iii) of the TRIPS Agreement by reference to, and consistently with, the interpretation of GATT Article XXI(b)(iii), as developed by the Panel in *Russia – Traffic in Transit*.[28]

Applying these interpretations to the facts of this dispute, the Panel found: i) "a situation … of heightened tension or crisis" exists in the circumstances in this dispute (Saudi Arabia's severance of "all diplomatic and economic ties" with Qatar in the context that Saudi Arabia repeatedly alleged that Qatar had, inter alia, repudiated the Riyadh Agreements designed to address regional concerns of security and stability, supported terrorism and extremism, and interfered in the internal affairs of other countries), and is related to Saudi Arabia's "defence or military interests, or maintenance of law and public order interests" (i.e. essential security interests), sufficient to establish the existence of an "emergency in international relations";[29] ii) the measures concerned were "taken in time of war or other emergency in international relations";[30] iii) Saudi Arabia had expressly articulated its "essential security interests", in terms of protecting itself "from the dangers of terrorism and extremism";[31] and iv) the measures aimed at denying Qatari nationals access to civil remedies through Saudi courts as an aspect of Saudi Arabia's umbrella policy of ending

26 *Ibid.*, paras. 7.197 and 7.221.
27 *Ibid.*, paras. 7.241–7.255.
28 *Ibid.*, para. 7.231.
29 *Ibid.*, paras. 7.257, 7.258 and 7.263.
30 *Ibid.*, para. 7.270.
31 *Ibid.*, para. 7.280.

or preventing any form of interaction with Qatari nationals, "meet a minimum requirement of plausibility in relation to the proffered essential security interests" i.e. to protect Saudi citizens and the Saudi population, Saudi government institutions, and the territory of Saudi Arabia from the threats of terrorism and extremism,[32] while the non-application of criminal procedures and penalties to beoutQ i.e., a commercial-scale broadcast pirate, did not have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals, and, therefore, failed to "meet a minimum requirement of plausibility in relation to the proffered essential security interests."[33]

3.2.3 *US – Steel and Aluminium Products* (DS544 etc.)[34]

After finding the additional duties on steel and aluminium products imposed by the United States to be inconsistent with GATT Articles II:1(b) and II:1(a) as well as Article I:1,[35] the Panel rejected, as the Panel in *Russia – Traffic in Transit*, the United States' argument that GATT Article XXI(b) is entirely "self-judging" or "non-justiciable" and the provision contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member,[36] and also supported the interpretation that an "emergency in international relations" within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations.[37] Applying this interpretation to the case, the Panel could not find that the global excess capacity in steel and aluminium to which the United States referred rose to the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations" during which a Member may act under Article XXI(b)(iii), and, therefore, found that the inconsistencies of the measures at issue with GATT Articles I:1 and II:1 were not justified under GATT Article XXI(b)(iii).[38]

32 *Ibid.*, paras. 7.284–7.288.
33 *Ibid.*, para. 7.293.
34 *See e.g.*, Panel Report, *United States – Certain Measures on Steel and Aluminium Products (China)*, WT/DS544/R, 9 December 2022 (on appeal).
35 *Ibid.*, paras. 7.47 and 7.59.
36 *Ibid.*, para. 7.128.
37 *Ibid.*, para. 7.139.
38 *Ibid.*, paras. 7.148–7.149.

3.2.4 *US – Origin Marking* (*Hong Kong, China*) (DS597)[39]

Considering the ordinary meaning including the grammatical structure, and the context, of Article XXI(b) as well as the object and purpose of the covered agreements, the Panel found that the phrase "which it considers" in the chapeau of Article XXI(b) does not extend to the subparagraphs and, therefore, Article XXI(b) is only partly self-judging in that the subparagraphs are not subject solely to the invoking Member's own determination. Instead, the subparagraphs are subject to review by a panel and a finding that the circumstances set out therein do not apply, means that the action cannot be justified under the exception.[40] The GATT/International Trade Organization (ITO) negotiating history confirms such reading of the structure of Article XXI(b).[41] The Panel found that Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase "which it considers" in the chapeau of that provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.[42]

The Panel found that the origin marking requirement of the United States accorded to products of Hong Kong, China treatment with regard to marking requirements that was less favourable than the treatment accorded to like products of any third country and was thus inconsistent with Article IX:1 of the GATT 1994.[43]

The Panel also interpreted the ordinary meaning of the terms in the phrase "emergency in international relations" as suggesting a reference to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations.[44] The Panel found the United States and Hong Kong, China's international relations continued to involve cooperation in a number of policy areas and trade has carried on between the two, largely as before, with the exception of the origin marking requirement and some export controls. All of this militated against a conclusion of a breakdown or near-breakdown in international relations that the Panel had found to be consonant with an emergency in such relations.[45] Although there was evidence of the United States and other Members being highly concerned

39 Panel Report, *US – Origin Marking Requirement* (*Hong Kong, China*), WT/DS597/R, 21 December 2022 (on appeal).

40 *Ibid*., paras. 7.160–7.161.

41 *Ibid*., para. 7.175.

42 *Ibid*., para. 7.185.

43 *Ibid*., para. 7.252.

44 *Ibid*., paras. 7.282 and 7.290.

45 *Ibid*., para. 7.354.

about the human rights situation in Hong Kong, China, the Panel stated that the situation had not escalated to a threshold of requisite gravity to constitute an emergency in international relations that would provide justification for taking actions that are inconsistent with obligations under the GATT 1994.[46]

It is also worth noting that the panel stated in its *dicta* that the open reference to "international relations" suggests that the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations and. thus, a war taking place between two or more countries, could also give rise to an emergency in international relations affecting other countries.[47]

3.2.5 Commonalities and Differences among the Four Panel Reports

The three panel reports take a different approach to interpreting Article XXI(b). While the Panel in *Russia – Traffic in Transit* mainly relies on the nature of the subject-matters in subparagraphs (i) to (iii) of Article XXI(b) which are "subject to objective determination,"[48] the Panels in *US – Steel and Aluminium Products* and *US – Origin Marking* (*Hong Kong, China*) relied to a greater extent on the grammatical construction or analysis, and grammatical structure, of Article XXI(b) in reaching their respective interpretations.[49] It should be pointed out, however, that the three panel reports above all share the conclusion that Article XXI(b) is not entirely self-judging,[50] and reject the argument raised by parties that invoked Article XXI(b)(iii) that panels had no jurisdiction to review the merits of invocation. Although the Appellate Body has yet to uphold this point, it is worth noting that all panel reports to date arrived at this interpretation.

The Panels in *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* concluded that the measures concerned satisfied the requirement of "taken in the time of a war or an emergency of international relations" of Article XXI(b)(iii) and therefore were able to go on to examine whether they satisfied the two requirements in the chapeau of Article XXI(b) that such measures were "necessary"

46 *Ibid*., para. 7.358.

47 *Ibid*., paras. 7.297 and 7.307.

48 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.77.

49 Panel Report, *US – Steel and Aluminium Products*, *supra* note 34, paras. 7.115–7.116; Panel Report, *US – Origin Marking* (*Hong Kong, China*), *supra* note 39, paras. 7.34–7.35, 7.89, 7.160, fn 128, 129, 130.

50 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.102; Panel Report, *US – Steel and Aluminium Products*, *supra* note 34, para. 7.128; *US – Origin Marking* (*Hong Kong, China*), *supra* note 39, paras. 7.160 and 7.309.

to protect the invoking Members' "essential security interests". The Panel in *Russia – Traffic in Transit* found both to be satisfied, while the Panel in *Saudi Arabia – IPRs*, for the first time, found that requirement concerning "necessary" had not been satisfied in relation to one of the measures. It is worth pointing out that the Panel in *Russia – Traffic in Transit* successfully introduced not too intrusive nor too permissive a standard, in an attemp to strike a delicate balance between the needs to prevent the abuse of national security exceptions and to ensure each Member's sovereignty to define its own national security interests and to design measures necessary for their protection.[51]

On the other hand, the Panels in *US – Steel and Aluminium Products* and *US – Origin Marking* (*Hong Kong, China*), for the first time, denied the existence of "an emergency of international relations" and thus did not need to examine whether the two requirements in the chapeau were satisfied. Neither Panel did not touch upon the applicability of the principles of good faith to the two requirements in the chapeau, as was applied by the Panel in *Russia – Traffic in Transit*. It is therefore necessary to keep a close eye on whether the chapeau of Article XXI(b) continues to be interpreted to function as a minimum safeguard to prevent the abuse of security exceptions.[52]

51 *See* Peter Van den Bossche and Sarah Akpofure, "The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994", *WTI Working Paper* No. 03/2020, pp. 7–8, 25 (evaluating the panel in Russia Traffic in Transit (2019) struck the correct balance between, on the one hand, the sovereign right of Members to determine what their security interests are and how to protect these interests, and, on the other hand, the inherent need for the WTO to avoid abuse of national security exceptions.); Viktoriia Lapa, "The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?", Questions of International Law, May 12, 2020 (evaluating the Panel skillfully dealt with the interpretation of the security exception of the GATT and managed to design a flexible framework which will accommodate the need for deference towards WTO Members on the one hand, and will prevent the abuse of the security exception on the other hand.), at http://www.qil-qdi.org/the-wto-panel-report-in-russia-traffic-in-transit-cutting-the-gordian-knot-of-the-gatt-security-exception/. *See also* Caroline Glöckle, "The second chapter on a national security exception in WTO law: the panel report in *Saudi Arabia – Protection of IPR*", EJIL: Talk!, July 22, 2020, *available at* https://www.ejiltalk.org/the-second-chapter-on-a-national-security-exception-in-wto-law-the-panel-report-in-saudi-arabia-protection-of-ipr/.

52 Separate Opinion of Judge Iwasawa, International Court of Justice, Judgment, Certain Iranian Assets (Islamic Republic of Iran v. United States of America) 30 March 2023, paras. 21–22 (After mentioning the Panel Report in *Russia – Traffic in Transit*, which introduced the principle of good faith in the interpretation of the chapeau of Article XXI(b), introducing the ICJ case law which states that this exercise of discretion is still subject to the obligation of good faith.).

4 Application to Trade Sanctions against Russia

4.1 *Applicable Provisions to Justify*

As there has been no UN Security Council resolution mandating the imposition of sanctions against Russia, GATT Article XXI(c) is not applicable. Therefore, our examination is limited to the applicability of (b)(ii) and (b)(iii) (*See* 3.1, above).

WTO Members, including Japan, that have imposed sanctions against Russia have not explained the reasons their sanctions are justified. It can be reasonably understood from the viewpoint of litigation strategies that possible justifications should not be disclosed to potential disputing parties until the dispute settlement procedures commence.

However, as circumstances that constitute objective conditions in each provision are different between (b)(ii) and (b)(iii), the essential security interests which should specifically be articulated and the measures necessary to protect such interests can vary between the two provisions. In addition, (b)(iii) sets a temporal limitation via the phrase "in time of war or other emergency" while (b)(ii) does not do so via the phrase "relating to the traffic in arms." Therefore, when designing measures that, on the face, may be inconsistent with WTO agreements yet necessary to be justified under security exceptions, governmental officials involved in their design should examine in detail based on which provisions such measures may be justified and try to ensure logical consistency, in order to avoid, and prepare for, potential WTO disputes.

If we look at Table 2 (*See* 2.2 above), most of the sanctions imposed by Japan so far seem more likely to be justified under (b)(iii) while some including export bans to Russian military-related entities and export bans of products related to chemical weapons are likely to be justified under both (b)(ii) and (b)(iii). Therefore, the following sections will mainly focus on (b)(iii).

4.2 *"(I)n Time of War or Other Emergency of International Relations" in Article XXI(b)(iii)*

This section aims to examine whether measures imposed by each country may satisfy the first requirement "in time of war or other emergency of international relations." As summarised earlier (*See* 3.2.1), the Panel in *Russia – Traffic in Transit* interpreted that whether it is "in time of war or other emergency of international relations" is an objective situation and whether it is "taken in the time" is also an objective fact which can be objectively determined by the panel.[53]

53 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.77. Panel Report, *US – Steel and Aluminium Products* (*China*), *supra* note 34, para. 7.148.

For the purposes of analysis, imposing countries are categorised into the following groups.

4.2.1 Parties to War or Armed Conflict (war, etc.)

The Panel in *Russia – Traffic in Transit* summarised (*See* 3.2.1), offered the following general statement: "An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[54] It also found that after the 2014 Crimea Crisis, Russia and Ukraine were in a situation of armed conflict.[55] As it was found that there was an "emergency in international relations" which was very close to a war between the complaining party Ukraine and the respondent party Russia which invoked Article XXI(b)(iii), it was apparent that the provision was applicable.

On the other hand, the Panel in *Saudi Arabia – IPRs* (*See* 3.2.2) considered that "a situation … of heightened tension or crisis" existed in the circumstance of that dispute by taking into account Saudi Arabia's repeated accusations that Qatar supported terrorism and extremism as background leading to Saudi Arabia's severance of diplomatic and consular relations with Qatar.[56] In that case, there was no finding of a situation very close to a war but an "emergency in international relations" between the two disputing parties was found to exist. Thus, Article 73(b)(iii) of the TRIPS Agreement – worded in terms identical to Article XXI(b)(iii) –, was found applicable.

Based on the above, Ukraine's trade sanctions against Russia in response to the latter's aggression can undoubtedly satisfy the requirement of "in time of war or other emergency of international relations" in Article XXI(b)(iii) as the two potentially disputing countries are in a war.

4.2.2 Non-parties to War, etc.

Justification under security exceptions that has been accepted in WTO jurisprudence only relates to cases of trade restrictions or suspension of intellectual property protection between direct parties to a war or an emergency in international relations, that is, *Russia – Traffic in Transit* and *Saudi Arabia – IPRs*. In the GATT era, Argentina had argued in the GATT Council that, other than the UK, EEC member states, Canada, and Australia could not ban imports from

54 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.76 (Footnote omitted).
55 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, paras. 7.122–7.123.
56 Panel Report, *Saudi Arabia – IPRs*, *supra* note 25, paras. 7.257, 7.258, 7.263.

Argentina by invoking GATT Article XXI(b)(iii) in reference to the Falkland/Malvinas Islands Dispute between Argentina and the UK in 1982.[57] So far, this issue of whether a Member that is invoking (b)(iii) must be a party to war, etc., has not been resolved in GATT and WTO jurisprudence.

However, the phrase "in time of a war or an emergency of international relations" in Article XXI(b)(iii) does not include limiting wording such as "its" war or "its" emergency. If taking a textual interpretation based on such wording, one may conclude that a country that is invoking GATT Article XXI(b)(iii) need not be a party to war, etc., and that any non-party to war, etc. may also argue that it is "in time of a war or an emergency of international relations."[58] In fact, the Panel in *US – Origin Marking* (*Hong Kong, China*) (*See* 3.2.4), albeit in *dicta*, indicated some favor towards such interpretation by stating that "(w)e recall that, the open reference to "international relations" suggests that the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations. Thus, a war taking place between two or more countries could also give rise to an emergency in international relations affecting other countries."[59]

However, it is very unreasonable for countries that are not geographically close to the parties of war, etc. and totally unrelated to such war, etc. on the other side of the world, to take advantage of the war occurring between two countries and to be permitted to impose trade restrictions on either or both parties to the war. This should not be resolved through the "in time of a war or an emergency of international relations" but through the more comprehensive

57 *Guide to GATT Law and Practice: Analytical Index*, Updated 6th ed. 1995, p. 605.

58 Though it is not so clear whether it is based on such textual interpretation, the following literature expressly states that a country who is invoking Article XXI(b)(iii) need not to be a party of a war. Timothy Meyer and Todd N. Tucker, "There are two ways to kick Russia out of the world trade system. One is more likely to work. Would WTO members change the rules?" *Washington Post*, March 11, 2022. at https://www.washingtonpost.com/politics/2022/03/11/russia-wto-penalize-ukraine-conflict/.

59 Panel Report, *US – Origin Marking Requirement* (*Hong Kong, China*), *supra* note 39, para. 7.297. On the other hand, the Panel in *Saudi Arabia – IPRS* in 3.2.2 above, stated that the Panel considered that "a situation … of heightened tension or crisis" exists in the circumstances in this dispute, and is related to Saudi Arabia's "defence or military interests, or maintenance of law and public order interests" (*i.e.* essential security interests), sufficient to establish the existence of an "emergency in international relations." Panel Report, *Saudi Arabia – IPRS*, *supra* note 25, paras. 7.257, 7.258 and 7.263. This may be interpreted that at the stage of finding an emergency in international relations, it is required to show the relationship to the essential security interests of an invoking party.

interpretation of the "essential security interests" and "necessary to protect" requirements in the chapeau of Article XXI(b) (*See* 4.3 and 4.4, below).

4.3 *"[I]ts Essential Security Interests" in the Chapeau of GATT Article XXI(b)*

4.3.1 Standard of Review

The Panel in *Russia – Traffic in Transit* stated that, while "it is left, in general, to every Member to define what it considers to be its essential security interests",[60] "the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith"[61] and also stated that "[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity … the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict."[62]

In the case of a party to the war such as Ukraine in the present case, it becomes apparent that "its essential security interests" are related, and even in case of a total ban taken by Ukraine, it would be very likely for such measures to be considered "necessary to protect its essential security interests."[63] On the other hand, it is necessary to conduct a more careful examination in the case of non-parties to war, etc. For the purposes of the ensuing analysis, non-parties to war, etc. are categorized into the following three groups.

4.3.2 Military Allies for the Parties of War, etc.

Even if imposing countries are not parties to war, etc., if they are military allies of the parties to war, they can be regarded as being in "a situation … of latent armed conflict" and thus as at least parties in "an emergency of international

60 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.131.

61 *Ibid.*, para. 7.132.

62 *Ibid.*, paras. 7.134–7.135.

63 *See* Prabhash Ranjan, "Russia-Ukraine War and WTO's National Security Exception," *Foreign Trade Review*, 2022, p. 1, p. 8.

relations." In such cases, it is very easy for them to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."

However, although Ukraine has expressed a strong interest in acceding to the North Atlantic Treaty Organization (NATO), it has yet to accede. Therefore, imposing countries that are NATO members cannot argue that they are parties in "an emergency of international relations" on the basis of a military alliance with Ukraine.

On the other hand, the United States, Canada, and European countries have repeatedly supplied considerable amounts of arms to Ukraine following the Russian invasion. Therefore, the question arises as to whether they too are belligerent countries. However, it is not considered that countries become belligerent countries on account of supplying arms to armed forces of a belligerent country.[64]

4.3.3 Countries Neighboring or Close to the Parties of War, etc.

Are imposing countries that are not the parties to war, etc., yet are geographically neighbouring or close to such parties able to invoke Article XXI(b)(iii)? It has been argued that such countries can invoke it to justify their measures.[65]

For example, Moldova (a WTO Member but not a NATO Member), who has imposed some sanctions in line with the EU, may be regarded as reasonably apprehensive of a similar threat of aggression by Russia as it has a sizable Russian population within its territory as is also the case with Ukraine. Countries in such a situation may be regarded as being in "a situation … of latent armed conflict … or of heightened tension or crisis" and thus as parties experiencing "an emergency of international relations", even if they are not belligerents parties to the war, etc. In addition, Poland as well as Estonia, Latvia, and Lithuania (the Baltic Three) which are neighbouring or close to Ukraine or Russia or Russia's military ally, Belarus, and Ukraine can be regarded as being reasonably apprehensive of a similar aggression by Russia. In the case of these countries, it is relatively easy to "articulate the essential security interests said

64 Michael N. Schmitt, Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force, March 7, 2022, at https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/. *See also* Marko Milanovic, The United States and Allies Sharing Intelligence with Ukraine, EJIL: Talk!, May 9, 2022, at https://www.ejiltalk.org/the-united-states-and-allies-sharing-intelligence-with-ukraine/.

65 Kazuhiro Nakatani, "Economic Sanctions against Russia," *Jurist* No. 1575, 2022, p. 115 (Supporting the invocation of GATT Article XXI(b)(iii) by countries neighboring or close to Russia).

to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."

On the other hand, it is not readily determined whether countries such as Germany, France, and Italy which are not geographically neighbouring or close to parties to the war, etc., may be regarded as reasonably being apprehensive of such threat to such a degree as to justify the invocation of security exceptions. However, if Poland and the Baltic Three can be regarded as parties in "an emergency of international relations" that are expected to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity," then there would be greater scope for trade sanctions uniformly imposed by the EU as a whole to be justified under Article XXI(b)(iii) insofar as these countries have delegated their powers to design and implement trade policy measures to the EU.

In the case of the United States and Japan, they are at least geographically remote from the areas where the war is taking place, and it is thus far from clear how they may be experiencing "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" nor whether they are able to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." However, if Poland and the Baltic Three can be regarded as parties in "an emergency of international relations," and all being NATO members, then there is scope for other NATO members including Canada, Iceland, Norway, the UK, and the United States to also argue to be parties in an "emergency of international relations" and to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." On the other hand, these arguments are not open to Japan as it is neither a NATO nor an EU member, leading to it being categorised in the final grouping (*see* 4.3.4) below.

4.3.4 Other Countries

Among the current imposing WTO Members, Japan, Australia, New Zealand, South Korea, Singapore and Taiwan (Group 4) cannot be categorized in either of the above categories, and, it is therefore difficult to be regard these as parties in "a war or an emergency of international relations" based on the above reasons.

4.3.5 Summary

The analysis in the foregoing (*see* 4.3.1 to 4.3.4) seeks to clarify the scope of parties in "war or an emergency of international relations" in terms of the ongoing

TABLE 5 Imposing countries/economies as of August 2023

Imposing	G7 (= Canada, *EU* (*27 Members including France, Germany, and Italy*), **Japan**, UK and US), **Australia**, Iceland, **Liechtenstein**, Moldova, **New Zealand**, Norway, **South Korea**, **Singapore**, **Switzerland**, **Taiwan**, Ukraine

Boxed: Parties to war. etc. and countries in a situation of latent armed conflict; *Italic*: EU member states; Underlined: NATO members; **Bold**: Group 4

Russian aggression towards Ukraine which are in a position to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." Table 5 summarises that analysis.

4.3.6 Group 4

Regarding countries in Group 4 (*see* 4.3.4, above), which are not geographically close to the parties to war, it does not seem possible for them to satisfy the requirements of "its essential security interests" directly by the fact that a war is taking place between the other countries, and it is, therefore, necessary to more carefully examine their "essential security interests" in order to avoid abuse of the security exceptions. The Panel in *Russia – Traffic in Transit* made it abundantly clear that "the further it is removed from armed conflict, … the less obvious are the defence or military interests … In such cases, a Member would need to articulate its essential security interests with greater specificity." For example, when countries in Group 4, which are not close to the parties to war, impose import bans from, or export bans to, either of the parties to war, they would be required to more specifically articulate their "essential security interests".[66]

To such end, Group 4 countries such as Japan, Australia, South Korea and New Zealand are likely to attempt to justify their trade sanctions against Russia[67] by arguing that Russia's invasion of Ukraine in 2022 constitutes

66 For a similar opinion, *see* Ito, *supra* note 1, p. 28.

67 For a similar argument, *see* Ranjan, *supra* note 63, p. 9; David Collins, "The WTO's Essential Security Exception and Revocation of Russia's Most Favoured Nation Status following the Invasion of Ukraine", *City Law Forum*, March 15, 2022 (suggesting a Member's essential security interests probably also include the respect for all internationally recognized borders and the prohibition of territorial acquisition by military force.). https://blogs.city.ac.uk/citylawforum/2022/03/15/the-wtos-essential-security-exception-and-revocation-of-russias-most-favoured-nation-status-following-the-invasion-of-ukraine/.

aggression in violation of Article 2 (4), of the Charter of the United Nations (the UN Charter)[68] and, as the prohibition of aggression is an obligation *erga omnis*,[69] it also constitutes a threat to the international order[70] and thus amounts to an "emergency in international relations" which involves "essential security interests" of all WTO Members in general.[71] In the present case, however, the issue arises as to whether WTO dispute settlement which concerns trade-related rules, is, or should be, able to make findings as to the existence of aggression by a certain country.[72] If such question is being contested between the disputing parties, there would conceivably be criticism of an international organisation specialising in rules related to the economic sphere to be too involved in such political or otherwise highly politicised questions.[73]

68 Article 2, paragraph 4 of the United Nations Charter. "(a)ll 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."

69 *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v. Spain*), ICJ Reports 1970, p. 32, paras. 33–34.

70 Government of Canada, Canada cuts Russia and Belarus from Most-Favoured-Nation Tariff treatment, 3 March 2022. "Russia's invasion of Ukraine … is a violation of international law and threat to the rules-based international order. Canada is taking further action to ensure those who do not support the rules-based international order cannot benefit from it." https://www.canada.ca/en/department-finance/news/2022/03/canada-cuts-russia-and-belarus-from-most-favoured-nation-tarifftreatment.html.

71 Executive Order on Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, March 8, 2022. "finding that the Russian Federation's unjustified … war against Ukraine, including its recent further invasion in violation of international law, including the United Nations Charter, further threatens the peace, stability, sovereignty, and territorial integrity of Ukraine, and thereby constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States."

72 The Panel in *Russia – Traffic in Transit* took a very cautious approach towards this type of findings. Panel Report, *Russia – Traffic in Transit*, *supra* note 6, paras. 7.5, "It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events.") and 7.121, "[I]t is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general."

73 Albeit in the direction that contracting parties' right to invoke security exceptions in GATT Article XXI should be respected, *see* the following arguments by the United Arab Republic at the time of the Arabic Boycott against Israel and by Canada at the time of the Falkland/Malvinas Islands dispute. *Guide to GATT Law and Practice*, *supra* note 57, pp. 602, "In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT." and 600, "Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action

That being said, this is not unprecedented. In fact, various WTO dispute settlement panels and the Appellate Body have previously adopted the fact findings of other specialised international organisations,[74] In this respect, it is crucial that the United Nations General Assembly Special Session on 2 March 2022 found that the Russian invasion of Ukraine was an aggression in violation of Article 2 (4) of the UN Charter.[75]

It is worth noting that the resolution was adopted in an emergency special session of the General Assembly in response to the failure of the Security Council to adopt a resolution deploring Russia's aggression against Ukraine in violation of Article 2 (4) of the UN Charter due to Russia vetoing such efforts.[76] Even when the Security Council becomes paralysed, for instance, in case of armed conflicts involving a permanent member of the Security Council and WTO Members are unable to invoke GATT Article XXI(c) as not preventing "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," there is scope to seek to rely on GATT XXI(b)(iii) instead, based on the existence of a General Assembly resolution expressly acknowledging the occurrence of aggression. If we take this to its conclusion, even Group 4 countries not close to Russia or Ukraine may be able to invoke GATT Article XXI(b)(iii) by referring to General Assembly Resolution ES-11/1 (adopted on 2 March 2022) which deplores Russian aggression against Ukraine.

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elsewhere, as *the GATT had neither the competence nor the responsibility to deal with the political issue* which had been raised." (emphasis added).

74 *See e.g.*, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R adopted 8 November 1998, para. 132 (confirming the exhaustibility of sea turtles by referring to the fact that all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")). *See also* Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.122 (confirming an emergency in international relations by referring the recognition by the United Nations General Assembly that the situation between Ukraine and Russia was involving armed conflict.).

75 *See* Resolution adopted by the General Assembly on 2 March 2022, ES-11/1, Aggression against Ukraine: "2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter". *See* Valerie Hughes, *et al.*, "Russia Will Challenge Economic Sanctions at the WTO", Bennett Jones Blog, March 22, 2022 (arguing that Canadian sanctions against Russia can be justified by GATT Article XXI(b) based on Resolution ES-11/1), at https://www.bennettjones.com/Blogs-Section/Russia-Will-Challenge-Economic-Sanctions-at-the-WTO. Hughes, *et al.* also argue that the phrase "urgent action is needed to save this generation from the scourge of war" in the resolution can serve as a basis to that end.

76 United Nations, S/2022/155 and S/PV.8979; Resolution 2623 (2022) adopted by the Security Council at its 8980th meeting, on 27 February 2022.

This will undoubtedly attract considerable criticism to the effect that WTO dispute settlement should refrain from becoming entangled in political or otherwise highly politicised events, even when panels themselves are not directly involved in findings of aggression but rely on the pronouncements of other international organisations or bodies such as the General Assembly.[77] The Panel in *Russia – Traffic in Transit*, however, found it to be an objective fact that Russia and Ukraine were "in war or other emergency in international relations" since 2014 by taking as evidence the United Nations General Assembly recognition of the situation between Ukraine and Russia as involving armed conflict.[78] Therefore, scope certainly exists for future panels within the context of WTO dispute settlement to also make such findings of fact based on the resolutions of the United Nations General Assembly.

As discussed above, there is scope for trade sanctions against Russia in response to Russia's invasion of Ukraine to be justified by arguing that the invasion constitutes "war or other emergency in international relations" for any WTO member including those that are not belligerent countries, and that it is related to their "essential security interests" based on Resolution ES-11/1 which finds Russian aggression in violation of the UN Charter. On the other hand, it is also worth reiterating that even when a war, etc. is taking place, unless there is such Resolution finding an aggression, trade sanctions adopted by any country may not always be justified by arguing that a "war or other emergency in international relations" exists for the invoking party and that such measures are "necessary to protect its essential security interests" (*see* 4.4, below).

4.4 *Measures "It Considers Necessary to Protect" in the Chapeau of GATT Article XXI(b)*

4.4.1 Standard of Review

The Panel in *Russia – Traffic in Transit* states that "(t)he obligation of good faith … applies not only to the Member's definition of the essential security

77 For example, India in the GATT era expressed similar criticism. *Guide to GATT Law and Practice*, *supra* note 57, p. 608. "India did not favour the use of trade measures for non-economic reasons. Such measures should only be taken within the framework of a decision by the United Nations Security Council. In the absence of such a decision or resolution, there was a serious risk that such measures might be unilateral or arbitrary and would undermine the multilateral trading system". *See also* similar criticism in the following statement regarding economic sanctions against Russia. Joint communiqué following the 21st meeting of the Shanghai Cooperation Organisation (SCO) Heads of Government (Prime Ministers) Council, 1 November 2022. "Unilateral economic sanctions, other than the sanctions approved by the UN Security Council, are inconsistent with the principles of international law and adversely affects third countries and international economic relations."

78 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, para. 7.122.

interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests. The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency."[79]

In addition, though its report has not been adopted by the DSB, the Panel in *Saudi Arabia – IPRs* found that, as part of the comprehensive measures to end any direct or indirect interaction between Saudi Arabia and Qatar, the measures to deny Saudi law firms from representing or interacting with Qatari nationals "meet a minimum requirement of plausibility" in relation to the proffered essential security interests, i.e. to protect Saudi Arabia itself from the dangers of terrorism and extremism.[80] On the other hand, it also found that the non-application of criminal procedures and penalties to beoutQ (i.e., a commercial-scale broadcast pirate in Saudi Arabia) did not have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals and, therefore, it was so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that Saudi Arabia implemented these measures for the protection of its "essential security interests".[81]

The above precedents go against the previous understanding that GATT Article XXI(b) is an entirely "self-judging" clause and demonstrate that panels can examine whether invoking countries meet the necessity test in its chapeau, though it does not reach the level of stringency of the necessity test in GATT Article XX(a), (b) and (d), which examines whether there are less trade-restrictive alternatives that are reasonably available.[82] The standard of review that is applied here is whether the measure at issue meets "a minimum requirement of plausibility", that is to say, whether it is so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member implemented the measure for the protection of its "essential security interests" arising out of the emergency. Under this standard, it is not

79 Panel Report, *Russia – Traffic in Transit*, *supra* note 6, paras. 7.138–7.139.

80 Panel Report, *Saudi Arabia – IPRs*, *supra* note 25, paras. 7.284–7.288.

81 *Ibid.*, paras. 7.289–7.293.

82 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R adopted 17 December 2007, para. 156.

permitted to examine whether there are less trade-restrictive alternatives and the test would be similar to the tests of "a close and genuine relationship of ends and means" as to "relating to" in GATT Article XX(g) and of "bring about a material contribution to the achievement of the objective" as a preliminary phase of the necessity test in Article XX(b),[83] or less stringent than those tests.

4.4.2 Application to Trade Sanctions against Russia

Applying the above standard of review (*see* in 4.4.1), export bans on items 1 to 3 in Table 6 are to diminish Russia's capacity to continue with its war efforts by making it impossible or at least difficult to procure or manufacture weapons, and thus not so remote from, or unrelated to, Japan's essential security interests to stop Russian aggression in violation of the UN Charter. In addition, the same can be applied to item 4, if it can be categorised along the lines of item 2.

On the other hand, item 5 (export ban on products contributing to strengthening Russia's industrial bases), covering a variety of products cannot necessarily be regarded as an export ban on weapons nor a measure directly making it impossible or difficult for Russia to finance war. Such a measure would certainly call into question whether it can be characterised as weakening Russia's

TABLE 6 Japan's trade sanctions against Russia as of August 2023

	Contents
1	Export ban on items subject to International Export Control (machine tools, carbon fiber, products related to chemical weapons, etc.)
2	Export ban on dual-use products which strengthen military capacity incl. semiconductors, personal computers, telecommunication equipment, etc.)
3	Export ban to Russian military-related entities incl. Ministry of Defence, aircraft manufacturers
4	Export ban on emerging technology products incl. quantum computing, 3D printers
5	**Export ban on products contributing to strengthening industrial base including lorries and bulldozers**
6	Export ban on oil refinery machines, etc.
7	Export ban on luxury products including luxury cars and jewellery, etc.
8	Import ban on coal, machinery, wooden products, vodka, gold, etc.
9	Suspension of MFN including tariff increase imposed on crude oil

83 Appellate Body Report, *US – Shrimp*, *supra* note 74, para. 136; Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 82, para. 151.

economy in the long term and thus decreasing the Russian capacity to continue with the war. Item 5 is the only one on which it can be disputed whether it "meet[s] a minimum requirement of plausibility".

Next, both import bans and the suspension of MFN application are measures aimed at curtailing Russian fiscal revenue from oil and gas exports and, therefore, at undermining Russia's ability to keep financing the war. Therefore, these measures are not too remote and unrelated to Japan's essential security interests in ending Russian aggression in violation of the UN Charter. Differential treatment towards products such as introducing an import ban on oil but not gas is not problematic under the standard of review of the necessity test in the chapeau of GATT Article XXI(b).[84]

On this point, the Panel in *US – Origin Marking* (*Hong Kong, China*) interpreted the phrase "an emergency in international relations" to refer to "a situation representing a breakdown or near-breakdown in those relations," thus appearing to suggest that a partial restriction of trade cannot be regarded as a breakdown or near-breakdown in international relations.[85] If we were to strictly adhere to this interpretation, even in the case of war or armed conflict and there being an emergency in international relations also for countries other than the belligerents, GATT Article XXI(b)(iii) may not be invoked unless such countries adopt a total ban on both imports and exports. This would seriously impair the self-judging power of Members who invoke GATT Article XXI(b)(iii) and would be inconsistent with the *dicta* of the Panel itself that "the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations but could happen more broadly in relations among a wider group of WTO Members".[86] Therefore, the paragraphs of the Panel Report that seem to require total breakdown in international relations can be interpreted as having in mind scenarios other than war, etc., for instance, the severance of relations as seen in *Saudi Arabia – IPRs*.

5 Concluding Remarks

Given the current strategic competition between the United States and China and the Russian invasion of Ukraine, the dysfunction of the UN Security Council is becoming patently clear to all. Now the possibility of invoking GATT

84 In the case of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), inconsistent treatment of similar disease risks between products such as beef and pork, can be problematic. *See* Article 5, paragraph 5 of the SPS Agreement.

85 Panel Report, *US – Origin Marking* (*Hong Kong, China*), *supra* note 39, paras. 7.290 and 7.354.

86 *Id.*, paras. 7.297 and 7.307.

Article XXI(c) is accordingly diminishing and the need to flexibly interpret GATT Article XXI(b)(iii) as an alternative is rapidly highlighted. In that context, this article's interpretative approach – namely, to consider the fact-finding aspects of an otherwise non-binding UN General Assembly resolution – may have certain theoretical and practical significance. On the other hand, as some of elements of the relevant jurisprudence suggest, it is crucial to interpret security exceptions in a balanced way to prevent their abuse. Currently we are merely at the starting point of a long journey.