

Article

Analysing WTO's Security Exceptions Amidst Middle East Conflicts

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The ongoing conflict in Gaza has drawn in numerous foreign actors and impacted trade, leading to proposed trade sanctions against parties like Israel (such as Turkey's trade ban), Iran, and Palestinian groups. As several of those parties are WTO members, they might challenge the restrictions under WTO law. In turn, the respondents would invoke the 'security exception' in Article XXI of the GATT 1994. This provision allows a state to bypass WTO obligations and take measures "which it considers necessary" to protect its security interests during wars and international emergencies. The WTO's handling of the Russia-Ukraine transit dispute – the only WTO case to extensively explore this exception to date – highlights the challenges in interpreting it. This blogpost considers the WTO Panel's approach and its potential implications for adjudicating security exceptions in Middle Eastern conflicts.

WTO Panel Analysis: Russia-Ukraine Transit Dispute and Article XXI Interpretation

In response to international sanctions imposed due to Russia's annexation of Crimea and invasion of the eastern part of Ukraine, Russia restricted the transit of Ukrainian goods, invoking Article XXI of the GATT for justification. On the one hand, the WTO Panel clarified that Article XXI is not entirely self-judging, as Russia had claimed (*ibid.*, para 7.26). According to the Panel, the term "which it considers" simply modifies "necessary," while specific scenarios like wars or emergencies restrict member discretion (*ibid.*, para 7.101). Further, the Panel stated that determining an "emergency in international relations" can be objectively evaluated (*ibid.*, para 7.77). On the other hand, it introduced a 'minimum plausibility' standard to link the measure with the security interests it purportedly protects (*ibid.*, para 7.138), establishing an extremely low threshold for justification. Ultimately, the Panel ruled that Russia's measures satisfied this criterion, making Ukraine's GATT claims on material law redundant and absolving Russia from liability (*ibid.*, para 7.148).

Criticism of the Panel's Reasoning: Muddying the Burden of Proof?

The WTO Panel's approach has sparked criticism for its lenient evidence standards. Russia justified its 2014 trade restrictions by vaguely referring to an "emergency in international relations," without specific details. It merely referred to "an emergency in international relations that had taken place sometime in 2014, which was the reason Russia took various

actions, like declaring the measures at issue” (ibid., para 7.112). In response, the Panel, lowering the burden of proof, suggested that states need not fully characterize such emergencies (ibid., para 7.121), raising concerns that this could lead to the justification of arbitrary trade restrictions.

Critics argue that this leniency might encourage states to artificially create emergencies to impose trade barriers. This issue is compounded by the Panel’s assertion that the responsibility for causing the emergency is irrelevant (para 7.121). Here, scholars have noted that the clean hands doctrine should be introduced within WTO Dispute Settlement mechanisms to prevent states from exploiting the Article XXI exception to their benefit.

Additionally, the Panel sided with Russia’s arguments despite scant factual evidence, blending protections from Article XXI(a) – which shields states from revealing sensitive information – with Article XXI(b)’s permissions for actions protecting security interests. This conflation led to concerns about the Panel’s role in assuming the burden of proof, primarily using evidence from Ukraine rather than Russia’s submissions. Highlighting this issue, Van Damme argues that “at least some evidence should be provided” while invoking the Article XXI(a) exception – even if the evidence “explains the nature of the withholding of evidence”.

Moreover, some scholars believe that the Panel in *Russia-Transit* “cut the baby in half”, by allowing Russia to claim the exception while also acknowledging an “emergency in international relations,” which would aid Ukraine in challenging Russia’s subsequent trade measures.

Despite many critiques, subsequent WTO cases have adopted the Panel’s interpretation of Article XXI, indicating broader acceptance within the WTO framework. Examples include cases involving Saudi Arabia, the United States concerning steel and aluminium, and the US origin marking requirements, which all reference the analytical framework established in the *Russia-Transit* decision (see *Saudi Arabia: Measures concerning the Protection of Intellectual Property Rights–Panel Report*, paras. 7.243-7.255, 7.271; *United States: Certain Measures on Steel and Aluminium Products–Panel Report*, para. 7.128; and *United States: Origin Marking Requirement–Panel Report*, para. 7.185). This development suggests that states involved in Middle East conflicts could use lower thresholds to justify trade measures under the guise of security.

Panel’s Findings at the International Law Background

The WTO Panel’s handling of security exceptions in the *Russia-Transit* case, contrasts with the International Court of Justice’s (ICJ) approach, as seen in several cases involving self-judging clauses, particularly the recent *Certain Iranian Assets* decision. In that case, the ICJ interpreted a similarly worded security exception provision, namely Article XX(1)(d) of the Iran-US Treaty of Amity (Judgment of 30 March 2023, para 96). While the WTO allowed a low threshold for invoking security exceptions, the ICJ required the U.S. to substantiate how

its actions met the security exception criteria in the Iran-US Treaty of Amity, concluding that the U.S. failed to do so (ibid., para 108). Notably, in his Separate Opinion, Judge Iwasawa discussed the necessity tests applied by the ICJ and the WTO, favoring less stringent standards for security exceptions to avoid compromising national security.

Conclusion

Ultimately, the WTO allows considerable deference to state authorities in determining security risks and necessary measures. This deference is overseen by a 'good-faith review' to prevent abuse, yet the existing framework significantly favors state discretion over stringent international scrutiny, potentially facilitating the justification of trade measures on the grounds of national security in conflict situations like those in the Middle East.

The threshold for invoking these exceptions remains low, enabling states to implement trade restrictions for non-trade objectives relatively unchallenged. This situation highlights that WTO is ill-equipped to balance trade and security interests. The ongoing impasse of the Appellate Body compounds this issue, making it unlikely that any future rulings will contradict the established Panel Report.

Cite as

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