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The Legal Interpretation of National Security Exception in Russia – Traffic in Transit: Requirements, Implications, and Limitations in a Global Economy Intertwined with National Security

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Abstract: The World Trade Organization (WTO) Panel in Russia – Measures Concerning Traffic in Transit made the first interpretation of Article XXI in WTO history, thereby establishing its jurisdiction and setting relatively strict requirements for invocations. As this interpretation has been followed in subsequent WTO disputes, deeper consideration of its requirements, implications, and limitations is warranted, especially in the global economic context where emerging security challenges and trade orders are intertwined. This article argues that the Panel achieved a balance by being flexible about new forms of 'emergency in international relations' and 'essential security interests', while remaining conservative on the high level of crises that should be embodied in these two components. This balanced interpretation renders Article XXI(b)(iii) a malleable exception that may accommodate certain evolving security threats. Nevertheless, this article contends that the Panel failed to point out the causal link between the two elements: 'emergency in international relations' and 'essential security interests'. This article proposes that the 'essential security interests' proffered by the Member should be either a new occurrence or have increased significantly due to the 'emergency in international relations' at hand. Regarding the implications of this case, it has preserved global economic multilateralism, as demonstrated by subsequent cases concerning national security exception clauses, including United States – Certain Measures on Steel and Aluminium Products (China). It will also influence the interpretation of Article XXI(b)(ii) and the national security review of foreign investment. Despite these far-reaching implications, there are also limitations to the Panel's ruling. A primary limitation is that the Panel's interpretation cannot respond to many new security needs that emerge in a context where the international economic and trade order is deeply intertwined with national security. The underlying reason is that many new security challenges have different inherent logic from issues intended to be covered under Article XXI(b)(iii), revealing the insufficiency of existing international economic and trade rules in addressing these evolving security challenges. Therefore, international economic and trade rules should be reformed, and a set of approaches ranging from political to legal, as well as hybrid ones,

are proposed herein. These approaches could promote one another, and thus a combination of these various approaches is recommended. By exploring these potential methods, international actors could play an active role in reshaping and reforming world trade mechanisms and rules to promote a global economic order capable of addressing multifaceted challenges.

Keywords: International Economic and Trade Rules; National Security; Security Exception; Article XXI; WTO; Russia – Traffic in Transit; National Security Review; Cybersecurity

1. Introduction

Allowing World Trade Organization (WTO) Members to deviate from their WTO obligations because of a national security concern, Article XXI of the General Agreement on Tariffs and Trade (GATT) 1994 has long been the broadest and most controversial exception in WTO law. In April 2019, the WTO Panel in *Russia – Measures Concerning Traffic in Transit* (DS512) (*Russia – Traffic in Transit*) promulgated the first interpretation of Article XXI in the history of the WTO, a ruling that could have repercussions on cases invoking the national security exception. Subsequently, WTO panels have applied the criteria set in this case in cases such as *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, *United States (US) – Certain Measures on Steel and Aluminium Products (China)*, and US – *Origin Marking Requirement*. These panels upheld the justiciability of the security exception clause and the panels' limited review power as established in *Russia – Traffic in Transit*, which demonstrates the significance of the latter as a landmark case. Moreover, with the emergence of new security challenges and trade wars in the name of national security under today's global economy, the requirements, implications, and limitations of the *Russia – Traffic in Transit* Panel (Panel)'s interpretation deserve further exploration.

This article comprises five sections, Section 1 being the introduction. Section 2 examines the requirements set by the Panel and provides some reflections. Section 3 discusses the implications of the Panel's interpretation. Section 4 indicates the limitations of the Panel's interpretation that reflect a shortage of trade rules to deal with many new security challenges. In response, this article presents a toolkit of possible approaches from political to legal as well as hybrid ones. Section 5 concludes the article.

2. Analysis of the Panel's Interpretation

The Panel first examined the provisions in the Dispute Settlement Understanding (DSU), resorted to the drafting history and the obligation of good faith, and finally established its jurisdiction to review Russia's invocation of the security exception. Then the Panel went on to examine the specific requirements.

2.1 The Panel's Interpretation of 'Emergency in International Relations'

The Panel examined the components of Article XXI(b)(iii), holding that the action should be 'taken in time of war or other emergency in international relations', and that this chronological concurrence is

amenable to objective determination. The Panel further found that the ‘emergency in international relations’ in subparagraph (iii) is also subject to objective review, judging from its position parallel to other subparagraphs that are also objective facts.

2.1.1 Requirements

The characteristics of ‘emergency in international relations’ defined by the Panel could be summarized as follows:

(1) Its formal feature is ‘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’, but the Panel used such wording as ‘appear to’ and ‘generally’. (2) Its substantive feature is that it ‘give[s] rise to defence and military interests, or maintenance of law and public order interests’. This is refined based on the common features of the three alternative subparagraphs of paragraph (b). (3) Political or economic conflicts are generally excluded. Even if the political or economic conflicts are ‘urgent or serious in a political sense’, they cannot be considered ‘emergencies in international relations’ ‘unless’ they give rise to ‘defence and military interests, or maintenance of law and public order interests’. Moreover, the inclusion of ‘unless’ here indicates that the fundamental criterion is the substantive feature.

2.1.2 Reflections

There exists a view that the Panel’s criterion for ‘emergencies in international relations’ is still confined to the traditional connotation in place when the clause was drafted and focuses on defence or military threats. It is difficult to cover the geopolitical/climatic conditions presently critical to some third-world countries. However, according to the Panel’s wording of ‘unless’, these geopolitical/climatic conditions could also be considered ‘emergencies in international relations’ if they fulfil the requirements of the substantive feature.

On one hand, the Panel’s definition is sufficiently open-ended that it could capture different forms of ‘emergency in international relations’, rather than being limited to certain traditional forms of emergency such as an armed conflict. The Panel’s wording ‘appear to’ and ‘generally’ when referring to the formal feature allows other possible forms of emergency. Additionally, the phrase ‘or maintenance of law and public order interests’ in the substantive feature leaves some room for other fundamental interests over time. Furthermore, the wording ‘unless’ suggests that the fundamental criteria should be the substantive characteristics. Given all these reasons, the Panel’s interpretation of ‘emergency in international relations’ is in fact not limited to traditional military armed conflicts.

On the other hand, this definition is conservative to the extent that it maintains a relatively high standard for the level of a crisis. The fundamental interests required by the substantive feature of the emergency are an evident demonstration. The formal feature further visualizes this high level of a crisis or severity: ‘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’.

2.2 The Panel's Interpretation of 'Essential Security Interests'

Having examined the component 'emergency in international relations', it is crucial to analyze how the Panel interprets the second key component: 'essential security interests'. The Panel found that while 'essential security interests' is a subjective element, it should be subject to the obligation of good faith. To provide clarity, the Panel further elaborated on its interpretation, offering a more detailed framework for understanding and applying this critical aspect of the security exception.

2.2.1 Requirements

In order to systematically examine the Panel's interpretation, it is helpful to break down their analysis into specific requirements, which could provide a structured approach for evaluation. The characteristics of 'essential security interests' defined by the Panel could be summarized as follows:

(1) Its intension refers to 'interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally'. (2) Its extension contains the interests that are 'directly relevant to the protection of a state from such external or internal threats', defined by every Member based on 'the particular situation and perceptions of the state in question', and can 'vary with changing circumstances'. (3) Its boundary is 'evidently' narrower than 'security interests' and the circumvention of WTO obligations is excluded. One glaring example of this circumvention would be simply 're-labelling' trade interests as 'essential security interests' to be released from 'reciprocal and mutually advantageous arrangements'. (4) The Member invoking Article XXI(b)(iii) needs to articulate that there is indeed an essential security interest at play. The remoter the emergency invoked by the Member is from the formal feature of 'emergency in international relations' (which are expected to give rise to substantive-feature interests, including the 'defence or military interests, or maintenance of law and public order interests'), the more articulation of its 'essential security interests' is needed. Both (3) and (4) derive from the obligation of good faith.

2.2.2 Reflections

After clarifying the features of 'essential security interests', two points are worth noting.

First, similar to the balancing approach in interpreting 'emergency in international relations', the Panel also achieved a balance by being flexible about new forms of 'essential security interests', while remaining strict about the high level of crises it should embody. The Panel's interpretation permits interests relating to 'maintenance of law and public order internally' to be qualified as 'essential security interests' and allows the Member to define its essential security interests depending on the particular situation and its perception. This may indicate the Panel's intent to make the security exception clause adaptable to new security challenges.

Meanwhile, the interpretation of 'essential security interests' still adheres to the strict requirement of the high level of interests or crisis, which can be demonstrated by the phrasing 'interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from

external threats, and the maintenance of law and public order internally' and 'evidently a narrower concept than "security interests"'.

Second, the Panel's interpretation has a certain flaw. The Panel used the phrasing 'essential security interests said to arise from the emergency in international relations' several times to seemingly narrow the scope of 'essential security interests'. However, the text of Article XXI(b)(iii) should be reverted to 'taking any action [taken in time of war or other emergency in international relations] which it considers necessary for the protection of its essential security interests'. Subparagraph (iii) is therefore simply a qualification on when the measures are taken: so long as the measures meet the strict requirement of being 'taken in time of war or other emergency in international relations', the Member could take various necessary measures to protect various forms of 'essential security interests'. This seems to be the basic connotation for these two different and separate elements: 'essential security interests' as the self-judging matter in the chapeau and 'emergency in international relations' as the objective fact in the subparagraph.

It may be inappropriate, however, to insist on the complete independence of these two elements. Such independence would create a loophole that a Member may exploit: if there is no causal link pointed out between the components 'essential security interests' and 'emergency in international relations', a Member may take advantage of this period of 'emergency in international relations' to take extensive trade-restrictive measures to protect various 'essential security interests' that have nothing to do with the emergency at hand. These measures may not be exempted previously and thus are left to be taken and getting exempted altogether during this period of 'emergency in international relations', which may not be the original intention of the drafters.

Furthermore, the independence of these two elements may also breed a moral crisis: taking into consideration a cost-benefit analysis, a Member may be incentivised to let an 'emergency in international relations' happen or persist. If no causal link is required, the Member could gain lots of trade interests by taking extensive trade-restrictive measures for any alleged 'essential security interests' and getting exempted during the period of 'emergency in international relations'. Meanwhile, the cost of getting involved in an 'emergency in international relations' may not always be unacceptably high: The 'emergency in international relations' does not indicate that the Member involved is at high risk per se, and the Member itself could still function stably and well as a whole, just as Russia in this case. As long as the Member is of the view that the trade benefits accruing from such extensive trade-restrictive measures during the period of exemption ('emergency in international relations') could exceed the cost of being involved in such emergency, the Member may be incentivised to trigger the 'emergency in international relations' instead of trying to resolve the crisis.

To limit the scope of the exemption, it remains necessary to establish the causal link that 'the essential security interests arise from the emergency in international relations'. Additionally, the causal link should encompass the situation where the concerns of 'essential security interests' are newly triggered or increase significantly due to the 'emergency in international relations' at hand. And the

rationale is that, under these two conditions, the ‘essential security interests’ are affected by the ‘emergency in international relations’ to a substantial degree and must be resolved with respect to this emergency.

Although it is necessary to establish a causal link, it may be inappropriate that the Panel directly added the qualification ‘arise from the emergency in international relations’ to the component ‘essential security interests’ without offering any argumentation or explanation. In terms of the logic of argumentation, the causal relationship between the two formally independent elements should be educed after a proper argumentation and put forward as an additional requirement for reviewing. And if the conclusion of argumentation turns out to be reverse, the direct qualification imposed here will be problematic. Regarding the standard setting, certain problems concerning the standard of this causality could not be clarified due to a lack of argumentation, such as what degree of connection does ‘arise from’ imply? Hence, the suggestion to develop the criteria of ‘essential security interests’ is to first recognize the different characteristics and connotations between ‘essential security interests’ and ‘emergency in international relations’ as being two formally independent components and, thereafter, to add a new requirement reviewing the causal link between these two components, that is, the essential security interests arise from the emergency in international relations, either the former being newly triggered or being influenced significantly by the latter.

2.3 The Panel’s Interpretation of ‘Necessity’

Having examined the Panel’s interpretation of ‘essential security interests’ and its associated issues, it is crucial to consider the third key condition of the security exception: the necessity of measures. This condition stems from the wording ‘taking any action which it considers necessary’ in the chapeau of Article XXI(b).

2.3.1 Requirements

Similar to the interpretation of ‘essential security interests’, the Panel also ruled that the ‘necessity’ of measures is a subjective component subject to the obligation of good faith. While the Panel acknowledged that the ‘necessity’ of the measures should be determined by the Member, it also specified certain limitations. Specifically, the Panel held that the measures must ‘meet a minimum requirement of plausibility in relation to the proffered essential security interests’, which entails that they are not ‘so remote from, or unrelated to’ the emergency that they are ‘implausible’ as measures ‘for the protection of its essential security interests’.

2.3.2 Reflections

The Panel adopted a comparatively low threshold of the necessity test that simply calls for ‘a minimum requirement of plausibility’. This standard is lower than the one required by GATT Article XX. Compared to the holistic necessity test of Article XX, the Panel adopted the threshold necessity analysis without delving further into the in-depth necessity analysis required by Article XX, which

includes ‘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’ as well as a comparison with possible alternatives.

This low threshold of necessity is likely proper. Considering that the security exceptions are the paramount safety valve indicating the compromise made by the WTO to the vital and politically sensitive interests of its Members, its overall standard of review should be lower than that of the general exceptions to defer to Members’ sovereign rights. The components ‘taken in time of’ and ‘emergency in international relations’ have already been considered as objective facts, and the scope of ‘essential security interests’, even with its subjective characteristic, is evidently narrower than the general interests. To balance these strict limitations and reflect the self-judging feature of this security exception, the requirements of the ‘necessity’ test should therefore allow more self-judgment.

This low-threshold necessity test is also fitting when considering the special nature of security interests. National security interests usually involve confidential information, as outlined in Article XXI(a) of GATT. And only the Member itself can fully assess its situation and capability to respond based on the comprehensive information (both public and confidential) at its hand. Given the lack of comprehensive information and the impossibility of putting itself into the Member’s shoes, any outsider’s assessment of the contribution of the measure to the objective and suggestions of alternative measures concerning the Member’s survival issues may be one-sided and lack legitimacy. Hence, it would be hard to add to this necessity test of Article XXI additional requirements on examining the ‘contribution’ or ‘alternatives’.

Once the Panel only requires ‘a minimum plausibility’ and allows the Member great latitude, this in turn indicates that the Panel should strictly adhere to the very high requirement of the level of crisis with respect to an ‘emergency in international relations’ and ‘essential security interests’ to contain the possible abuse of the national security exception. One should note that ‘adhering to the very high level of crisis embodied by these two components’ pointed out in this article differs from ‘adhering to the strict traditional connotations’ argued by some scholars: the latter directly excludes new emergencies such as critical geopolitical/climatic conditions without further examining whether the substantive features of the ‘emergency in international relations’ are satisfied.

3. Implications

As a groundbreaking case, the interpretation of the *Russia – Traffic in Transit* Panel has repercussions on subsequent WTO disputes invoking relevant security exceptions. Furthermore, this interpretation also has significant impacts on the interpretation of GATT Article XXI(b)(ii) and even possibly on the national security review in international investment law.

3.1 Multilateralism and Subsequent Cases

If Article XXI(b)(iii) is totally self-judging and nonjusticiable, it could be abused by a Member without limit, thus diminishing the predictability and security of the multilateral trading system. The

Panel in this case, however, established its jurisdiction on this issue and clarified detailed requirements for invoking this exception, which could reduce the possibility of the misuse of this exception and better preserve the multilateral trading system. Indeed, after this case established the review criteria for the security exception clause, subsequent WTO panels have also applied the standards set in this case to maintain the WTO's predictability and global economic multilateralism. Some unilateral measures to impose trade restrictions in the name of national security have been ruled by WTO panels as unable to invoke the security exception clause to exempt Members' violations of WTO rules, including in cases *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, US – *Certain Measures on Steel and Aluminium Products (China)*, and US – *Origin Marking Requirement*.

3.1.1 Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights

The panel in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* strictly adhered to the *Russia – Traffic in Transit* Panel's interpretation. The case involved Saudi Arabia's alleged support of a domestic pirate broadcaster, beoutQ, infringing on the proprietary content of beIN, a global sports and entertainment company headquartered in Qatar. Saudi Arabia invoked the security exception in TRIPS Article 73(b)(iii). The panel found that 'Saudi Arabia's severance of all diplomatic, consular and economic ties with Qatar' constituted an 'emergency in international relations'. It further accepted Saudi Arabia's articulation of its 'essential security interests' as protection against terrorism and extremism threats, which included an umbrella policy of ending or preventing any form of interaction with Qatari nationals. However, the panel ruled that Saudi Arabia's refusal to apply criminal procedures to the pirate broadcaster was implausible for protecting its 'essential security interests' because this would not require 'any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national'. As the minimum plausibility test was not met, the panel concluded that the requirements for invoking Article 73(b)(iii) were not met.

3.1.2 US – Certain Measures on Steel and Aluminium Products (China)

In *US – Certain Measures on Steel and Aluminium Products (China)*, the US imposed additional duties on steel and aluminium products imported from China and other countries. The US claimed that this action was to safeguard its national security and was covered by the security exception, which it argued was self-judging and insusceptible to WTO panel review. China challenged this measure before the WTO Dispute Settlement Body (DSB). In this case, the panel followed the *Russia – Traffic in Transit* Panel's interpretation that this exception is not self-judging but susceptible to review. It further held that an 'emergency in international relations' within the meaning of Article XXI(b)(iii) 'must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations', and it refers to 'situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations'. Notably, this interpretation, by using the wording 'comparable in its gravity or severity' and

'international tensions', also followed the approach adopted by the Panel in *Russia – Traffic in Transit*, namely the high level of crisis/severity and meanwhile openness to various forms of concrete situations.

Regarding the element as to whether the actions were taken in time of an 'emergency in international relations', the panel followed *Russia – Traffic in Transit* Panel's practice to conduct an objective review. The panel noted that the three bases for the US' measures under Section 232 were '(a) displacement of domestic steel/aluminium by excessive imports; (b) the consequent adverse impact on the economic welfare of the domestic steel/aluminium industry; and (c) the global excess capacity in steel and aluminium'. The first two factors focused on domestic developments of steel and aluminium industries, which could not be qualified as 'emergency in international relations'. Although the third factor concerns a global situation that has triggered high-level discussion in various international fora, the panel held that this aspect referred to by the US was not persuasive enough to rise to 'the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations"'. Therefore, the panel found that the standard for invoking the security exception was not met and the US had violated the WTO rules.

3.1.3 US – Origin Marking Requirement

In *US – Origin Marking Requirement*, the panel conducted an objective review of the US's invocation of the security exception. Regarding the element of 'emergency in international relations', the panel recalled that in *Russia – Traffic in Transit*, there existed a 'significant breakdown in relations between the two disputing Members', and that in *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, the diplomatic, consular or economic relations between disputing parties were severed. The Panel held that an 'emergency in international relations' refers to 'a state of affairs, of the utmost gravity, which represents a breakdown or near-breakdown in the relations between states or other participants in international relations'. It further held that in the case at hand, there was no 'evidence or argument on the record that the United States or any other Member has severed its diplomatic, consular, or economic relations with China or Hong Kong, China'. Therefore, the threshold of requisite gravity to constitute an 'emergency in international relations' was not met. By using the wording 'of the utmost gravity' and 'near-breakdown in the relations', the panel also maintained a balance between being strict in terms of gravity and being open to specific forms.

Although the three abovementioned panel reports were not adopted after their circulation due to mutual withdrawal by the parties or an appeal by one party in the context of the non-operational status of the WTO Appellate Body, these panel reports continued the approach of the Panel in *Russia – Traffic in Transit*, confirming the specific review requirements for the security exception clause while maintaining a certain degree of openness. This created a favorable atmosphere for promoting global economic multilateralism through the dispute settlement mechanism.

3.2 Implication for the Interpretation of Article XXI(b)(ii)

Apart from the direct influence on subsequent WTO disputes invoking clauses identical or similar to GATT Article XXI(b)(iii), the interpretation of the Panel in *Russia – Traffic in Transit* could also provide some guidance in interpreting GATT Article XXI(b)(ii), which is also ambiguous to some extent and thus susceptible to misuse. As some scholars have indicated, Article XXI(b)(ii) focuses on the 'traffic in arms', but the phrase 'traffic in other goods and materials … carried on directly or indirectly for the purpose of supplying a military establishment' itself has a very broad connotation, and the word 'indirect' further adds a doubtful possibility to expand the scope to 'dual-purpose goods'.

Although the Panel's reasoning in *Russia – Traffic in Transit* is basically focused on subparagraph (iii), the analysis of subparagraph (iii) could also provide some constructive guidance for interpreting subparagraph (ii) from three perspectives, and thus a three-pronged approach to interpreting subparagraph (ii) may be formed. First, according to the Panel, the phrase 'relating to' in subparagraphs (i) and (ii) requires a 'close and genuine relationship' between the objective and the measure. 'Relating to' has been interpreted by the Appellate Body as requiring a 'close and genuine relationship of ends and means', which is an objective relationship subject to objective determination. Compared to the 'minimum requirement of plausibility' required by subparagraph (iii), 'relating to' is much stricter and could prevent the abuse of the word 'indirect'.

Second, based on the structure and context of the three subparagraphs of Article XXI(b), one may conclude that even the 'indirect' part of the 'traffic in arms' should attain a similar level of 'danger' to the 'fissionable materials' in subparagraph (i). The Panel stressed that the three alternative subparagraphs of Article XXI(b) should raise the same security interests. Based on the alternative nature of these three subparagraphs, one could further infer that the level of security concerns indicated in these subparagraphs should also be similar. Considering that 'relating to' required by subparagraph (ii) is already much stricter than the 'minimum plausibility' required by subparagraph (iii), the 'indirect' part of the 'traffic in arms' in subparagraph (ii) may not need to attain the high standard indicated by the 'emergency in international relations' in subparagraph (iii). However, because subparagraphs (i) and (ii) are alternative and have the same three components, namely, 'essential security interests', 'necessary', and 'relating to', it could be inferred that subparagraphs (i) and (ii) should have the same requirements of 'essential security interests', the same close and genuine relationship between the objective and the measures (which covers the requirement of 'necessary'), and the same level of danger posed by the fissionable materials in subparagraph (i) and by the 'direct or indirect' 'traffic in arms' in subparagraph (ii). In this manner, even the 'indirect' part of the 'traffic in arms' should also reach the threshold of danger indicated by the fissionable materials in subparagraph (i).

Third, the Panel's interpretation of 'essential security interests' in the chapeau is shared by all three subparagraphs and thus indicates the same strict requirements for invocation, that is, 'relating to the quintessential functions of the state' and 'excluding the circumstance of circumventing the WTO obligations', such as taking trade-restrictive measures simply out of trade interests.

3.3 Implication in the Field of International Investment Law

In recent years, many countries have begun to use the national security review to safeguard their national security in the field of international investment law. The Committee on Foreign Investment in the United States ('CFIUS') has, in the name of national security, pressured Chinese companies to divest their US assets after conducting investigations into the LGBTQ dating app Grindr and the short-video app TikTok. In fact, national security review frameworks, such as CFIUS, have been criticized as an impediment to trade. Moreover, although CFIUS's decision could be litigated in the federal court system grounded in due process, as what was revealed in *Ralls Corporation v. Committee on Foreign Investment in the US*, this kind of review is limited to procedural issues and incapable of extending to the substantive issue that concerns the long-time presumed nonjusticiable issue of national security by analogy to the previous understanding of GATT Article XXI.

The Panel's interpretation may have some implications on the justiciability of the national security review concerning the substantive issue. The Panel's holding on its jurisdiction and on the standards of revocation regarding the security exception would affect the interpretation of other WTO security exceptions, such as Article XIV bis of the General Agreement on Trade in Services, Article 73 of Agreement on Trade-Related Aspects of Intellectual Property Rights, and Article 3 of Agreement on Trade-Related Investment Measures (TRIMs). To take TRIMs as an example, if the measures are 'investment measures' and 'trade-related', as required by the Panel in *Indonesia – Certain Measures Affecting the Automotive Industry*, and do not meet the comparatively strict requirements of the security exception set by the Panel in *Russia – Traffic in Transit* (Article 3 in TRIMs Agreement provides that all exceptions under GATT 1994 shall apply to the provisions of the TRIMs Agreement), then the investment measures related to national security may not be exempted from liability under WTO law.

Admittedly, the applicability of the WTO agreements on the national security review of foreign investment would be limited because these agreements only apply to certain types of investment measures that exactly satisfy the specific requirements in those agreements. And the WTO, aiming at settling trade disputes, does not have comprehensive competence in foreign investment issues. Nevertheless, the Panel's interpretation in *Russia – Traffic in Transit* could, at least theoretically, provide a new possible path to the judicial review of national security review decisions.

4. Limitations and Possible Solutions

The Panel's interpretation, despite its far-reaching implications, faces several limitations in its application and ability to fully address contemporary security needs. Understanding these limitations is crucial for developing more comprehensive and effective approaches to navigate the complex interplay between global economic order and national security concerns nowadays. This section will analyze the limitations of the Panel's interpretation and propose possible solutions to address the challenges.

4.1 Limitations on Effects and on Fully Responding to Contemporary Needs

Despite many positive impacts of Panel's interpretation, these implications may be limited by the uncertainty in following this interpretation. First, if there is an appeal, WTO panel reports could only be considered adopted after the completion of the appeal. Even if a panel adopts a similar interpretation in future disputes, as long as the paralysed Appellate Body has not been back on track, a party to a trade dispute could file an appeal to block the adoption of the panel report. Second, although the reliance on precedents in the WTO could provide foreseeability and certainty to the Members, the Panel's decision is not binding on future disputes; future panellists may adopt a different approach of interpretation.

Another limitation of the Panel's interpretation lies in its difficulty to fully respond to various new security needs, which may further reflect some underlying problems. Nowadays, cybersecurity, terrorism, climate change, pandemic disease, and other new security challenges are becoming increasingly prominent and could pose grave or even fatal threats to countries. Some new security threats under specific conditions that meet the substantive requirements of the Panel's interpretation may still be considered qualified situations under Article XXI(b)(iii). For instance, Neha Mishra suggests that some cyberattacks on critical digital infrastructure similar in magnitude and nature to military attacks may lead to damages or even significant casualties threatening law and public order interests, calling for protection from external or internal threats. In this case, a panel may deem there to be an 'emergency in international relations' and 'essential security interests' if substantial evidence and sufficient articulation are provided. Nevertheless, the Panel's interpretation is not able to, and also not intended to cover all types of new security issues.

In terms of quantity or degree, as the escape valve for the 'vital interests' of WTO Members, the security exception is the broadest and top-level exception in GATT. Only security crisis of an extraordinarily high level could be covered by the security exception. For novel security issues that are below the threshold of the security exception, some could still be resolved via other WTO exceptions or rules. For example, the protection for domestic industry may be an issue targeted by the WTO's 'safeguards' provisions, and trade-distorting climate regulations concerning environmentalists and domestic industries may fall within the scope of GATT Article XX. There still exist, however, many other novel security interests not precisely covered by existing WTO laws in terms of their degree; they may need to be decided in other ways that are not purely judicial or even outside the WTO system.

In terms of quality or nature, emerging novel security threats are quite different in internal logic from the security issues addressed when the security exception was drafted. 'War' and 'emergency in international relations' are occasional; WTO Members are thus allowed to be exempted in these rare and exceptional circumstances by revoking security exceptions. Evolving security threats, however, are persistent, omnipresent, and unbounded by space and time. These threats, including cybersecurity, climate change, and pandemics, emerge in the context of today's rapid technological innovation and globalization. Countries are now economically interdependent; their technological interconnectedness and ecological environment differ from the past. To take cybersecurity as an example, Chengjin Xu

suggests that it stems from the uncertainty of technology and the lack of strategic mutual trust among counties, and such unknown risks and deep-seated contradictions are persistent. If the security exceptions dealing with incidental crises are blindly applied to those novel security threats with a different inherent logic, this will cause continuous damages to the international trading system. While some new occasional and extremely high-level security risks may occasionally meet the conditions, the inherent logic of security exceptions does not accommodate all evolving security needs. This reveals the inadequacies of current international trade frameworks in addressing emerging security challenges, while simultaneously unveiling opportunities for pioneering reforms in global economic and trade mechanisms. Consequently, the development of novel trade paradigms and governance structures becomes imperative for the international community.

4.2 Developing Mechanisms and Rules from Political to Legal and to Hybrid Ones

The persistent and omnipresent nature of these new security threats renders it increasingly harder to separate them from daily trade activities, which contributes to a new international economic order deeply intertwined with the concept of national security. Indeed, J. Benton Heath points out that the concept of national security has transformed from the traditional stable meaning that focuses on interstate conflicts to now encompassing various security aspects that could pose severe threats to countries. Many trade issues have become security-sensitive, and separating trade and security may be unrealistic. Thus, it may be necessary to consider mechanisms that combine political and legal attributes. Even so, purely political or legal means still have certain functions that cannot be ignored and should also be taken into consideration.

The following discussion provides possible mechanisms in a descending order of political attributes, including essentially nonjudicial means, judicial methods with some nonjudicial elements, and essentially judicial paths. The aim is not to decide which approach is the best but to offer various possibilities to respond to new security challenges. These possible approaches may not be mutually exclusive but may work well together.

4.2.1 Essentially Nonjudicial Approach Outside the WTO Framework

Considering that reaching a consensus among WTO Members on effective legal approaches may be hard to achieve, some political approaches would be more feasible. Mishra proposes that, in response to cyberattacks stemming partly from mistrust, political approaches outside the WTO framework, such as a diplomatic dialogue, bilateral understanding, and international cooperation framework, may be more useful and advisable. Good-faith negotiations on regional or global standards may play a similarly helpful role in dealing with cybersecurity threats.

4.2.2 Basically Nonjudicial Approach Within the WTO Framework

One nonjudicial approach within the WTO framework is to use specialized WTO committees. Specialized WTO committees could monitor Members' use of international standards, facilitate

information exchanges and norm elaboration among WTO Members, and even resolve disputes before they reach adjudication. In their regular meetings, these committees serve as multilateral fora for discussion on specific trade concerns. Thus, one suggestion is that these committees could deal with new security challenges related to their mandates. This is an approach based on existing mechanisms.

Concerning committees, another suggestion that goes a little further is to establish a new Committee on National Security Measures, where security-related practices could be discussed in regular meetings and where conflicts could be resolved outside litigation. Compared to the former suggested approach wherein new security issues are discussed by various WTO committees, a committee specifically focused on national security measures could be more efficient in developing coherent rules and carrying out possible supervision.

Another nonjudicial route within the WTO framework proposed by Simon Lester and Huan Zhu is a rebalancing mechanism similar to the safeguards model. This rebalancing mechanism allows restricting trade out of security concerns without WTO adjudication. Members taking trade-restrictive measures would have to bear strong notification obligations and engage in negotiations to provide adequate compensation promoting trade liberalization in other sectors. If not, they would be subject to retaliation in an equivalent amount by the complaining party. Compared with a full WTO dispute proceeding which usually takes two to four years, this rebalancing mechanism would be more efficient and flexible. If this nonjudicial rebalancing mechanism is adopted, the previously proposed new Committee on National Security Measures could also be helpful by facilitating the negotiations and consensus on rebalancing and examining both the national security measures and the proposed compensation.

4.2.3 Judicial Methods with Some Nonjudicial Elements

One judicial method with some nonjudicial elements is a combination of domestic administrative decisions and an international procedural review. On one hand, investigations are conducted by national authorities, leaving the determination of the substantive and procedural standards of security measures to the domestic administrations. On the other hand, after the domestic process, a procedural review follows at the international level, providing standards for domestic investigation, public participation, and reason-giving, aiming at bringing national security within the legal order.

Another approach that also combines the judicial methods with some (but less) nonjudicial elements is a judicial rebalancing mechanism based on the non-violation complaint, proposed by Nicolas Lamp. This mechanism proceeds as follows: after a non-violation complaint is launched, and if a panel determines that the measure in question is nullifying or impairing benefits accruing to the complaining party, the responding party would be recommended to agree to a ‘mutually satisfactory adjustment’. The amount and form of compensation could be determined through negotiations or by DSU Article 21.3(C) arbitration. If the parties then disagree on the existence of the ‘mutually satisfactory’ compensation, they could ask the panel to decide. If the panel holds that a mutually

satisfactory adjustment does not exist, for a rebalance, the complaining party could be authorized to suspend obligations to the extent equivalent to that of the nullification or impairment.

In this approach, the negotiations to reach a consensus on the compensation is a nonjudicial element that leaves room for political flexibility, and this judicial rebalancing mechanism based on non-violation claims shares a similar rationale of rebalancing with the previously mentioned one based on the safeguards model, namely, compensation first and retaliation later. The primary difference between them is that the former calls for adjudication for compensation and retaliation, whereas the latter does not necessarily require WTO adjudication. One advantage of the judicial rebalancing mechanism compared with the nonjudicial one may lie in more justification for the legality of the retaliation, because it is authorized after WTO adjudication. However, as it involves trial procedures, it may not be as efficient and flexible as the nonjudicial one. The choice between these two rebalancing mechanisms depends more on one's inclination to different values, that is, whether to put the dispute within the DSB framework for more considerations on legalism or take a more political and flexible route to deal with novel security threats.

4.2.4 Essentially Judicial Paths

As for the essentially judicial paths, one is a 'judicial managerialist' approach, which may mainly apply to security exceptions. Scholars suggest that according to the *Russia – Traffic in Transit* case, if a Member could show that it is engaging in good-faith negotiations to develop regional or international standards for addressing new security challenges, a panel could defer and exercise less scrutiny on the security measures in question. One limitation, however, is that this approach is based on and thus is mainly applied to security exceptions. As discussed in Section 4.1, there are still many other new security issues that could not be covered by security exceptions inherently and thus cannot be solved by this managerial approach.

Another essentially judicial path is to develop a new exception for new security threats that fall outside the scope of existing exceptions. Admittedly, it would be quite difficult to develop a new exception, because a consensus among WTO Members may be difficult to reach and there are insufficient international rules forming the basis for a new exception. However, one needs to consider that there may still exist some new security threats that do not reach the threshold of the security exception and do not belong to other escape clauses but still call for an exemption of measures taken rather than offering compensation. Despite this narrow scope of applicability, to logically fill this gap with a new exception is to reserve room for future situations where rebalancing mechanisms and other approaches may not be suitable. Moreover, the requirements set for this new exception must be much stricter than those in the rebalancing mechanisms because the new exception creates an exemption of liability and freedom from offering compensation.

It would be more feasible to explore the possibility of developing a new exception via some previously mentioned, comparatively flexible mechanisms in Section 4.2, such as dialogues and negotiations, norm elaboration promoted by a specialized Committee on National Security Measures,

rebalancing mechanisms, and so on. Based on experience gained from these aforementioned mechanisms, whether there exists a possibility where the rebalancing mechanism is not enough and a new exemption clause is needed, and what the conditions and the outcomes of this new exception would be, could gradually be determined. Although this approach may face many obstacles, instead of ignoring it completely, keeping an open mind on this possible route would be more advisable.

Some of the approaches mentioned in Section 4.2 could promote one another. Approaches with political features are generally more suitable to carry out first. It is thus suggested to first gain experience and feedback from diplomatic dialogues, cooperation frameworks, and so on to determine whether a new Committee on National Security Measures, a rebalancing mechanism, or a new exception is needed. In turn, the reasoning in the judicial rebalancing mechanism and the international procedure review could also provide some legal grounds and arguments for diplomatic dialogues and the development of nonjudicial mechanisms.

Additionally, some approaches are not mutually exclusive but rather could coexist with one another. For example, political dialogues, the assistance of specialized committees on negotiations and norm elaboration, the nonjudicial rebalancing mechanism, and the managerial approach applied to the security exception may all coexist and complement one another. This kind of comprehensive use of multiple approaches may fit better given today's complicated relationships between trade and security and the coexistence of various new security threats that may call for different response mechanisms at the same time. Collectively, these perspectives may offer potential avenues for reshaping and guiding international economic and trade rules in the contemporary global landscape.

5. Conclusion

The *Russia – Traffic in Transit* Panel established its jurisdiction over the security exception and set comparatively strict criteria for invoking it. The Panel achieved a balance by being flexible about new forms of 'emergency in international relations' and 'essential security interests', while remaining conservative on the high level of crises that should be embodied in these two components. However, one flaw is that the Panel failed to point out the causal link between the two elements 'emergency in international relations' and 'essential security interests': the 'essential security interests' proffered by the Member should be a new occurrence or has increased significantly due to the 'emergency of international relations' at hand.

The Panel's interpretation of Article XXI(b)(iii) has far-reaching implications: it has preserved the multilateralism and impacted subsequent cases. It will influence the interpretation of Article XXI(b)(ii) and even the justiciability of national security reviews of foreign investment. However, there are also limitations. One primary limitation is that the Panel's interpretation cannot respond to many new security threats.

In response, a reconsideration of the relationship between international economic order and national security is suggested. The various proposed approaches, ranging from purely political to legal and hybrid models, offer a spectrum of possibilities for reforming international economic and trade rules.

These approaches include a combination of domestic decisions and an international procedural review, nonjudicial and judicial rebalancing models, etc. The potential for these approaches to complement one another suggests that a comprehensive, integrated strategy may be most effective in navigating the complex interplay between global economic order and national security concerns.

As the international community moves forward, it must remain open to exploring unconventional solutions, even those that may seem unlikely at first glance, such as developing a new exception. The dynamic nature of global security and economic challenges demands continuous adaptation and innovation in governance structures. By embracing a diverse array of approaches and fostering collaboration among nations, the international actors can seize opportunities to promote and lead the reshaping and reform of world trade mechanisms and rules, which could allow the international community to work towards a more resilient, equitable, and secure global economic order capable of addressing multifaceted challenges.

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The author declares no conflicts of interest to report regarding the present study.

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