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# WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?

Geraldo VIDIGAL<sup>\*</sup>

*For twenty years, World Trade Organization (WTO) Members managed to avoid invoking the security exception before WTO panels, leaving unresolved the tension between the self-judging element explicit in its text and the compulsory jurisdiction of WTO panels. Then, in 2017 and 2018, a dozen panels were established after the respondent declared that it deemed the challenged measures necessary to protect its essential security interests. The first panel report to examine the issue, in Russia – Traffic in Transit, was adopted in April 2019 without appeal. Its interpretation of General Agreement on Tariffs and Trade (GATT) Article XXI significantly limits the scope of the self-judging element in the provision and devises a three-step legal test to be met by Members invoking the exception, with the declared objective of safeguarding ‘the object and purpose of GATT 1994 and the WTO Agreements more generally’. This article examines and discusses this interpretation and its effects over the role of the WTO in international trade relations, viewing it as the latest episode in the long-standing tension between mechanisms providing for compulsory international adjudication and the view that, where states deem their essential interests to be involved, the submission of disputes to adjudication remains subject to their sovereign determination.*

## 1 INTRODUCTION

On 26 April 2019, the Dispute Settlement Body (DSB) adopted the WTO’s first-ever dispute settlement report directly addressing one of the security exceptions in the WTO Agreements.<sup>1</sup> The report, issued by the panel in *Russia – Traffic in Transit*, was met with surprising acceptance by both parties,<sup>2</sup> becoming the first adopted WTO dispute settlement report interpreting and applying a security exception. This article focuses not on the dispute itself, concerning restrictions on the transit of goods from Ukraine through Russia which Russia argued were covered by the security

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<sup>1</sup> There are a number of ‘security exceptions’ in the WTO Agreement. Besides GATT Art. XXI, security exceptions appear in Art. XIVbis of the General Agreement on Trade in Services (GATS), Art. 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Arts 2.2, 2.10, 5.4, 5.7 and 10.8.3 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Art. III:1 of the Revised Agreement on Government Procurement.

<sup>2</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, adopted 26 Apr. 2019 (WT/DS512/R).

exception, but on the panel's interpretation of the exception and its relationship with the WTO's compulsory dispute settlement system.

The security exception has been the subject of much scholarship,<sup>3</sup> some of which sought to see it interpreted in WTO adjudication 'to test the commitment of the parties to the world trading system'.<sup>4</sup> Most, however, felt that conducting this test would be a supremely bad idea; references to Pandora's Box are simply too abundant to cite. For a long time, WTO Members seemed to take the latter view and, for over two decades and 500 disputes, managed to avoid raising the exception before WTO panels. The best-known example of the acceptance by Members of the particular character of the exception came when, in the early days of the WTO, the United States (US) referred to 'security concerns' in response to a panel request concerning the 1996 Cuban Liberty and Democratic Solidarity Act ('Helms-Burton').<sup>5</sup> The European Communities agreed to a bilateral solution that allowed the US to maintain its legislation in place.<sup>6</sup>

Then, in 2016 and 2017, three simultaneous developments in international relations led to disputes being brought against the firm view of the respondent that, first, their actions were covered by the security exception, and second, Article XXI(b) was self-judging, making its invocation a sufficient condition for a panel to declare the exception applicable.<sup>7</sup> Besides the crisis involving Russia and Ukraine,<sup>8</sup> the exception was invoked with respect to the economic blockade

<sup>3</sup> See e.g. Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 Utah L. Rev. 697 (2011); Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 Va. J. Int'l L. 319 (2003); Holger Hestermeyer, *Article XXI: Security Exceptions*, in *WTO – Trade in Goods* 569–93 (Rüdiger Wolfrum, Peter-Tobias Stoll & Holger Hestermeyer eds 2008); Panagiotis Delimatsis & Thomas Cottier, *Article XIVbis GATS: Security Exceptions*, in *WTO – Trade in Services* 329–48 (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle eds, Martinus Nijhoff 2008); Michael J. Hahn, *Vital Interests and the Law of GATT* 12 Mich. J. Int'l L. 558 (1990); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L. J. 1 (forthcoming 2019); Saba L. Mollaian, *Does Trade Equal Peace? The Role of the WTO in International Peace*, 46 Legal Issues of Econ. Integration 77 (2019).

<sup>4</sup> Stefaan Smis & Kim van der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AJIL 227, 236 (1999).

<sup>5</sup> Dispute Settlement Body, *Minutes of Meeting* (WT/DSB/M/24), 7 (16 Oct. 1996). See Request for the Establishment of a Panel by the European Communities, *United States – The Cuban Liberty And Democratic Solidarity Act* (WT/DS38/2) (8 Oct. 1996).

<sup>6</sup> *U.S.-European Union Understanding on LIBERTAD Act* 91 AJIL 497 (Marian Nash (Leich) ed. 1997). The panel report includes a thorough review of the negotiating history of the exception (Panel Report, *Russia – Traffic in Transit*, paras 7.83–7.100) as well as GATT and WTO practice relating to the exception (*ibid.*, Appendix). See also Mona Pinchis-Paulsen, *Trade Multilateralism and National Security: Antinomies in the History of the International Trade Organization* (15 Mar. 2019), <https://ssrn.com/abstract=3353426> (accessed 21 June 2019).

<sup>7</sup> Members varied between arguing that the exception was non-justiciable and claiming that, though justiciable as a matter of procedure, its applicability to any particular case was exclusively a matter for the state invoking it.

<sup>8</sup> This situation led to disputes DS499, DS512, DS525, DS532, all between Russia and Ukraine.

imposed on Qatar by three other Gulf Cooperation Council Members,<sup>9</sup> as well as with respect to extra-schedule tariffs imposed by the US on imports of steel and aluminium from most WTO Members.<sup>10</sup> The interpretation adopted in the *Russia – Traffic in Transit* report immediately impacts a total of twenty-three pending disputes – and possibly more in the years to come.

This article analyses the interpretation of the security exception by the panel in *Russia – Traffic in Transit*, arguing that the panel – quite transparently – interpreted the provision, and its own task, in light of the broader question lurking beneath the arguments on treaty interpretation: what did WTO Members commit to when entering into the WTO Agreements? Did Members commit to compulsory adjudication, i.e. to having their trade laws and policies examined by WTO adjudicators in all circumstances, or was this commitment subject to an opt-out provision, which a Member would be able to invoke unilaterally to prevent a dispute it deemed sensitive from being heard by a panel? Although both answers were conceivable in light of the text of the provision, the resulting institutional framework would be very different depending on the answer that prevail. In not allowing Members to opt out of WTO adjudication unilaterally even by arguing that security concerns are involved, the panel affirmed the compulsory character of the WTO's rule-oriented dispute settlement system.

The panel reasoned in three steps. First it settled, with respect to WTO law, a debate as old as international adjudication itself: whether adjudicators can be called upon to address disputes that states view as 'political' (section 2). Second, the panel proceeded to interpret the subparagraphs of GATT Article XXI(b), finding that the seemingly most subjective element in them, the question of what constitutes an 'emergency in international relations', was amenable to objective determination by a WTO panel,<sup>11</sup> and providing the expression with an open-ended but not boundless content (section 3). While these two findings would have been sufficient to limit, albeit to a small extent, Members' discretion, the panel went on to interpret the seemingly self-judging chapeau as subject to objective determination. Borrowing from general international law not just an abstract principle but a concrete 'obligation of good faith',<sup>12</sup> it established two further requirements for a measure to be justified under Article XXI(b): first, a Member must articulate before a WTO panel the 'essential security interests' that the measure seeks to protect; second, the measures at issue must 'not [be] implausible as measures protective of

<sup>9</sup> This situation led to disputes DS526, DS527, DS528, DS567, and DS576.

<sup>10</sup> This situation led to disputes DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556, and DS564 (brought against the United States), as well as to disputes DS557, DS558, DS559, DS560, DS561 and DS566 (brought by the United States).

<sup>11</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.77.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132.

these interests'<sup>13</sup> (section 4). The outcome, which provides for a far more constraining assessment of the exception than most had imagined, has potential to contribute to the current 'WTO blues', stemming from the uncertain future of the dispute settlement system if the Appellate Body becomes non-operational. At the same time, the report may be instrumental in ensuring that Members can overcome the current crisis by operating within the WTO's rules-based system rather than outside of it (section 5). The panel's conclusions thus amount to an affirmation of its stated assumption: that, while adjudication does not (and probably cannot) displace negotiations in the solution of trade disputes, in the WTO system it is always available to provide an objective assessment of measures taken by Members (section 6).

## 2 SOMETHING OLD – THE AFFIRMATION OF COMPULSORY JURISDICTION

The first determination required of the panel was, at the same time, the least challenging from a legal standpoint and highly significant from the viewpoint of establishing the role of WTO adjudication. Both Russia (the respondent) and the US (as third party) argued that the invocation by a respondent of the security exception should prevent the panel from proceeding to an 'objective assessment' of the dispute, as it is normally required to do under Article 11 of the Dispute Settlement Understanding (DSU). Russia's argument was that the wording of the provision, combined with the subject-matter, meant that WTO panels faced with an invocation of the exception should limit themselves to acknowledging this invocation in their reports 'without engaging in any further exercise'.<sup>14</sup> The US went a step further, arguing that there were no legal criteria by which a Member's determination of its essential security interests could be judged, making any dispute in which the security exception is invoked simply 'non-justiciable'.<sup>15</sup>

As a matter of the WTO's procedural rules, the non-justiciability position is difficult to maintain. Unless there is consensus to the contrary, the WTO DSB is bound to establish a panel the second time a panel request appears on its agenda.<sup>16</sup> Pursuant to DSU Article 7.1, the panel is tasked with 'examin[ing], in the light of the relevant provisions ... cited by the parties to the dispute ... , the matter referred to the DSB' by the complainant, and Article 7.2 requires panels to 'address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. Since Article

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.138.

<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, paras 7.29–7.30.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, paras 7.51–7.52.

<sup>16</sup> DSU, Art. 6.1.

XXI(b) had been cited by Russia and was relevant to the dispute, it was within the panel's terms of reference to examine the matter referred to the DSB by Ukraine 'in light of Article XXI(b).'<sup>17</sup>

The non-justiciability argument, however, only superficially concerns legal provisions. As the panel noted in a footnote, this argument descends directly from the 'political question' argument,<sup>18</sup> which has haunted international adjudication since Frederic De Martens, Russian delegate to the First Hague Peace Conference, presented to other delegates the first draft of what would become the 1899 Convention on Pacific Settlement of International Disputes. De Martens viewed positively the potential for compulsory arbitration to settle international disputes, as long as the 'sphere of application' of this arbitration was remained to cases in which a state demands 'material indemnity for damages and losses caused to it or to its nationals'.<sup>19</sup> Disputes concerning whether a state 'shall or shall not exercise certain given attributes of the sovereign Power', on the other hand, were political – and not appropriate for arbitration – because they might concern 'the national honour or vital interests' of states.<sup>20</sup> The Explanatory Note to the Draft mentions, as an example of 'questions of which none but the sovereign Power can be the judge', 'questions upon which its security in large part depends'.<sup>21</sup>

De Martens' view not only proved popular with states at the time but was reflected in the 1899 and 1907 Hague Conventions, which recognize arbitration as the most effective and equitable means for settling 'questions of a legal nature'.<sup>22</sup> The implication – that there are questions of a non-legal nature for which arbitration is inappropriate – was deemed by Hersch Lauterpacht in 1933 as a means to allow states to undermine the authority of international adjudication. There was no determinable distinction, Lauterpacht reasoned, between questions of one type and the other. As acknowledged in a 1928 paper by the British government, the effect of this divide was to create a category of 'political questions which, although justiciable when viewed from the point of view of application of legal rules, were not so on account of

<sup>17</sup> Panel Report, *Russia – Traffic in Transit*, paras 7.54–7.56. The panel made a point of referring to the obvious WTO precedent – the finding by the Appellate Body, in *Mexico – Soft Drinks*, that panels are not free 'to decline to exercise validly established jurisdiction' (Appellate Body Report, *Mexico – Soft Drinks*, para. 53) – only as an afterthought, in a footnote to its concluding considerations, and only after citing to less apposite jurisprudence by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia (Panel Report, *Russia – Traffic in Transit*, fn. 183).

<sup>18</sup> Panel Report, *Russia – Traffic in Transit*, fn. 183.

<sup>19</sup> Russian Delegation to the First Hague Conference, *Explanatory Note Concerning Article 10 of the Russian Draft*, in *Reports to the Hague Conferences of 1899 and 1907* 97–101, 98 (James B. Scott ed., Carnegie Endowment for International Peace 1917).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, at 99.

<sup>22</sup> Art. 38 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, repeating Art. 16 of the 1899 Convention.

the importance of the issues involved'.<sup>23</sup> The theory of 'political questions', Lauterpacht concluded, ultimately 'give[s] expression to the view that obligatory judicial settlement of disputes must be confined to small issues'.<sup>24</sup>

This argument that certain questions are too 'large' to be assessed by international adjudicators is a recurring one. In its 1980 Judgment in *Tehran Hostages*, the International Court of Justice (ICJ) rejected this argument, made by Iran in a case brought by the US following the taking of hostages in the United States' embassy in Tehran. The Court reasoned that 'legal disputes between sovereign States by their very nature are likely to occur in political contexts', but that there was no basis for the view that, 'because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them ... if the Court were ... to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court'.<sup>25</sup> Four years later, the ICJ used the same reasoning to reject the same argument, this time put forward by the US in a case brought by Nicaragua.<sup>26</sup>

Coincidentally, one of the key precedents for the invocation of the security exception in trade adjudication is the dispute brought by Nicaragua, in parallel to the one it took to the ICJ, for adjudication by a GATT panel. Under GATT rules and practice, a respondent was permitted to prevent the establishment of a panel simply by opposing its establishment. The US conditioned its agreement to the establishment of a panel to the panel's terms of reference specifying that the panel '[could] not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States'.<sup>27</sup> The GATT panel in *United States – Trade Measures Affecting Nicaragua*, which issued its report in October 1986, was thus operating with limited jurisdiction. Acknowledging the limitation inherent in its terms of reference, the panel concluded that 'it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement'.<sup>28</sup>

<sup>23</sup> Hersch Lauterpacht, *The Function of Law in the International Community* 150 (OUP, 2011/1933) (quoting 'Observations of His Majesty's Government in Great Britain on the Programme of Work of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference', *League of Nations Official Journal*, May 1928, at 694–704).

<sup>24</sup> *Ibid.*

<sup>25</sup> *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, at 3, 20.

<sup>26</sup> *Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction)*, ICJ Reports 1984, at 392, 439–40.

<sup>27</sup> GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, 13 Oct. 1986 (L/6053), para. 1.4.

<sup>28</sup> *Ibid.*, para. 5.3.



The WTO Agreements, however, contain no such procedural bar to jurisdiction.<sup>29</sup> The reversal of the consensus rule in dispute settlement, which has as its counterpart the quasi-automaticity of WTO adjudication, is not only enshrined in the applicable provisions of the DSU but is considered to be one of the key objectives and results of the Uruguay Round negotiations.<sup>30</sup> Since panels lack the authority ‘to disregard or modify existing provisions of the DSU’,<sup>31</sup> the non-justiciability/political question version of the argument would require the panel to refrain from exercising validly established jurisdiction with no legal basis for doing so. While exercising adjudication over issues that a Member deems ‘political’ may have implications in the political arena (on which see section 5), the panel lacked a procedural tool to decline to exercise jurisdiction.<sup>32</sup> The more legally plausible argument for WTO panels to defer to respondents with respect to the security exception – the self-judging wording of the exception – required the panel not to decline but to exercise jurisdiction.

### 3 SOMETHING NEW – ASSESSING OBJECTIVELY AN ‘EMERGENCY IN INTERNATIONAL RELATIONS’

#### 3.1 ‘EMERGENCY IN INTERNATIONAL RELATIONS’ AS AN OBJECTIVELY DETERMINABLE CONCEPT

The first substantive finding by the panel was that the circumstance of there being an emergency in international relations was objectively *determinable*. The fact that a panel has jurisdiction over a dispute does not imply an entitlement for the panel to review every decision by a Member. In *EC – Bananas*, the Appellate Body found that Members should be ‘largely self-regulating’ in deciding whether bringing a dispute before the WTO would be fruitful,<sup>33</sup> and concluded that in meetings with a panel the composition of a Member’s delegation ‘is for [that] WTO Member to decide’.<sup>34</sup> Russia’s view was that the language of Article XXI(b), combined with the subject-matter it concerns, should make the application of the exception entirely self-judging.

<sup>29</sup> See by contrast, India’s Model Bilateral Investment Treaty (BIT) (2016), Annex 1(ii): ‘a defence that conduct alleged to be a breach of [a party’s] obligations under this Treaty is for the protection of its essential security ... shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Art. 14 of 15 of this Treaty to review any such decision’.

<sup>30</sup> Andrew L. Stoler, *The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?*, 3 World Trade Rev. 99 (2004).

<sup>31</sup> Appellate Body Report, *India – Patents (US)*, para. 92. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36 (‘as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute’).

<sup>32</sup> Neither the panel nor the parties appear to have considered the possibility that a panel could refrain from exercising jurisdiction in case its report would not help ‘secure a positive solution to a dispute’, which Art. 3.7 of the DSU describes as ‘[t]he aim of the [WTO] dispute settlement mechanism’.

<sup>33</sup> Appellate Body Report, *EC – Bananas*, para. 135.

<sup>34</sup> *Ibid.*, para. 10.



The GATT security exception is found in Article XXI, which appears in the agreement immediately following, and separated from, the general exceptions of Article XX. Within Article XXI, Article XXI(b) concerns individual Members' right to protect their essential security interests.<sup>35</sup> Article XXI(b) provides that '[n]othing in th[e GATT] shall be construed'

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

- (i) relating to fissionable materials or the materials from which they are derived;
- (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations[.]<sup>36</sup>

The argument that would prevent the panel from exercising any substantive review of the national security exception was that the self-judging element explicit in the phrase 'which it considers necessary' sets a self-judging tone that permeates the interpretation of the whole provision, including its subparagraphs. In other words, even though Article XXI(b) could in principle allow a 'two-tiered' analysis similar to the subparagraph/chapeau analysis applied by panels when Members invoke Article XX (in which the chapeau only comes into play once the panel is satisfied that the measure is provisionally justified under a subparagraph),<sup>37</sup> the wording of the security exception 'chapeau' would require a WTO panel to defer to the Member not only with respect to whether the specific action taken by that Member is 'necessary', in a particular case where its essential security interests are involved, but also with respect to whether the measure falls under one of the exceptions listed in the subparagraphs.

The argument for allowing Members to determine for themselves whether the measure falls under one of the exceptions would seem particularly cogent when applied to the specific exception invoked by Russia, which argued that its measures were justified because they were 'taken in time of [an] emergency in international relations'. While there can be reasonable consensus that the concepts of 'fissionable materials', 'arms, ammunition and implements of war' and even 'war' are liable to objective interpretation,<sup>38</sup> many Members argued that it would be inappropriate for

<sup>35</sup> Art. XXI(a) permits WTO Members to withhold 'any information the disclosure of which it considers contrary to its essential security interests' and Art. XXI(c) concerns the system of collective security, safeguarding a Member's entitlement to 'tak[e] any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'.

<sup>36</sup> Equivalent language is found in Art. XIVbis(b) of the GATS and Art. 73(b) of the TRIPS Agreement.

<sup>37</sup> See e.g. Appellate Body Report, *Colombia – Textiles*, para. 5.67 ('a panel must first examine whether the measure falls under one of the exceptions listed in the paragraphs of Article XX, before considering the question of whether the measure satisfies the requirements of the chapeau of Article XX').

<sup>38</sup> See George Dian Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*. *Society of International Economic Law (SIEL)*, Sixth Biennial Global Conference, SSRN: <https://ssrn.com/abstract=3218513> (accessed 21 June 2019).

a WTO panel to second-guess a Member's determination that there is an 'emergency in international relations'.<sup>39</sup>

In addressing this issue, the panel was explicit that its decision, while grounded on an assessment of the text and context of the provisions, was ultimately guided by what it found to be not simply the object and purpose of Article XXI but 'a general object and purpose of the WTO Agreement, as well as of the GATT 1994'.<sup>40</sup> This general object and purpose involved, on the one hand, the aim of 'promot[ing] the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade', and on the other, to permit Members to 'depart from their GATT and WTO obligations in order to protect other non-trade interests'. Viewing Article XXI(b)(iii) within this broader framework, the panel concluded that it was one among many 'exceptions and escape clauses built into the GATT 1994 and the WTO Agreements' which provide WTO Members with:

a degree of autonomy to adopt measures that are otherwise incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations ... It would be entirely contrary to the security and predictability of the multi-lateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.<sup>41</sup>

In other words, leaving to the unfettered discretion of Members whether a measure is within the scope of the subparagraphs of Article XXI would create, within the structure of the WTO Agreements, an *über* escape clause that Members could resort to avoid all jurisdictional oversight. The panel's conclusion was that, in order to have *effet utile*, the subparagraphs, first, *had to* constitute what the panel termed 'limitative qualifying clauses', which 'qualify and limit the exercise of the discretion accorded to Members under the chapeau to the[] circumstances' they refer to,<sup>42</sup> and, second, *had to be* 'amenable to objective determination' by a WTO panel.<sup>43</sup>

<sup>39</sup> Panel Report, *Russia – Traffic in Transit*, paras 7.29 (Russia), 7.38 (Brazil), 7.40 (Canada), 7.49 (Singapore), footnote 142 (United States).

<sup>40</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>41</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>42</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>43</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.71.

## 3.2 DETERMINING THE MEANING OF 'EMERGENCY IN INTERNATIONAL RELATIONS'

Giving *effet utile* to the subparagraphs required the panel to provide an objectively determinable content to the expression 'emergency in international relations'. Beyond the potentially broad meaning of 'emergency', interpreting this provision was particularly delicate in light of the view, expressed by the US when the provision was drafted, that the addition of this expression was meant to allow the exception to cover 'the situation which existed before the last war, before [the US's] participation in the last war, which was not until the end of 1941'.<sup>44</sup> This indicated that the subparagraph was drafted to allow Members to take measures not only when they are specifically involved in a war or emergency but also in case of conflagration that does not (yet) involve them individually. If this interpretation were extended to cover the existence of an emergency anywhere in the world, every conceivable measure could be said to be taken 'in time of *some* emergency in international relations somewhere.

The panel's solution was, first, to interpret the expression not in isolation but within the broader context of the provision. Subparagraphs (i) and (ii) refer to fissionable materials, arms and ammunition and the supply of military establishments, while subparagraph (iii) refers first to war before adding to its coverage 'or other emergency in international relations'. Once the three subparagraphs are interpreted as part of a whole, the panel found, it becomes clear that they all concern issues relating to 'defence and military interests, as well as maintenance of law and public order interests'.<sup>45</sup>

The panel concluded that, read in this context, the expression 'emergency in international relations' does not cover mere 'political or economic conflicts with other Members or states [even if] considered urgent or serious in a political sense'.<sup>46</sup> A higher threshold must be met, involving 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 ... giv[ing] rise to ... defence or military interests, or maintenance of law and public order interests'.<sup>47</sup> While the panel was careful not to require the Member taking the measure to be specially affected by the emergency it invokes (which would have contradicted the wording of the provision), the framework it established would require WTO Members to justify – before a WTO panel, and therefore before other WTO Members and the public at large – their measures on the basis of a specific emergency in international relations rather than on the general concept of an emergency.

<sup>44</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.92 (citing the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, at 20–21).

<sup>45</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.74.

<sup>46</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.75.

<sup>47</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.76.

The first outcome of the panel's interpretation of Article XXI(b) was thus, first, to affirm that the exception as a whole is amenable to objective determination, and second, to limit the scope of the potentially broadest and most subjective subparagraph, restricting its coverage to measures taken 'in time of' a situation of heightened tensions in international relations, rising to the level of present or latent armed conflict and involving either military or defence interests or the maintenance of law and public order interests.

#### 4 SOMETHING BORROWED – THE OBLIGATION OF GOOD FAITH AND THE 'SELF-JUDGING' CHAPEAU

##### 4.1 THE CHAPEAU OF ARTICLE XXI(B) AND THE OBLIGATION OF GOOD FAITH

Determining the scope of Article XXI(b)(iii) in its context could have been sufficient for the panel to resolve the dispute. The situation between Russia and Ukraine, the panel concluded, did rise to the level of an emergency in international relations. Not only had the situation given rise to unilateral sanctions from other WTO Members and counter-sanctions from Russia, it had also been the subject of two resolutions of the United Nations General Assembly, one of which (by referring to the Geneva Conventions of 1949), implied multilateral recognition that the situation involved 'declared war or other armed conflict'.<sup>48</sup> Since the measures challenged by Ukraine had been taken during the time in which this situation was actively being the subject of multilateral concern and bilateral sanctions, the panel concluded that they had been taken 'in time of' an emergency in Russia's international relations.<sup>49</sup> Had the chapeau been interpreted as entirely self-judging, i.e. as permitting a Member to take 'any action which it considers necessary' within the scope of one of the subparagraphs, the panel's assessment of the dispute would have concluded here.

The panel, however, did not interpret the chapeau in this way. Instead, it performed two operations. First, it divided the chapeau into three different elements: the Member's 'essential security interests' that the measure seeks to protect and the issue of whether the measures are 'for the protection of' these interests. Second, it brought into the interpretation of both elements an 'obligation of good faith', which it termed 'a general principle of law and a principle of general international law' according to which treaty obligations must be both *interpreted* and *performed* in good faith.<sup>50</sup> The obligation of good faith, the panel found, would preclude WTO

<sup>48</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.122 and corresponding footnotes.

<sup>49</sup> Panel Report, *Russia – Traffic in Transit*, paras 7.124–7.125.

<sup>50</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132 (citing not only Art. 31(1) of the Vienna Convention on the Law of Treaties ('[a] treaty shall be interpreted in good faith') but also its Art. 26 ('[e]very treaty ... must be performed [by the parties] in good faith')).

Members from resorting to the exception to circumvent their WTO obligations, either by labelling as '[their] essential security interests' economic interests that they agreed to pursue and promote in accordance with WTO rules or by claiming that measures unrelated or remotely related to the security interests they declare to be protecting are measures taken 'for the protection of' these interests.

Incorporated into the interpretation of Article XXI(b), the obligation of good faith was found to produce for a Member seeking to justify a measure under this provision two legal hurdles besides providing evidence that the circumstances fall under the scope of one of its subparagraphs. First, pointing to the term 'essential', the panel noted that not every security interest falls within the scope of the provision. Essential security interests, the panel found, are those relating to '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'.<sup>51</sup> Not only must the protected interests pertain to the Member itself ('its'), they must correspond to those that are within this limited scope: 'the further [an alleged emergency] 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'.<sup>52</sup>

As a matter of procedure, this finding means not only that the security interests in question must exist but also that the panel must be able to assess whether they exist to the extent claimed by the Member. In other words, the Member must articulate before the panel the essential security interests that its measure seeks to protect, 'sufficiently enough to demonstrate their veracity'.<sup>53</sup> Russia, the panel found, had articulated its security interests in a 'minimally satisfactory' manner, with 'nothing in Russia's expression of those interests to suggest that Russia invoke [d] Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994'.<sup>54</sup>

The second consequence of the panel's partition of the chapeau was the finding that, in order to be justified under the security exception, a measure should have a connection with the security interests articulated by the Member, in the sense that it could credibly be claimed to be 'for the protection of' these interests. As the panel put it, the measure must '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'.<sup>55</sup> In the case of Article XXI(b)(iii), second sentence, a

<sup>51</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.130.

<sup>52</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.135.

<sup>53</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.134.

<sup>54</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.137.

<sup>55</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.138.

measure that were ‘so remote from, or unrelated to’ the emergency invoked that it would be ‘implausible’ that it had been implemented for the protection of the essential security interests arising out of the invoked emergency would fail the plausibility test.<sup>56</sup>

#### 4.2 THE LEGAL TESTS OF ARTICLE XXI(B) AND THE LIMITED SCOPE OF THE SELF-JUDGING ELEMENT

In sum, challenging the common perception that Article XXI(b) establishes a self-judging, or at least largely self-judging, exception, the panel in *Russia – Traffic in Transit* set out no less than three objective legal tests that a Member must fulfil in order to justify under Article XXI(b) an otherwise WTO-inconsistent measure. This Member must: (1) demonstrate objectively that the measure falls under one of the subparagraphs of Article XXI(b); (2) articulate before a panel what essential security interests, in the sense of the quintessential functions of the state, its measure is seeking to protect, in such a way as to convince the panel that it is not simply re-labelling its economic interests as ‘essential security interests’ to circumvent the application of WTO rules; and (3) demonstrate to the panel that the measures it deems justifiable under Article XXI(b) have a connection to the essential security interests it declares to protect so that they can plausibly be asserted to have been taken ‘for the protection of these interests.

Given this complex three-tiered test, one may wonder whether there is anything left of the self-judging element explicit in the wording of Article XXI(b), which provides for a WTO Member the right to take ‘any action which it considers necessary’ for the protection of its essential security interests. In this respect, the panel noted that, once the measures were deemed to have been taken in time of emergency in international relations and to be sufficiently related to Russia’s essential security interests articulated before the panel, it was ‘for Russia to determine the “necessity” of the measures for the protection of its essential security interests’.<sup>57</sup>

The scope of this ‘necessity’ judgment that Members are free to undertake becomes clear once the test devised by the panel in *Russia – Traffic in Transit* is examined against the backdrop of the jurisprudence on ‘necessity’ in Article XX of the GATT. In *Colombia – Textiles*, the Appellate Body described the first tier of the two-tiered assessment under Article XX(a) (applied to determine whether a measure is ‘necessary to protect public morals’) as itself involving two inquiries. First, a panel should conduct an ‘initial, threshold examination’ of the design of the

<sup>56</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.139.

<sup>57</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.146.

measure and its relationship with the asserted objective, to determine whether the measure is ‘incapable of protecting public morals’.<sup>58</sup> Only if the measure is found to be ‘not incapable of’ protecting public morals, i.e. if the panel finds that there is a rational relationship between the measure and the protection of public morals, should the panel proceed to an in-depth necessity analysis, involving, first, ‘weighing and balancing the relative importance of the societal interest or value at stake, the degree of contribution, and the degree of trade-restrictiveness so as to determine whether the measure is “necessary” to protect public morals’,<sup>59</sup> and second, assessing possible alternative measures that could protect the same objective to the same degree while being less trade-restrictive.

Examined in light of this two-tiered necessity test, the scope of the self-judging element in Article XXI(b) becomes clear. The panel in *Russia – Traffic in Transit* interpreted this provision as dispensing a measure (found to be within the scope of one of the subparagraphs and to credibly protect an essential security interest) from fulfilling the *second* and more demanding part of the necessity test. A panel is thus dispensed from conducting a weighing-and-balancing analysis or from examining proposed alternative measures that would achieve the same objective while being less trade-restrictive or less WTO-inconsistent.<sup>60</sup> Conversely, the panel's interpretation retains for WTO panels the right (and duty) to conduct, on top of the other two assessments, the first part of the necessity assessment: a threshold examination of whether the measure is ‘not incapable of’ protecting the Member's essential security interests, in the sense that there is a rationally ascertainable relationship between the measure and the protection of the interests articulated by the Member.<sup>61</sup> The table below summarizes the set of tests established in *Russia – Traffic in Transit* and compares them to the tests developed for Article XX of the GATT:

<sup>58</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.68.

<sup>59</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.77. See also Panel Report, *Brazil – Taxation*, paras 7.570–7.583; Panel Report, *Indonesia – Chicken*, paras 7.248–7.249 (applying the same test with respect to Art. XX(d)).

<sup>60</sup> Panel Report, *Russia – Traffic in Transit*, 7.108.

<sup>61</sup> A relevant finding is that the panel found that it is ‘not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers’ (Panel Report, *Russia – Traffic in Transit*, 7.121). This corresponds to the text of the exception, which, contrary to the ‘necessity’ defence under general international law, does not impose, as a requirement for its invocation, that the state invoking it has not contributed to the situation justifying the invocation (see International Law Commission, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), Art. 25.2(b)). The necessity defence and the ‘essential security interests’ exception have sometimes been merged in investment arbitration, e.g. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 374. See Michael Waibel, *Two Worlds of Necessity: CMS and LG&E 20* Leiden J. Int'l L. 637, 642 (2007); Caroline Henckels, *Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses*, in *Exceptions and Defences in International Law* (Federica Paddeu & Lorand Bartels eds, OUP forthcoming).



Article XXI(b)	Equivalent in Article XX
<b>[from Panel Report, <i>Russia – Traffic in Transit</i>]</b>	<b>[from Appellate Body Report, <i>Colombia – Textiles</i>]</b>
<b>Order of Analysis</b>	
‘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’ (7.82)	‘a panel must first examine whether the measure falls under one of the exceptions listed in the paragraphs of Article XX, before considering the question of whether the measure satisfies the requirements of the chapeau of Article XX’ (5.67)
<b>Applicability of the Exception</b>	
‘incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations’ (7.134)	‘requires that a challenged measure “address the particular interest specified in that paragraph”’ (5.67)
<b>Threshold Necessity Analysis</b>	
‘measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests’ (7.138)	‘that “there be a sufficient nexus between the measure and the interest protected”’ (5.67) ... ‘an analysis of the “design” of the measure reveals that the measure is not incapable of protecting’ the interest (5.77)
<b>In-depth Necessity Analysis</b>	
None (7.108, 7.146, 7.147)	‘a process of “weighing and balancing” a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure. In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken’ (5.70)
<b>Non-discrimination</b>	
None (not mentioned)	‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ (5.66) <sup>62</sup>
<b>Not a disguised restriction on international trade</b>	
‘not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994’ (7.133)	‘disguised restriction on international trade’ (5.66)

<sup>62</sup> On the chapeau of Art. XX (which was not examined in this dispute), see Lorand Bartels, *The Chapeau of the General Exceptions in the WTO, GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int’l L. 95 (2015); Christian Riffel, *The Chapeau: Stringent Threshold or Good Faith Requirement?*, 45 Legal Issues Econ. Integration 141 (2018).

In conclusion, the extent of the assessment of the justifiability of measures under Article XXI(b) as developed by the panel in *Russia – Traffic in Transit* falls short of the in-depth review of the necessity of the measure that panels must undertake under Article XX and does not require panels to consider whether the measures are discriminatory. At the same time, the panel did insert into its analysis of the measure a variation of the requirement, which appears in the chapeau of Article XX, that measures adopted to protect non-trade interests not constitute a disguised restriction on international trade. It found that the assessment of whether a measure is in fact ‘for the protection of its essential security interests’ includes an assessment of whether the Member is invoking the exception ‘as a means to circumvent [its] obligations under the GATT 1994’.<sup>63</sup>

Coupled with the delineation of an objective notion of ‘emergency in international relations’, this interpretation of the chapeau infused by an ‘obligation of good faith’ extracted from general principles of law severely limits the self-judging element in the provision. Even if the circumstances are found to be within one of the subparagraphs, Members invoking Article XXI(b) must still not only articulate the precise character of the essential security interests that they are seeking to protect and the relationship between the measure and these interests but must also establish a credible connection between measure, protected interests and circumstances justifying the invocation of the measure.

## 5 SOMETHING BLUE? THE SECURITY EXCEPTION AND THE WTO CRISIS

The first interpretation of the security exceptions by a WTO panel comes during challenging times for the WTO. Since mid-2017, the US has been blocking new appointments to the Appellate Body, which will, if there is no consensus to appoint new Members, make the organ unable to receive appeals from 11 December 2019 and therefore permit Members to appeal panel reports into oblivion, leaving disputes unresolved.<sup>64</sup> The US argues that blocking appointments is an instrument to obtain other Members’ support for a collective decision to address ‘persistent overreaching’ by the Appellate Body, which it argues constantly oversteps its dispute settlement and clarification role and actively seeks to reshape the obligations that WTO Members originally committed to in 1994.<sup>65</sup> As the same time, the multiplication of US tariffs

<sup>63</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.133.

<sup>64</sup> Pieter Jan Kuijper, *The U.S. Attack on the WTO Appellate Body*, 45 *Legal Issues of Econ. Integration* 1 (2018); Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance* 52 *JWT* 867 (2018); Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 *L. & Contemp. Prob.* 237–73 (2016); Kathleen Claussen, *The Other Trade War*, 103 *Minn. L. Rev. Headnotes* 1 (2018).

<sup>65</sup> Minutes of DSB Meeting, 27 Aug. 2018 (WT/DSB/M/417), para. 12.2.

imposed on grounds of national security and emergency situations,<sup>66</sup> coupled with the preference of the Trump administration for bilateral settlements that sideline, or outright ignore, the WTO legal framework,<sup>67</sup> risks marginalizing the WTO as the ‘common institutional framework for the conduct of trade relations among its Members’.<sup>68</sup>

The interpretation of Article XXI(b) by the panel in *Russia – Traffic in Transit*, which embodies a far more constraining assessment of measures justified under the security exception than most had imagined, might contribute to this ‘WTO blues’, if it diminishes Members’ trust that WTO adjudicators will apply objectively the agreed rules. Some of the wording employed seems provocative: the panel refers to the interpretation of the exception as self-judging, which has over the past decades been understood as at least plausible, as portraying Article XXI(b)(iii) as ‘an incantation that shields a challenged measure from all scrutiny’.<sup>69</sup> In the DSB meeting at which the report was adopted, the US criticized the panel’s finding that it ‘could review multiple aspects of a responding party’s invocation of the essential security exception’, which in the US’s view contradicted ‘the clear text of Article XXI’ as well as the ‘underst[anding], from the very beginning of the international trading system, that each Member may judge for itself what actions it considers necessary to protect its essential security interests’.<sup>70</sup> Had it been issued by the Appellate Body, there is little doubt that the *Russia – Traffic in Transit* report would have been taken by the US as a prime example of the overreaching that it sees as pervasive in its practice.

The panel’s teleological approach is avowedly aimed at implementing and preserving the institutional architecture of the WTO. The view of Article XXI as entirely self-judging, in that merely invoking it would suffice to prevent WTO panels from making any substantive findings in a dispute, would make the security exception an *über* escape clause, allowing Members not only to deviate from their WTO obligations but to deviate from them without either providing legal reasons, as is required for example by GATT Article XX, or incurring legal consequences, such as the ones that arise when Members apply safeguards. Members would be acting entirely outside the

<sup>66</sup> White House, *Presidential Proclamation on Adjusting Imports of Steel into the United States* (8 Mar. 2018); White House, *Presidential Proclamation on Adjusting Imports of Aluminum into the United States* (8 Mar. 2018); White House, *Statement from the President Regarding Emergency Measures to Address the Border Crisis* (30 May 2019); White House, *Adjusting Imports of Automobiles and Automobile Parts Into the United States* (17 May 2019).

<sup>67</sup> See Geraldo Vidigal, *The Return of Voluntary Export Restraints? How WTO Law Regulates (and Doesn’t Regulate) Bilateral Trade-Restrictive Agreements*, 53 J. World Trade 187 (2019).

<sup>68</sup> Agreement Establishing the World Trade Organization, Art. II:1.

<sup>69</sup> Panel Report, *Russia – Traffic in Transit*, 7.100.

<sup>70</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body (26 Apr. 2019). The panel sought to address this issue by undertaking an analysis of the negotiating history of, and practice under, Article XXI, which it concluded did not support the view that there was such an understanding (Panel Report, *Russia - Traffic in Transit*, paras. 7.83-7.100 and Appendix - Subsequent Conduct Concerning Article XXI of the GATT 1947). See also the archival research by Mona Pinchis-Paulsen, *supra* note 6.

scope of WTO law, and would be ‘bound’ solely by the possible reactions of other Members. Accepting the existence of a fully discretionary right to escape jurisdiction, in the absence of a clear textual directive (such as the one that exists in India’s Model BIT),<sup>71</sup> would subvert the entire structure of the multilateral trading system as negotiated in 1994.

Additionally, only superficially does preventing adjudication avoid the consequences of measures inconsistent with WTO commitments. The more probable effect of sidelining adjudication is to reignite the traditional mechanism whereby states enforce international obligations by means of self-judging tit-for-tat retaliation.<sup>72</sup> Once measures are taken purportedly outside the framework of WTO rules, they are bound to be met with strong political resistance. The argument that a measure is beyond the reach of WTO rules, purely because the Member taking it formulates in certain terms the justification for its actions, is unlikely to be accepted by Members that find the justification to be implausible. The outcome of a Member taking action that it argues is not subject to WTO rules is likely to be, first, contestation in political fora, and second, as has happened with respect to US tariffs on steel and aluminium and on Chinese products, immediate retaliation from other Members.<sup>73</sup> These responses, taken at the political level and arguably in acceptance of the proposition that WTO law is no longer the controlling paradigm, thus appear as the concrete manifestation of what the Chairman of the GATT negotiating committee which drafted the future Article XXI in 1947 termed ‘the atmosphere inside the [International Trade Organization]’, which would be ‘the only efficient guarantee against abuses of the [security exception]’.<sup>74</sup>

Seen in this light, the *Russia – Traffic in Transit* series of legal tests merely implements, and applies to the security exception, the shift from political to judicialized dispute settlement that took place when the WTO Agreements entered into force. The panel provides legal language, structure and a procedure to an enquiry that, in the absence of an adjudicator with jurisdiction to examine the dispute, WTO Members would likely conduct unilaterally, voicing in WTO political bodies their concerns and proceeding to adopt mutually harmful tit-for-tat responses. While, as Brazil pointed out before the DSB, these responses are themselves incompatible with the commitment by WTO Members to resolve their trade disputes through the WTO dispute settlement system,<sup>75</sup> this commitment arguably loses its object if the

<sup>71</sup> *Supra* n. 29.

<sup>72</sup> See Geraldo Vidigal, *Why Is There So Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, 20 J. Int’l Econ. L. 927 (2017).

<sup>73</sup> See Geraldo Vidigal, *Westphalia Strikes Back: The 2018 Trade Wars and the Threat to the WTO Regime*, Amsterdam Law School Research Paper No. 2018-31 (2018).

<sup>74</sup> UN Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, 24 July 1947 (E/PC/T/A/PV/33), at 20.

<sup>75</sup> Minutes of DSB Meeting, 21 Nov. 2018 (WT/DSB/M/421), para. 15.4.

respondent invokes an *über* escape clause that prevents the adjudication-based dispute settlement system from operating entirely.<sup>76</sup>

The dilemma between seeking the entitlement to act unilaterally without adjudicatory oversight and an unwillingness to accept others' responses to these unilateral acts has become apparent for the US in its attempt to replace legalized dispute settlement with unilateral enforcement in its new trade agreements. In agreeing with Canada on a solution to allow the removal, with respect to Canada, of the US's extra-schedule tariffs on steel and aluminium (justified both domestically and before the WTO as based on national security and therefore non-justiciable), the US was required to revert to tit-for-tat retaliation as the alternative enforcement mechanism against abuse. The Joint Statement between the parties thus provides that, if an importing nation imposes additional tariffs on steel or aluminium in the future, 'the exporting country agrees to retaliate only in the affected sector'.<sup>77</sup> In its negotiations with China, the US initially sought 'one-sided monitoring' before reportedly agreeing to the establishment of a bilateral enforcement mechanism.<sup>78</sup>

The panel's organization of the report also seems geared at preserving the role of adjudication as an instrument in negotiations.<sup>79</sup> Following its acceptance of Russia's invocation of the security exception, the panel proceeded to make an assessment of the legality of Russia's measures 'had the measures been taken in normal times',<sup>80</sup> ostensibly to permit the Appellate Body to complete the analysis should it disagree with the panel on the applicability of the security exception.<sup>81</sup> In providing what the US termed an 'advisory opinion' on the legal status of Russia's measures,<sup>82</sup> the panel both delimited the extent of the applicable security issue and pointed to the specific WTO-inconsistent elements in the measures (lawfully) taken to address it. In describing and conducting a legal assessment of the measures at issue, the panel provided the parties with an objective basis for negotiations. Rather than responding, politically or legally, on the basis of its perceived view of the injury it has suffered, a Member seeking to respond to WTO-inconsistent measures taken in the name of the protection of security interests may act on the basis of the panel's authoritative assessment of the extent to which its rights are being violated. Additionally, negotiations over forms of redress for the measures

<sup>76</sup> See *ibid.*, para. 10.2 (argument put forward by Norway).

<sup>77</sup> Joint Statement by Canada and the United States on s. 232 Duties on Steel and Aluminum (17 May 2019), <https://www.canada.ca/en/global-affairs/news/2019/05/joint-statement-by-the-united-state-s-and-canada-on-section-232-duties-on-steel-and-aluminum.html> (accessed 21 June 2019), para. 5.

<sup>78</sup> Teddy Ng & Kinling Lo, *Monitoring Agreement Clears Major Obstacle to Deal*, South China Morning Post (11 Apr. 2019).

<sup>79</sup> On the functions of adjudication, see Joshua Paine, *International Adjudication as a Global Public Good?*, 29 Eur. J. Int'l L. 1223 (2018).

<sup>80</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.183.

<sup>81</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.154.

<sup>82</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body (26 Apr. 2019).

can be based on objectively ascertained commitments and infringements rather than unilaterally determined grievances.<sup>83</sup>

This latter function may become particularly important if indeed the Appellate Body becomes non-operational at the end of 2019. WTO Members will still be able to request the establishment of panels and to obtain their objective assessment of the challenged measures. If a panel report is appealed, however, the DSB may not adopt it ‘until after completion of [an] appeal’ that is no longer forthcoming,<sup>84</sup> with the result that the report will remain in limbo and therefore will not produce formal legal effects, such as the obligation of implementation and the prospect of WTO-authorized retaliation. However, the fact that an objective assessment is provided will inevitably anchor Members’ perceptions with respect to whether the challenged measures are permissible. Especially if the respondent rejects solutions proposed by a complainant to ensure a final objective assessment of the dispute, the outcome is likely to be a demand for negotiations, or unilateral action, on the basis of the best available assessment: the panel report. This anchoring function of non-binding reports has been referred to by US Trade Representative Robert Lighthizer as preferable to the current system of binding adjudication.<sup>85</sup> The panel’s decisions to, first, conduct a plausibility analysis with respect to the invocation of the security exception, and second, conduct an objective assessment of the challenged measures and their (hypothetical) legality under WTO law, preserve this anchoring function even in the case of measures taken to protect essential security interests.

In short, the function of adjudication that the panel’s choices emphasize is to serve as an alternative to purely bilateral negotiations based on unilateral assessments of conformity of the measures with WTO commitments. To the extent that it is operational, WTO dispute settlement not only remains available to Members that feel aggrieved but also provides Members charged with violating their commitments with the right to demand that complainants pursue adjudication rather than adopting retaliation on the basis of their unilateral assessments.<sup>86</sup> The panel’s invocation of the object and purpose of the WTO Agreements, as well as its incorporation of a good

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<sup>83</sup> On a similar proposal, see Simon Lester and Huan Zhu, A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions, 42 *Fordham Int’l L.J.* 1451 (2019).

<sup>84</sup> DSU, Art. 16.4.

<sup>85</sup> Robert Lighthizer, *U.S. Trade Policy Priorities*, Center for Strategic and International Studies (18 Sept. 2017), <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative> (‘before 1995, before the WTO, under the GATT, ... there was a system where you would bring panels and then you would have a negotiation. And, you know, trade grew and we resolved issues eventually’) (accessed 21 June 2019).

<sup>86</sup> DSU, Art. 23.

faith obligation into Article XXI(b), reveal the explicit aim to preserve this role of adjudication in the WTO system.

## 6 CONCLUSION

It is hard to overstate the Copernican shift operated by the panel in *Russia – Traffic in Transit* with respect to the view, almost consensual before the current security exception disputes were initiated, that there was a dominant if not an absolute self-judging tone to Article XXI(b). The panel's reliance on an overarching object and purpose of the WTO Agreements, coupled with its dissection of Article XXI(b)(iii) into four different core elements – 'emergency in international relations', 'its essential security interests', 'for the protection', and 'necessary' – and the restriction of the self-judging aspect only to the latter element, not only made the provision amenable to a multi-step objective assessment but, perhaps more importantly, established for a Member seeking to justify a challenged measure under the security exception the obligation to put forward a plausible articulation of the connection between the circumstances that it claims to fall under the exception, its essential security interests, and the measure it took to protect these interests. As an effect of this dissection, arguments and precedents previously thought to be highly significant were considered by the panel almost as afterthoughts.<sup>87</sup>

At the heart of the debate concerning the security exception is a debate about the role of adjudication. In the WTO as elsewhere, compulsory international adjudication does not have the power to solve major economic conflicts or political tensions. Its sole power is to permit an objective third-party determination of the extent to which states have entered into engagements towards one another. There were and are good arguments for adjudicators not to seek to determine in the place of Members what interests they are permitted to pursue or the importance that they must accord to their non-economic concerns. At the same time, if the WTO is to continue to 'provide the common institutional framework for the conduct of trade relations among its Members',<sup>88</sup> it is difficult to ask panels to accept the assumption that otherwise compulsory adjudication can be sidelined at will by a respondent. The panel in *Russia – Traffic in Transit* sought to tread a fine line between safeguarding Members' discretion to determine what measures to take to address security threats and ensuring that WTO adjudication can perform its function even in the presence of such threats.

<sup>87</sup> See in particular, Panel Report, *Russia – Traffic in Transit*, para. 7.147 and fn. 156 (in which the panel discusses, and dismisses, the parallels with Art. 22.3 of the DSU and previous jurisprudence of the ICJ and a WTO panel, which had assigned significant relevance to the expression 'which it considers'. The panel brushes aside these parallels and accepts to defer entirely to the respondent with respect to necessity, a finding that as relatively minor in this context, given the review powers the panel did assert).

<sup>88</sup> Agreement Establishing the World Trade Organization, Art. II:1.



Adjudication performs the same function with respect to inter-state disputes in 2019 as it did in 1899, when twenty-six states, gathered in The Hague, first sought to go beyond ad hoc adjudication of specific disputes and establish a mechanism to allow claims to be brought unilaterally to adjudication, on the basis of states' prior consent to be bound by a third party's assessment of certain disputes. It is a means of settling peacefully 'disputes which diplomacy has failed to settle'.<sup>89</sup> It is not the sole means of settling disputes, and, specifically with respect to trade, it does not replace the reciprocal monitoring that ultimately ensures a high degree of compliance with trade agreements.

In 2019 as in 1899, there is significant support for notion that compulsory adjudication should be subject to a self-judging exception, applicable whenever a state believes that the dispute touches upon one of its vital interests. By asserting the ability of WTO panels to provide an objective assessment of challenged measures even in less than peaceful circumstances, and by affirming a requirement for Members to articulate a justification for their measures even when this justification relates to their essential security interests, the panel in *Russia – Traffic in Transit* not only arrived at but began from a fundamentally Lauterpachtian stance: that the commitment to compulsory adjudication entered into by WTO Members in 1994 does not have a backdoor.

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<sup>89</sup> 1899 Convention on the Pacific Settlement of Disputes, Art. 38(1).