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RUSSIA – TRAFFIC IN TRANSIT: A LANDMARK CASE UNDERMINING THE ROLE OF WTO SECURITY EXCEPTIONS AMIDST TRADE AND HYBRID WARS

Abstract

This article explores the relationship between trade and hybrid warfare conducted by state actors in the context of the Russia-Ukraine war before Russia's full-scale invasion in 2022 and the US-China trade war. It analyzes recent WTO case-law, notably the landmark case Russia – Traffic in Transit, where justification under GATT Art. XXI was successfully invoked by Russia – a WTO member that launched armed aggression against its neighbor, resorting to occupation and annexation of Ukraine's territories. Panel's application of a two-tier test in this case is put into question as Russia has neither explained what constituted an emergency in international relations nor articulated its essential security interests. The analysis addresses how Russia employed trade war tactics as part of its arsenal in the realm of hybrid warfare, subsequently escalating to a full-scale aggression against Ukraine, triggering the largest continental war in Europe since WWII. However, the article recognizes the balanced nature of the GATT Art. XXI interpretation, requiring the Panel to assess whether the measures were "taken in time of war or other emergency in international relations," and also to identify whether the invoking member acted in good faith when establishing the connection between the measures and its essential security interests. If applied correctly, this interpretation should not encourage further trade wars.

Keywords: trade war, hybrid war, WTO law, security exceptions, Russian aggression.

It has been 11 years since Russia started a war against Ukraine and more than 2 years since Russia's full-scale aggression against Ukraine began. Yet, there is a critical lack of legal studies exploring the connections between trade and hybrid wars. This article fills these gaps and focuses on the role of WTO security exceptions in hindering or facilitating trade wars.

The notion of hybrid warfare, or synonymous 'hybrid war,'¹ continuously evolves, and its relation to trade wars remains underexplored. This article analyzes the following points:

- (i) the relevance of a trade war component and its connection with hybrid war;
- (ii) trade measures adopted by the parties to the Russia-Ukraine trade and hybrid war before Russia launched its full-scale invasion, as well as the US-China trade war;
- (iii) the role of GATT Article XXI (Art. XXI) in trade wars, based on its interpretation in the PR *Russia – Traffic in Transit*² case, as well as

the most recent WTO case-law, particularly, *Saudi Arabia – IPRs*³, *US–Origin Marking*⁴, *US–Steel and Aluminium Products*⁵.

³ *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Panel Report, June 16, 2020, DS567, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm.

⁴ *US – Origin Marking (Hong Kong, China)*, WTO Panel Report, December 21, 2022, DS597, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm.

⁵ There was a series of disputes from eight different complainants: *US – Steel and Aluminium Products (China)*, WTO Panel Report, December 9, 2022, DS544, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm; *US – Steel and Aluminium Products (India)*, WTO Panel Report, August 8, 2023, DS547, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds547_e.htm; *US – Steel and Aluminium Products (EU)*, WTO Panel Report, October 18, 2018, DS548, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm; *US – Steel and Aluminium Products (Canada)*, WTO Panel Report, July 11, 2019, DS550, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds550_e.htm; *US – Steel and Aluminium Products (Mexico)*, WTO Panel Report, July 11, 2019, DS551, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds551_e.htm; *US – Steel and Aluminium Products (Norway)*, WTO Panel Report, December 9, 2022, DS552, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds552_e.htm; *US – Steel and Aluminium Products (Russia)*, WTO Panel Report, January 25, 2019, DS554, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds554_e.htm; *US – Steel and Aluminium Products (Turkey)*, WTO Panel Report, December 9, 2022, DS564, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds564_e.htm.

¹ Alex Deep, "Hybrid War: Old Concept, New Techniques," *Small Wars Journal*, February 3, 2015, <https://smallwarsjournal.com/jrnl/art/hybrid-war-old-concept-new-techniques>.

² *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.

(i) Hybrid war combines political, conventional, irregular, and cyber warfare⁶ with other influencing methods,⁷ expanding beyond traditional warfare⁸. NATO's interpretation of the notion of the hybrid war includes economic developments, of which trade wars may form a part⁹. The distinction between the definitions of hybrid wars that refer to economic factors or omit them can be explained by examining the evolution of hybrid war.

Hybrid wars can be either conducted by non-state actors, such as in the Israel-Hezbollah conflict and the Syrian civil war,¹⁰ or by state actors, as seen in the Russian-Georgian and Russian-Ukrainian hybrid wars.¹¹ In the latter, states use economic tools like trade wars strategically. Trade wars are less applicable when non-state actors are involved due to the lack of formal trade relationships. This article primarily examines state-to-state hybrid wars, where economic strategies, including trade wars and economic statecraft, play significant roles alongside military and informational tactics.

Hybrid war, exemplified by Russia's strategies against Ukraine, integrates economic statecraft with military operations.¹² Economic statecraft, which includes sanctions and trade agreements, serves to advance national foreign policy goals.¹³ Russian hybrid war transformed into a full-scale aggression against Ukraine on February 24th, 2024. This led to a trade embargo between the two countries. This article examines the trade wars that preceded this invasion, focusing on the Russia-Ukraine and US-China contexts.

(ii) Trade measures having the greatest detrimental economic effect in the Russia-Ukraine

and US-China trade wars are highlighted. Those trade measures are distributed into four groups, depending on their subject matter: covering trade in goods, services or intellectual property rights.

Regarding trade in goods, in case of the Russia-Ukraine hybrid war, Russia imposed the first set of restrictive trade measures in July 2013, seven months before the occupation of Crimea¹⁴ and a year before Russian military intervention in the East of Ukraine¹⁵ banning "the import of [some] confectionery products"¹⁶ as a warning for Ukraine not to enter into an Association agreement with the EU.¹⁷ These actions were also classified as an act of aggression by the EU, Parliamentary Assemblies of the OSCE and the Council of Europe.¹⁸ Additionally, 40 enterprises from different sectors of the Ukrainian economy, owned by Ukrainian oligarchs, were put to Russian "list of risk" and made subject to additional customs formalities with the prospect of an import ban,¹⁹ but within 10 days the restrictions were withdrawn. Subsequently, Ukraine decided not to enter into the Association Agreement with the EU.

This decision caused Euromaidan events, and after the change of government, Ukraine decided to enter into an Association agreement with the EU, signed in March 2014, which includes a part on EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA) with the EU, signed in July 2014.²⁰ The second wave of Russia's measures in the trade war with Ukraine followed immediately, with Russia's import bans on (1) juice products, including baby food from July 2014,²¹ (2) alcoholic and beer beverages from August 2014,²² (3) a list of

⁶ Michael Kofman and Matthew Rojansky, *A Closer look at Russia's "Hybrid War"*, Wilson Center, Kennan Cable 7, April 2015, <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/7-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>.

⁷ Ahmed Salah Hashim, "State and Non-State Hybrid Warfare," LSE Digital Library, March 30, 2017, <https://lse-atom.arkivum.net/uklse-as1ox010070010116>.

⁸ Damien Van Puyvelde, "NATO Review – Hybrid war – does it even exist?," *NATO Review*, May 7, 2015, <https://www.nato.int/docu/review/articles/2015/05/07/hybrid-war-does-it-even-exist/index.html>.

⁹ Michael Aaronson, Michael Miklaucic, Sverre Diessen, Yves De Kermabon, and Mary B. Long, "NATO Countering the Hybrid Threat," Defense Technical Information Center, September 1, 2011, <https://apps.dtic.mil/sti/citations/AD1042838>.

¹⁰ Greg Grant, "Hybrid Wars," *Government Executive*, May 1, 2008, <https://www.govexec.com/magazine/features/2008/05/hybrid-wars/26799/>

¹¹ Mark Galeotti, "(Mis)Understanding Russia's two 'hybrid wars'," *Eurozine: Europe's leading cultural journals at your fingertips*, November 29, 2018, <https://www.eurozine.com/misunderstanding-russias-two-hybrid-wars/>.

¹² Arsalan Bilal, "NATO Review – Russia's hybrid war against the West," *NATO Review*, April 26, 2024, <https://www.nato.int/docu/review/articles/2024/04/26/russias-hybrid-war-against-the-west/index.html>.

¹³ What Is Economic Statecraft?, CFR Education from the Council on Foreign Relations, May 12, 2023, <https://education.cfr.org/learn/reading/what-economic-statecraft>.

¹⁴ UN, General Assembly, *Territorial integrity of Ukraine*, Resolution A/RES/68/262, adopted April 1, 2014; UN, General Assembly, *Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, Resolution A/RES/71/205, adopted 2016.

¹⁵ Edith M. Lederer, "Russia criticized at UN over Ukraine conflict, Crimea, crash," *AP News*, May 30, 2018, <https://www.apnews.com/2a7b209ae4894b1cb48ad6665064fa49>.

¹⁶ *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products*, Request for Consultations, October 19, 2017, DS532, paras. 34, 40, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm.

¹⁷ Nikolaj Nielsen, "Ukraine and Russia on path to trade war over EU pact," *EUobserver*, August 19, 2013, <https://euobserver.com/foreign/121146>.

¹⁸ Sergey Sayapin, "The End of Russia's Hybrid War against Ukraine?," *Opinio Juris*, April 1, 2019, <http://opiniojuris.org/2019/01/04/the-end-of-russias-hybrid-war-against-ukraine/>.

¹⁹ Evhenii Havrylov, "Russia «Without a Declaration of War» Put Pressure on Ukrainian Importers," *Mirror of the Week*, August 12, 2013, https://dt.ua/ECONOMICS/rosiya-bez-ogoloshennya-viyni-posilila-tisk-na-ukrayinskih-importeriv-126613_.html.

²⁰ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.7.

²¹ *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products*, Request for Consultations, October 19, 2017, DS532, paras. 3-10.

²² *Ibid.*, paras. 23-28.

agricultural products from August 2014,²³ (4) all Ukrainian confectionery products from September 2014,²⁴ (5) wallpaper and similar wall coverings from April 2015²⁵ and (6) suspension of conformity assessment certificates on railway products that effectively resulted in import ban on these products from 2014.²⁶

As for Ukraine, in August 2014 it prohibited exports of military and dual-use products to Russia.²⁷

The third round of Russia's measures unfolded when EU-Ukraine DCFTA entered into force on 1 January 2016. On 29 December 2015, Russia introduced transit limitations for all products mentioned above.²⁸ From 1 July 2016, Russia adopted a transit ban on products in categories (1), (3), (4) mentioned above that prevented traffic in transit by road or rail from Ukraine destined for Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan.²⁹

In response, on 10 January 2016, Ukraine imposed an import ban on a wide range of agricultural and industrial products.³⁰ In May 2016, Ukraine adopted a law that excluded vehicles from or transiting through Russia from the reduced duty rates.³¹ In December 2016, Ukraine adopted a law requiring approval of the Ministry of Information Policy of Ukraine for import and distribution of printed materials originating from, manufactured in and/or delivered from Russia.³²

The fourth round of trade escalation occurred after Russia as an occupying power in Crimea attacked three Ukrainian navy ships and its crew

members in the Kerch Strait heading to Ukrainian ports of Berdyansk and Mariupol in November 2018.³³ In December 2018 Russia broadened the scope of its import ban on the products originating in Ukraine or transiting through its territory including a wide range of both agricultural and industrial products.³⁴ On 30 April 2019, upon request of Kazakhstan and Kyrgyz Republic, Russia made exceptions regarding some industrial goods from Resolution No. 1716-83 that were temporarily allowed to transit through Russian territory until 1 July 2019.³⁵ In April 2019 Ukraine added several items, such as different types of glass bottles, to its import ban list.³⁶

Another set of trade restrictive measures regarding goods were adopted on 18 April 2019 after Russia successfully invoked Art. XXI security exceptions in the WTO dispute *Russia – Traffic in Transit*.³⁷ Russia banned the export of crude oil, oil products and coal to Ukraine as of 1 July 2019.³⁸ After the full-scale invasion started Ukraine had adopted a trade embargo on all Russian products on the 9th of April 2022 with the decision of the Government of Ukraine by Resolution N 426.³⁹

Trade restrictive measures of both parties referred to above may amount to inconsistencies with GATT Arts. I:1, II, V, X or XI. As both Ukraine and Russia acceded to the WTO, trade restrictions discussed may be inconsistent with various provisions of countries' Accession Protocols. Considering that among the most recent WTO cases on application of Art. XXI the only case with successful resort to this exception with the Adopted Panel Report was by Russia, the key question addressed in part (iii) of this paper is how potential inconsistencies with the GATT and Accession

²³ Government of Russian Federation, *On measures for implementation of the Decree of the President of the Russian Federation dated August 6, 2014 No 560 "On the application of certain special economic measures to ensure the security of the Russian Federation,"* Resolution 778, adopted August 7, 2014, https://food.ec.europa.eu/system/files/2016-10/ia_eu-russia_ru-eu-import-ban_20140820_unoff-trans-en.pdf.

²⁴ *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products*, Request for Consultations, October 19, 2017, DS532, paras. 36-40.

²⁵ *Ibid.*, paras. 55, 62.

²⁶ *Russia – Railway Equipment*, WTO Panel Report, July 20, 2018, DS512, para. 2.2, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds499_e.htm.

²⁷ National Security and Defense Council, *On the measures regarding improvement of state military and technical policy*, Decision, adopted August 27, 2014.

²⁸ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.1(a).

²⁹ *Ibid.*, para. 7.1 (b), (c).

³⁰ Cabinet of Ministers of Ukraine, *About the ban on importation into the customs territory of Ukraine of goods originating from the Russian Federation*, Decree 147, adopted December 30, 2015, <https://www.kmu.gov.ua/npas/248749006>.

³¹ *Ukraine – Measures relating to Trade in Goods and Services*, Request for Consultations, May 19, 2017, DS525, para. 3, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds525_e.htm.

³² Verkhovna Rada of Ukraine, *On Amendments to Certain Laws of Ukraine in Relation to Restricting Access of Foreign Printed Materials with Anti-Ukrainian Content to the Ukrainian Market*, Law of Ukraine 1780-VIII, adopted December 8, 2016.

³³ UN, General Assembly, *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov*, Resolution A/RES/73/194, adopted December 17, 2018.

³⁴ Government of Russian Federation, Resolution 1716-83, adopted in 2018, Annex.

³⁵ Darya Kharchenko, "Russia lifter the restriction on transit of Ukrainian goods under sanctions," *NV*, April 29, 2019, <https://nv.ua/ukr/world/geopolitics/rosiya-znyala-zaboronu-na-tranzit-pidsankciynih-ukrajinskih-tovariv-50019165.html?fbclid=IwAR0ThJvpR4iauBq6UeBmS-TIFjNWIsJ020LpEZWyO2LA0D1M6dkTIAMPrTY>

³⁶ Cabinet of Ministers of Ukraine, *About the ban on importation into the customs territory of Ukraine of goods originating from the Russian Federation*, Decree 147, adopted December 30, 2015, <https://www.kmu.gov.ua/npas/248749006>.

³⁷ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.149.

³⁸ Gabriel Hardy-Françon, "Russia bans exports of oil products to Ukraine," *Kyiv Post*, April 18, 2019, <https://www.kyivpost.com/business/russia-bans-exports-of-oil-products-to-ukraine.html>.

³⁹ Cabinet of Ministers of Ukraine, *On the application of the ban on the import of goods from the Russian Federation*, Decree 426, adopted April 9, 2022.

protocols were justified under Art. XXI in *Russia-Traffic in Transit*⁴⁰ case.

During the Russia-Ukraine hybrid war, restrictive measures were implemented regarding individuals and legal entities. In December 2018, Russia imposed sanctions on 75 Ukrainian legal entities and 567 Ukrainian individuals.⁴¹ In March 2019, Ukraine imposed sanctions on 294 Russian legal entities and 848 Russian individuals.⁴² Potentially, these trade restrictions may be inconsistent with the GATS, but may be justified under GATS Art. XIV *bis*. As the text of GATS Art. XIV *bis* (1)(b)(iii) is identical to the text of Art. XXI(b)(iii), the analysis of application of the latter is likely to apply if the former is invoked.

During the US-China trade war, a steep escalation regarding trade in goods happened in January 2018 after the US placed a 30 % tariff on foreign solar panels, which affected China as the world leader in solar panel manufacturing. In response, China initiated a WTO dispute, where it claimed violations of GATT Art. XIX and various provisions of the Agreement on Safeguards.⁴³ That same day, tariffs of 20 % were placed on washing machines, which resulted into *United States – Safeguard Measure on Washers* dispute, where Korea challenged GATT Arts. I:1 and II:1(a), (b), XIX and the Agreement on Safeguards.⁴⁴ In March 2018 tariffs of 25 % on steel and 10 % on aluminum were imposed, which resulted in eight WTO disputes initiated by China, India, the EU, Canada, Russia, Norway, Mexico, and Turkey on the grounds of inconsistency with GATT Arts. I:1 and II:1(a), (b), X, XIX and the Agreement on Safeguards.⁴⁵ Art. XXI has been invoked by the US in its disputes on steel and

aluminum. The key interpretative question was whether the US had been able to establish the existence of an emergency in international relations considering PR in *Russia – Traffic in Transit* and whether Art. XXI could justify violations of the Agreement on Safeguards, which does not refer to security exceptions. The outcomes of these disputes for different complainants were distinct. Mutually agreed solutions were reached with Canada and Mexico in 2019, the EU in 2022, India in 2023. Russia did not go beyond the stage of composition of the Panel. While in the cases of China, Norway, and Turkey – Panel Reports were adopted and subsequently appealed into the void in January 2023 as the WTO Appellate Body remains in crisis due to the US blocking the appointment of Appellate Body members.⁴⁶

As to the first question of whether there existed an emergency in international relations, in *US – Steel and Aluminium Products* cases Panels did not find that the measure at issue were taken in time of war or other emergency in international relations, so the analysis stopped at the first tier of the test established in *Russia – Traffic in Transit* discussed below. The US has not justified its inconsistencies with the GATT. The question of Art. XXI application to the Agreement on Safeguards has not been addressed.

In its turn, China was accused of forcing foreign firms to enter joint ventures with domestic Chinese entities to whom they did not have any connection, so foreign companies must grant ownership or usage rights of their technology to Chinese entities and were deprived of the ability to freely negotiate market-based terms in technology transfer agreements. The US and EU brought WTO disputes to challenge this practice claiming it was at odds with the basic rights that companies should be enjoying under the WTO rules, specifically, under Arts. 3 and 28.1(a), (b), 28.2 of the TRIPS Agreement.⁴⁷ Potentially, TRIPS Art. 73 could have been invoked as a justification, as its wording is identical to that of Art. XXI. However, in the dispute *China – Intellectual Property Rights II* the authority of the Panel lapsed on the 9th of June 2021⁴⁸, and the dispute was terminated without the PR issued, while

⁴⁰ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512.

⁴¹ Government of the Russian Federation, *On amending Resolution of the Government of the Russian Federation of 1 November 2018, No. 1300*, Resolution 1656, adopted December 25, 2018.

⁴² President of Ukraine, *On the Application, Revocation and Amendment of Personal Special Economic and Other Restrictive Measures (Sanctions)*, Decree 82/2019, adopted March 19, 2019.

⁴³ *US – Safeguard Measure on PV Products (China)*, WTO Panel Report, September 2, 2021, DS562, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm.

⁴⁴ *US – Safeguard Measure on Washers*, WTO Panel Report, February 8, 2022, DS546.

⁴⁵ *US – Steel and Aluminium Products (China)*, WTO Panel Report, 09 December 2022, DS544. *US – Steel and Aluminium Products (India)*, WTO Panel Report, 08 August 2023, DS547. *US – Steel and Aluminium Products (EU)*, WTO Panel Report, 18 October 2018, DS548. *US – Steel and Aluminium Products (Canada)*, WTO Panel Report, 11 July 2019, DS550. *US – Steel and Aluminium Products (Mexico)*, WTO Panel Report, 11 July 2019, DS551. *US – Steel and Aluminium Products (Norway)*, WTO Panel Report, 09 December 2022, DS552. *US – Steel and Aluminium Products (Russia)*, WTO Panel Report, 25 January 2019, DS554. *US – Steel and Aluminium Products (Turkey)*, WTO Panel Report, 09 December 2022, DS564.

⁴⁶ Robert Howse, “Unappealable but not Unappealing: WTO dispute settlement without the Appellate Body,” International Institute for Sustainable Development, July 17, 2023, <https://www.iisd.org/articles/policy-analysis/wto-dispute-settlement-without-appellate-body>.

⁴⁷ *China – Intellectual Property Rights II*, WTO Panel Report, June 9, 2021, DS542, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm; *China – Certain Measures on the Transfer of Technology*, WTO Panel Report, June 1, 2018, DS549, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds549_e.htm.

⁴⁸ *Ibid.*

in *China – Certain Measure on the Transfer of Technology* the dispute did not go beyond the stage of consultations.⁴⁹

(iii) Although WTO case-law on Art. XXI application includes *Russia – Traffic in Transit, Saudi Arabia – IPRs, US–Origin Marking, US–Steel and Aluminium Products, Russia – Traffic in Transit* remains the landmark case as it is the only example of successful application of security exceptions in contemporary WTO jurisprudence. Thus, the author analyzes (1) the interpretation of Art. XXI in the PR *Russia – Traffic in Transit*, including, whether the scope Art. XXI extends to the provisions of the Accession Protocols; (2) how current and alternative interpretations affected trade war, including as a part of hybrid war, on the example of Russian full-scale invasion of Ukraine in 2022.

(1) In *Russia – Traffic in Transit* the Panel did not support an approach advocated by Russia⁵⁰ and the US⁵¹ that the dispute under Art. XXI is non-justiciable, and that the Panel does not have jurisdiction regarding Art. XXI. The Panel considered that potentially there were 3 ways to interpret the text of the adjectival clause “which it considers” in the chapeau of Art. XXI(b): first, to qualify only the word “necessary”, i.e. the necessity of the measures for the protection of “its essential security interests”; or, second, to qualify also the determination of these “essential security interests”; or, finally, and maximally, to qualify the determination of the matters described in the three subparagraphs of Art. XXI(b) as well.⁵² The Panel concluded that it has jurisdiction to determine whether the requirements of Art. XXI(b)(iii) are satisfied.⁵³ Not having expressly stated so, it seems that the Panel had chosen the second approach, establishing a two-tier test on application of Art. XXI where the Panel should assess (i) whether the measures challenged by Ukraine were in fact taken during time of war or other emergency in international relations⁵⁴ and, while it is incumbent upon the invoking member to articulate the essential security interests that arise from the emergency in international relations sufficiently enough to demonstrate their veracity,⁵⁵ (ii) the Panel should identify whether the invoking member acted in good faith when establishing the connection between the measures and its essential security interests.

According to para. 7.138 “the obligation of good faith ... 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, 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.” This conclusion followed, firstly, from interpretation of different wording of subparagraphs. (i)-(iii) of Art. XXI(b),⁵⁶ secondly, from the analysis of object and purpose of the GATT 1994 and the WTO Agreement⁵⁷ and, thirdly, based on the negotiating history of Art. XXI.⁵⁸

Though the Panel observed a clear correlation between “the deterioration in Ukraine’s relations with Russia (as evidenced by the March 2014 UN General Assembly resolution concerning the territorial integrity of Ukraine), and the sanctions that have been imposed against Russia by several countries,”⁵⁹ Russia itself only described the emergency in international relations as the situation which is publicly known⁶⁰ without specifying its involvement in a hybrid war against Ukraine, including annexation of Crimea or military intervention in Donetsk and Luhansk regions. Having decided that each of the Russia’s measures at issue was “taken in time of” an emergency in international relations,⁶¹ the Panel found that the scope of Art. XXI extends to all four provisions of the Russia’s Accession Protocol that otherwise would have been violated.⁶²

Paragraph 1426 of Russia’s Accession Protocol that was scrutinized by the Panel in *Russia – Traffic in Transit* imposes an obligation that all laws, regulations of Russia would be published promptly in a manner that “fulfils applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994.” The Panel considered that para. 1426 of Russia’s Accession Protocol fell within the scope of application of Art. XXI(b)(iii) because “just as Article X of the GATT 1994 is specified to contain “applicable requirements” to paragraph 1426, Art. XXI(b)(iii) clearly contains “applicable requirements” to Article X of the GATT

⁴⁹ Ibid.

⁵⁰ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.30.

⁵¹ Ibid., para. 7.52.

⁵² Ibid., para. 7.63.

⁵³ Ibid., paras. 7.102-7.104.

⁵⁴ Ibid., para. 7.109.

⁵⁵ Ibid., para. 7.134.

⁵⁶ Ibid., paras. 7.69, 7.70, 7.77.

⁵⁷ Ibid., para. 7.82.

⁵⁸ Ibid., para. 7.98.

⁵⁹ Ibid., para. 7.142.

⁶⁰ Ibid., para. 7.119.

⁶¹ Ibid., para. 7.125.

⁶² Ibid., paras. 7.256-7.257.

1994.”⁶³ While The Panel considered the practice of GATT Art. XX application to China’s Accession protocol as relevant,⁶⁴ the same reasoning was not supported in *China – Raw Materials* case, where the Appellate Body confirmed the Panel’s interpretation and considered that Art. XX did not extend to the provisions of China’s Accession Protocol, because “the language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX.”⁶⁵ It remains to be seen how the sphere of application of Art. XXI is interpreted in the future disputes and whether the analogy will be drawn with GATT Art. XX. However, with the current interpretation there are high chances that the broad sphere of application of Art. XXI could extend to the provisions of Accession Protocols, and even to the Agreement on Safeguards, as in its argumentation the Panel heavily relied on “the overall architecture of the WTO system as a single package of rights and obligations.”⁶⁶

It seems surprising that having established a standard that the measures at issue must meet a minimum requirement of plausibility in relation to the declared essential security interests, the Panel considered Russia’s burden of proof discharged when “Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect.”⁶⁷ To justify such interpretation the Panel relied upon characteristics of the emergency in international relations in subpara. (iii) as involving an armed conflict that was recognized by the UN General Assembly,⁶⁸ but not by Russia.⁶⁹ The Panel established a correlation where if an emergency in international relations resembled a war or armed conflict at the border with an adjacent country, member’s articulation of its essential security interests, despite its allusiveness, was minimally satisfactory.⁷⁰ As professor P. Van den Bossche rightly pointed out “the panel in *Russia – Traffic in Transit* (2019) ... somewhat surprisingly from the perspective of the burden of proof – which is on the respondent – concluded that [articulation of] essential security interests of Russia ... was ‘minimally satisfactory’

in the given circumstances.”⁷¹ If the invoking member had not articulated its essential security interests, it is doubtful how the minimum requirement of plausibility was met. The question arises whether the WTO Panel in *Russia – Traffic in Transit* erred in its determination that Russia acted in good faith when invoking Art. XXI(b)(iii).

The conclusion that Russia met the good faith requirement under the second tier of the test under Art. XXI seems especially unreasonable since in *Russia – Traffic in Transit* Russia has not explicitly articulated its essential security interests. This puts into question whether Russia has discharged its burden of proof and whether the WTO Panel correctly applied the two-tier test under Art. XXI to the facts of the case. The PR in *Russia – Traffic in Transit* has not been appealed. In other WTO cases where the respondent tried to invoke Art. XXI – *Saudi Arabia – IPRs*, *US–Origin Marking*, *US–Steel and Aluminium Products* – such attempts were unsuccessful. Though in *Saudi Arabia – IPRs* the two-tier test on TRIPS Art. 73(b)(iii) invocation was satisfied regarding part of the TRIPS violations, the dispute was terminated in April 2022⁷² and the PR has not entered into force. To the contrary, in *US–Origin Marking* and *US–Steel and Aluminium Products* the Panels did not consider that the US had demonstrated that the situation which existed could be qualified as an emergency in international relations.⁷³ Thus, in both cases the first condition of the two-tier test was not satisfied.

As of now the WTO Appellate Body has not reviewed the application of Art. XXI due to the Appellate Body being dysfunctional. Since the Multi-Party Interim Arbitration Arrangement (MPIA) is a temporary alternative for the WTO Appellate Body for those WTO Members who joined this mechanism,⁷⁴ there might be a different interpretation of Art. XXI application.

(2) This article assesses the impact of two potential interpretations of Art. XXI and the effect that the adopted one might have on trade wars.

One potential interpretation restricts the Panel’s mandate the most, where “it considers” qualifies for the necessity of the measures, the determination of the

⁶³ Ibid., para. 7.242.

⁶⁴ Ibid., para. 7.230.

⁶⁵ *China – Raw Materials*, WTO Appellate Body Report, January 30, 2012, DS394, para. 291, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm.

⁶⁶ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.231.

⁶⁷ Ibid., para. 7.136.

⁶⁸ Ibid., para. 7.137.

⁶⁹ Ibid., para. 7.115.

⁷⁰ Ibid., para. 7.137.

⁷¹ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (Cambridge University Press, 2021), 671–80.

⁷² *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Panel Report, June 16, 2020, DS567.

⁷³ Ibid., para. 7.360; *US – Steel and Aluminium Products (Turkey)*, WTO Panel Report, December 9, 2022, DS564, para. 7.164.

⁷⁴ The Multi-Party Interim Appeal Arbitration Arrangement (MPIA), WTO Plurilaterals, https://wtoplurilaterals.info/plural_initiative/the-mpia/.

country's "essential security interests" and whether the measures were taken during a time of war or other emergency. This 'self-judging' approach would escalate trade and hybrid wars. However, WTO Panels have consistently rejected this interpretation.

Another potential interpretation grants the Panel the greatest discretion to interpret whether the measures were taken during a time of war or emergency and to assess if the state's security interests are "essential." Of course, such interpretation would drastically limit the arsenal of states in trade wars, but it might also shift the balance in Art. XXI by curtailing the state's sovereign right to determine its essential security interests.

The interpretation suggested by the Panel in *Russia – Traffic in Transit* seems the most balanced. The state retains sovereignty over determination of its essential security interests. At the same time, it is upon the Panel to consider, whether the measures were "taken in time of war or other emergency in international relations" and whether a member invoking Art. XXI(b) acted in good faith. While there is discretion of a member to designate particular concerns as "essential security interests," it is limited by the member's obligation to interpret and apply Art. XXI(b)(iii) in good faith.⁷⁵ Thus, the Panel acknowledged that the invoking member must articulate its essential security interests⁷⁶ but the Panel must look into the connection between these interests and the measures adopted.⁷⁷

To conclude, trade war can be used as a hybrid war's effective tool only in state-to-state conflicts. The analysis of Russia-Ukraine and US-China trade wars shows that justification of possibly WTO-inconsistent trade restrictive measures used depends upon the interpretation of security exceptions enshrined in the GATT, GATS and TRIPS. The first interpretation of Art. XXI by the Panel in *Russia – Traffic in Transit* might influence further

interpretations of security exceptions in the GATT and other WTO Agreements. The WTO Panels has not supported a non-justiciable approach regarding Art. XXI interpretation. The current interpretation established the broad sphere of application of Art. XXI that could extend to the provisions of Accession Protocols, and possibly WTO covered agreements, like the Agreement on Safeguards. The author agrees that the standard developed by the Panel in *Russia – Traffic in Transit* seems balanced and reasonable, but to avoid its abuse to further engage in trade wars, it should be cautiously implemented, making sure that the invoking party properly discharges its burden of proof. The effect of this interpretation on trade wars can already be seen. Russia approved a new ban on export of oil products to Ukraine two weeks after the Panel justified its previous trade-restrictive measures under Art. XXI. Ironically, *Russia – Traffic in Transit* remains the only case when justification under Art. XXI was successfully invoked by a WTO member who resorted to the act of aggression, temporarily occupying part of its member's territory and annexing another part. Russia used trade war mechanisms in the arsenal of its hybrid war tools. Later Russia resorted to the full-scale aggression against Ukraine starting the biggest continental war in Europe since WWII. Though the reasoning and application of the test to interpret Art. XXI in *Russia – Traffic in Transit* should be criticized, the test itself seems well balanced, as it requires the Panel not only to consider, whether the measures were "taken in time of war or other emergency in international relations" but also to identify whether the invoking member acted in good faith when establishing the connection between the measures and its essential security interests. If applied correctly, this interpretation should not encourage further trade wars. Sadly, as illustrated by the example of Russia-Ukraine hybrid war, *de facto* Art. XXI was used in bad faith by Russia as an aggressor and an occupying power to justify its trade war as one of its hybrid war instruments.

⁷⁵ *Russia – Traffic in Transit*, WTO Panel Report, April 26, 2019, DS512, para. 7.132.

⁷⁶ *Ibid.*, para. 7.134.

⁷⁷ *Ibid.*, para. 7.138.

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«РОСІЯ – ЗАХОДИ ЩОДО ТРАНЗИТНОГО РУХУ»: ДОЛЕНОСНА СПРАВА, ЯКА ПІДРИВАЄ РОЛЬ ВИНЯТКІВ ЩОДО БЕЗПЕКИ СВІТОВОЇ ОРГАНІЗАЦІЇ ТОРГІВЛІ ПІД ЧАС ГІБРИДНИХ І ТОРГОВЕЛЬНИХ ВОЄН

У статті досліджено взаємозв'язок між торговельними та гібридними війнами, які відбуваються між державами, на прикладі російсько-української війни до повномасштабного вторгнення Росії у 2022 році та торговельної війни між США та Китаєм. Описано роль торговельної війни як одного з інструментів гібридної війни. Проаналізовано найновішу судову практику Світової організації торгівлі (СОТ), зокрема Звіт групи експертів у справі «Росія – заходи щодо транзитного руху», де було успішно застосовано винятки щодо безпеки СОТ за статтею XXI ГАТТ. Ця справа є єдиним прикладом прийнятого Звіту групи експертів СОТ, коли винятки щодо безпеки застосувала Росія – держава-член СОТ, яка розпочала збройну агресію проти свого сусіда, вдаючись до окупації та анексії території України. У цьому випадку авторка ставить під сумнів обґрунтованість застосування групою експертів СОТ дворівневого тесту за статтею XXI ГАТТ, оскільки Росія ніяк не пояснила, що є надзвичайною ситуацією в міжнародних відносинах, а також не сформулювала своїх суттєвих інтересів безпеки. Висвітлено, як Росія використовувала тактику торговельної війни як частину свого арсеналу в гібридній війні проти України та пізніше ескалювала до повномасштабної агресії, що спричинило найбільшу континентальну війну в Європі з часів Другої світової війни. Однак авторка визнає збалансований характер тлумачення статті XXI ГАТТ, що вимагає від групи експертів СОТ оцінювання, чи заходи були вжиті під час війни чи іншої надзвичайної ситуації в міжнародних відносинах, а також визначення того, чи діяла держава-член СОТ добросовісно і чи простежується зв'язок між заходами та суттєвими інтересами безпеки. Підсумовано, що, якщо цю інтерпретацію буде правильно застосовано, вона не сприятиме подальшим торговельним війнам. Зазначено, що потенційно винятки щодо безпеки в торговельних війнах можна застосовувати не лише для виправдання порушень ГАТТ, але й інших охоплених угод СОТ. Це припущення підкріплено тим, що у справі «Росія – заходи щодо транзитного руху» статтю XXI ГАТТ було успішно застосовано і для виправдання порушень за Протоколом про приєднання до СОТ, який не є частиною ГАТТ.

Ключові слова: торговельна війна, гібридна війна, право СОТ, винятки щодо безпеки, агресія Росії.

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