

# Invoking Article 73 TRIPS in good faith: no recourse to ‘security exceptions’ for Russia’s violation of TRIPS

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## 1. Introduction

On 24 February 2022, Russia launched an unprecedented and unjustified war against Ukraine, which at the time of writing is still ongoing.<sup>1</sup> The Russian occupation army has been targeting objects of civilian infrastructure, including hospitals, medical facilities, schools and shelters. Thousands of Ukrainian civilians are being tortured, raped

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### Abstract

- By unlawfully invading Ukraine and committing terrifying atrocities against civilians, Russia has

gravely violated many international laws. This also includes its recent measures in the field of intellectual property (IP) law: (i) the changes to its compulsory licensing regime with no compensations to the rightsholders from ‘unfriendly states’ and (ii) a blank IP waiver in relation to any products, including changes to its regime of parallel importation.

- These IP-related measures violate fundamental principles of Trade-Related Aspects of Intellectual Property Rights (TRIPS), national treatment and most-favoured-nation, and Russia’s obligation under TRIPS that obliges all members to provide minimum standards of IP protection. In addition, this article argues that such measures cannot be justified based on security exceptions under Article 73 TRIPS. This is because the invocation of the security exceptions provision, which allows a WTO Member to protect its essential security interests during an ‘emergency in international relations’, must be undertaken in good faith.
- Therefore, Russia, whose unlawful actions have led to the current emergency in international relations when it launched the war against Ukraine, cannot benefit from security exceptions under Article 73 TRIPS as this will be against good faith and will constitute an abuse of rights. Furthermore, this article challenges the approach taken by the panel in *Russia—Traffic in Transit*, which has set a dangerous precedent and allowed Russia to shield itself from liability for violating its obligations under GATT by invoking an identical security exceptions provision contained in Article XXI(b)(iii) GATT in similar circumstances.

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1 The Russian war against Ukraine began in February 2014, when Russia invaded, annexed Crimea and triggered a separatist rebellion in the east, followed by the Russian army’s overt invasion of the eastern Ukraine to support the rebels. ‘International sanctions have been imposed during the Russo-Ukrainian War by a large number of countries, including the United States, Canada, and the European Union against Russia following the Russian invasion of Ukraine, which began in late February 2014 [...] In response to the annexation of Crimea by the Russian Federation, some governments and international organisations, led by the United States and European Union, imposed sanctions on Russian individuals and businesses. As the unrest expanded into other parts of Eastern Ukraine, and later escalated into the ongoing war in the Donbass region, the scope of the sanctions increased. The Russian government responded in kind, with sanctions against some Canadian and American individuals and, in August 2014, with a total ban on food imports from the European Union, United States, Norway, Canada and Australia.’ Available at [https://en.wikipedia.org/wiki/International\\_sanctions\\_during\\_the\\_Russo-Ukrainian\\_War](https://en.wikipedia.org/wiki/International_sanctions_during_the_Russo-Ukrainian_War) (accessed 25 February 2023).

and murdered, including children.<sup>2</sup> These horrific actions have been done in a flagrant violation of international law and basic principles of human decency.<sup>3</sup> These atrocities are overwhelmingly condemned by international community.<sup>4</sup> In response to these terrible actions, many countries, including the USA, UK, EU, Switzerland, Canada, Australia and Japan, have imposed broad economic and financial sanctions against Russia,<sup>5</sup> including restrictions on Russia's oil and gas imports.<sup>6</sup> Many international organizations have also demonstrated their condemnation of Russia's inhumane actions by annulling its participation in numerous international institutions,<sup>7</sup> while multinational business has been massively exiting the Russian market.<sup>8</sup> These joined punitive measures, which are considered to be the most powerful and costly punishment

imposed on a major economy at least since the Cold War,<sup>9</sup> are aimed at crippling the Russian economy in order to reduce Russia's ability to finance its cruel war against Ukraine and pressuring it to withdraw its forces from the Ukrainian territory.<sup>10</sup>

In turn, Russia responded with its own retaliatory economic measures against the USA and other countries affiliated with them.<sup>11</sup> Among these countersanctions is the implementation of certain legal mechanisms related to intellectual property ('IP') rights, which are owned by the residents of the Western countries that imposed sanctions against Russia over its invasion of Ukraine. Specifically, Russia has introduced certain changes to its compulsory licensing regime under Article 1360 of the Civil Code, as well as adopted new law No. 46-FZ that allows the government to waive IP rights in relation to certain goods (group of goods).

This article argues that the implementation of such measures constitutes a blatant violation of Russia's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS')<sup>12</sup> and should be dealt with by the WTO dispute settlement body. Moreover, as it will be demonstrated in this article, such measures cannot be justified based on security exceptions under Article 73 TRIPS. While there is a doubt whether Russia would meet a specific set of requirements under Article 73 TRIPS developed in the WTO case law when invoking security exceptions,<sup>13</sup> more fundamentally, it is submitted that in the current circumstances, Russia should not be allowed to rely on this provision at all. This is because the invocation of the security exceptions provision, which allows a WTO Member to protect its

2 Lorenzo Tondo, 'Russia has committed war crimes in Ukraine, say UN investigators' (*The Guardian*, 23 September 2022) ('The United Nations has said its investigators have concluded that Russia committed war crimes in Ukraine, including bombings of civilian areas, numerous executions, torture and horrific sexual violence'). Available at [https://www.theguardian.com/world/2022/sep/23/russia-has-committed-war-crimes-in-ukraine-say-un-investigators?CMP=fb\\_gu&utm\\_medium=Social&utm\\_source=Facebook&fbclid=IwAR0LNVW5h3wpkGIRmTvMj\\_0\\_18nunnb61WizkuPWC-p8rs1\\_T0AXw-zX2Xw#Echobox=1663942591](https://www.theguardian.com/world/2022/sep/23/russia-has-committed-war-crimes-in-ukraine-say-un-investigators?CMP=fb_gu&utm_medium=Social&utm_source=Facebook&fbclid=IwAR0LNVW5h3wpkGIRmTvMj_0_18nunnb61WizkuPWC-p8rs1_T0AXw-zX2Xw#Echobox=1663942591) (accessed 25 February 2023).

3 Statement by President Obama on Ukraine, 24 February 2022.

4 See n 53 in this article.

5 'Overview of Economic Sanctions on Russia' (*Global Data*, October 2022). Available at [https://www.globaldata.com/data-insights/macroeconomic/overview-of-economic-sanctions-on-russia/?gclid=CjwKCAjwKmaBhBMEiwAyINuwBdd8TAEqEgkMrTcplS9mBefE0WF9\\_Plkq2clWysofQeUZYON-VqxoCjg8QAvD\\_BwE](https://www.globaldata.com/data-insights/macroeconomic/overview-of-economic-sanctions-on-russia/?gclid=CjwKCAjwKmaBhBMEiwAyINuwBdd8TAEqEgkMrTcplS9mBefE0WF9_Plkq2clWysofQeUZYON-VqxoCjg8QAvD_BwE); 'Russia Sanctions Tracker' (*Ashurst*, 13 October 2022) (This tracker provides a high-level summary of the measures imposed by each of the UK, EU, and Japan and Australia following Russia's invasion of Ukraine in February 2022). Available at <https://www.ashurst.com/en/news-and-insights/hubs/sanctions-tracker/>; Claire Mills 'Sanctions against Russia' (11 October 2022) House of Commons, Research Briefing. Available at <https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf>; European Council 'EU Sanctions Against Russia Explained'. Available at <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions> (all accessed 25 February 2023).

6 World Economic Forum 'Here's What You Need to Know About the EU's Ban on Russian Oil Products' (7 February 2023). Available at <https://www.weforum.org/agenda/2023/02/eu-ban-on-russian-oil-products-ukraine/> (accessed 25 February 2023); Tatiana Mitrova 'Understanding the Impact of Sanctions on the Russian Oil and Gas Sector with Limited Data' (*Centre on Global Energy Policy*, 29 September 2022). Available at <https://www.energypolicy.columbia.edu/research/qa/qa-understanding-impact-sanctions-russian-oil-and-gas-sector-limited-data> (accessed 25 February 2023).

7 'Isolation. Russia ousted from 42 international fora' (*War.Ukrain.UA*, 2 June 2022). Available at <https://war.ukraine.ua/articles/isolation-russia-suspended-from-42-international-platforms/> (accessed 25 February 2023).

8 Yaroslav Pylypenko 'International Businesses Leaving Russian Market: Is There Progress?' (*Vox Ukraine*, 13 October 2022). Available at <https://voxukraine.org/en/international-businesses-leaving-russian-market-is-there-progress/> (accessed 25 February 2023); Minami Funakoshi, Hugh Lawson and Kannaki Deka, 'Tracking sanctions against Russia' (Reuters, 7 July 2022) ('Major international companies, including Apple, IKEA, ExxonMobil, and General Motors, have decided themselves to apply sanctions to Russia'). Available at <https://graphics.reuters.com/UKRAINE-CRISIS/SANCTIONS/byvrjznmve/> (accessed 25 February 2023).

9 Richard Berner, Stephen Cecchetti, and Kim Schoenholtz 'Russian Sanctions: Some Questions and Answers' (*VOXEU.CERP*, 21 March 2022). Available at <https://cepr.org/voxeu/columns/russian-sanctions-some-questions-and-answers> (accessed 25 February 2023).

10 Minami Funakoshi *et al.* (n 8).

11 Decree of the president of Russian Federation 'On the application of special economic measures in connection with the unfriendly actions of the United States and foreign states and international organizations that have joined them' dated 28 February 2022, No. 79 (with further amendments). Available at <http://kremlin.ru/events/president/news/67881> (accessed 25 February 2023); Alexander Bychkov and Vladimir Efremov 'Russia imposes special economic measures in response to Western sanctions' (*Blog BakerMacKenzie*, 1 March 2022). Available at <https://sanctionsnews.bakermckenzie.com/russia-imposes-special-economic-measures-in-response-to-western-sanctions/> (accessed 25 February 2023).

12 WTO Agreement on Trade-Related Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 15 April 1994, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 321 (1999), as amended on 23 January 2017 (hereinafter 'TRIPS' or 'TRIPS Agreement').

13 Such requirements were developed in Russia—Measures Concerning Traffic in Transit, 5 April 2019 (WT/DS512/R) (hereinafter 'Russia—Traffic in Transit') and confirmed in Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights, 16 June 2020 (WT/DS567/R) (hereinafter, *Saudi Arabia IPRs*).

essential security interests during an ‘emergency in international relations,’ must be undertaken in good faith. Consequently, a WTO Member whose unlawful actions have led to an emergency in international relations should not benefit from security exceptions in order to justify a non-compliance with its obligations under TRIPS. The invocation of this defence in such a case would constitute an abuse of rights. Therefore, Russia, whose actions have led to the current emergency in international relations when it launched a war against Ukraine, cannot benefit from security exceptions under Article 73 TRIPS as it would be otherwise against good faith and constitute an abuse of rights. This article, therefore, challenges the approach taken by the panel in *Russia—Traffic in Transit*,<sup>14</sup> which has set a dangerous precedent and allowed Russia to shield itself from liability for violating its obligations under GATT by invoking identical security exceptions in Article XXI(b)(iii) GATT in similar circumstances.

## 2. IP-related measures taken by Russia as part of its countersanctions against the West

### 2.1. Compulsory licensing with no compensation to IP rightsholders

The first IP-related countermeasure taken by Russia against the West concerns compulsory licensing. Specifically, the compulsory licensing regime in Russia is regulated by Articles 1360 and 1362 of the Civil Code.<sup>15</sup> According to Article 1360, the Russian government in certain cases is allowed to grant a permission to use an invention, utility model or industrial design without the IP rightsholder’s consent. This provision also specifies the grounds for issuing a compulsory licence. The first ground is related to ensuring the defence and security of the state. Another ground, which was added in 2021 in light of the COVID-19 pandemic, concerns the protection of lives and health of citizens.<sup>16</sup> This provision also requires that the IP rightsholder be notified about such a grant and receive a commensurate compensation. The Government Decree No. 1767 of 18 October 2021 defines how the compensation should be calculated.<sup>17</sup>

On 31 December 2020, based on Article 1360, the Russian government granted its first compulsory licence on remdesivir to deal with the surge of the COVID-19 pandemic; the government also ordered a relevant ministry to provide information on the payment of a proportionate compensation to the rightsholders by the Russian compulsory licensee Farmasitez.<sup>18</sup>

However, on 6 March 2022, as a part of its retaliatory measures, Russia adopted Decree No. 299 that introduced certain amendments to the compensation methodology set in the Government Decree No. 1767. The new Decree No. 299 shows that the amount of compensation to be paid to the IP rightsholders associated with foreign states that committed unfriendly actions against Russian legal entities and individuals would be zero per cent of the actual proceeds of the person who used the invention, utility model and industrial design without the rightsholder’s consent.<sup>19</sup> In other words, the IP rightsholders from the ‘unfriendly states’<sup>20</sup> will receive no compensation in case their inventions, utility models or industrial designs are used without their consent. Some commentators suggest that these measures were implemented to remove barriers in the form of patents that protect medicines owned by western companies to allow Russian pharmaceutical companies that have manufacturing facilities to produce most of the medicines that are needed in Russia locally.<sup>21</sup> For example, on 5 March 2022, the Russian government issued a second compulsory licence on remdesivir, which contained no mentioning of any compensation to the rightsholders.<sup>22</sup> Importantly,

of the actual proceeds of a person who has exercised the right to use an invention, utility model or industrial design without the consent of the patent holder, from the production and sale of goods, performance of work and provision of services for the production.

14 *Russia—Traffic in Transit* (n 13). The panel in this case provided an in-depth analysis of the grounds for invoking security exceptions under Art XXI(b)(iii) (Art 73(b)(iii) TRIPS mirrors this provision).

15 Art 1360 ‘Using an Invention, Utility Model or Industrial Design in the Interests of National Security’ of the Russian Civil Code, Part Four No. 230-FZ dated 18 December 2006.

16 Federal Law No. 107-FZ ‘On Amendments to Article 1360 of Part Four of the Civil Code of the Russian Federation’, dated 30 April 2021.

17 According to para 2 of the Methodology approved by the Decree No. 1767, the amount of the compensation to be paid to the IP rightsholders is 0.5%

18 Degree of the Government of the Russian Federation dated 31 December 2020 No. 3718-r ‘On the authorization of Pharmasintez JSC to use inventions protected by Eurasian patents belonging to the companies GAYLYD SCIENCES, INC. (US), JILID SCIENCES, INC. (US), JILYD PHARMACY, LLS (US), during one year without the consent of the patent holders in order to provide the population of the Russian Federation with medicinal products with the international non-proprietary name “Remdesivir”.

19 Para 1 of the Decree No. 299 dated 6 March 2022; a list of countries and regions that have taken unfriendly actions against Russia, Russian companies and citizens according to the Government Decree dated 5 March 2022 No. 430-r includes Australia, Albania, Andorra and United Kingdom, including Jersey, Anguilla, British Virgin Islands, Gibraltar, Member States of the European Union, Iceland, Canada, Liechtenstein, Micronesia, Monaco, New Zealand, Norway, Republic of Korea, San Marino, North Macedonia, Singapore, USA, Taiwan (China), Ukraine, Montenegro, Switzerland and Japan.

20 Who have citizenship of these states, or whose place of registration, place of primary business activity or place of primary profit from the activity are in these states (see para 1 of Decree No. 299 dated 6 March 2022).

21 Alisa Pestryakova ‘Freezing of Foreign Pharma Patents in Russia? Legal Uncertainty or Fake News’ (*Lexology*, 24 March 2022). Available at <https://www.lexology.com/library/detail.aspx?g=e07089bf-8c98-49ff-8c8b-cae19ae89efba> (accessed 25 February 2023).

22 Decree of the Russian Government No. 429-r dated 5 March 2022.

no restrictions with respect to the type of a product that could be compulsorily licensed with zero per cent compensation to the IP rightsholder have been indicated in the law, and, thus, this new provision can be applied to any IP-protected product owned by foreign companies.<sup>23</sup>

## 2.2. The waiver of IP rights in relation to any goods (groups of goods)

In addition to the changes in the compulsory licensing regime, Russia has implemented another IP-related measure that essentially allows the government to waive IP rights in relation to any goods and services or groups of goods.<sup>24</sup> On 8 March 2022, Russia adopted the law 'On amendments to certain legislative acts of the Russian Federation' (No. 46-FZ), Article 18(1)(13) of which permits the government during 2022 and 2023 to decide on 'the list of goods (groups of goods) in respect of which certain provisions of the Civil Code regarding the protection of exclusive rights on the results of intellectual activities expressed in such goods and means of individualization with which such goods are marked may not apply'.<sup>25</sup> This means that these new rules give the Russian government new extensive powers to waive any IP rights for certain goods or groups of goods. Essentially, this provision allows the Russian government to suspend certain provisions of the Civil Code in relation to certain goods, as well as allowing it to determine the lists of goods in respect of which certain provisions of the Civil Code would not apply. At the same time, the new law does not

establish any limits on the powers of the government in this matter, including regarding the purpose of such new powers.<sup>26</sup>

The new rules that establish a broad IP waiver, discussed earlier, have been augmented with another provision. Article 18 of the law No. 46-FZ has been supplemented with subsection 3, which is deemed to introduce changes to the parallel importation regime, allowing parallel import of certain goods, the list of which is determined by the Ministry of Industry and Trade.<sup>27</sup> According to this new provision, the use of the results of intellectual activity expressed in goods (groups of goods) as well as means of individualization with which such goods are marked will not violate the exclusive rights to the results of such intellectual activity or the means of individualization, contained in a list established in accordance with Article 18(1)(13). On 29 March 2022, the Russian government further issued Decree No. 506 according to which the Russian Ministry of Industry and Trade, based on the proposals of federal executive bodies, approves a list of goods (groups of goods) in respect of which the provisions of Articles 1359(6) and 1487 of the Civil Code do not apply, provided that the specified goods (groups of goods) are placed into circulation outside of the Russian territory by the IP rightsholders and with their consent.

These additional new provisions essentially change the rules of parallel importation in Russia: while according to Articles 1359(6) and 1487 of the Civil Code, the IP exhaustion regime in Russia is national, for certain types of goods and groups of goods that are included in the list approved by the Ministry of Industry and Trade, the regime is now international. On 6 May 2022, the relevant ministry has put together a list of products

23 Moreover, a similar approach was applied by the Kirov Region Court that denied relief over the infringement of 'Peppa Pig' and 'Daddy Pig' marks because of the sanctions imposed by the UK and other countries (ie by 'unfriendly states'). Sukanya Sarkar 'Russian Court Rejects "Peppa Pig" IP Claims Due to Sanctions' (*Managing IP*, 11 March 2022). Available at <https://www.managingip.com/article/2a5d0zxo7uj1lvloovk74/russian-court-rejects-peppa-pig-ip-claims-due-to-sanctions> (accessed 25 February 2023). On 21 June 2022, the Second Arbitration Court of Appeal overturned the decision of the Kirov Region Court and granted the rightsholder's claims for compensation for violation of the exclusive right to a trade mark. However, some courts have followed the approach of the Kirov Region Court and rejected infringement claims. See, for example, the Arbitration Court of Sevastopol, after considering the counterfeit case, also refused ABRO Industries Inc. on the grounds of 'American registration' and abuse of the right (decision of the Arbitration Court of the city of Sevastopol of 13 April 2022 in case No. A84-453/2022).

24 Denis Khabarov and Margarita Divina, 'Russian Parliament adopts bill allowing Government to disregard IP rights for certain products' (*Baker McKenzie*, 9 March 2022) ('We believe that the measure is likely to apply to certain essential goods, medicines and medical products, foods, agricultural seeds, technological items and other goods that could be produced in Russia under import-substitution programs, primarily in the absence or insufficiency of such goods to meet the needs of Russian users and businesses'). Available at <https://sanctionsnews.bakermckenzie.com/russian-parliament-adopts-bill-allowing-government-to-disregard-ip-rights-for-certain-products/> (accessed 25 February 2023).

25 Art 18(13) of the law 'On amendments to certain legislative acts of the Russian Federation' (No. 46-FZ) with amendments introduced by the law No. 519-FZ of 19 December 2022, which came into force on 1 January 2023.

26 'New Regulation and Practice in the Sphere of Intellectual Property' (*EPAM*, 14 March 2022) ('In practice, this means the removal of restrictions on the use of intellectual property contained in certain goods, the supply of which to Russia is limited. According to the authors of the draft law, this will smooth out the impact on the market where the supply chains are broken, as well as deal with the shortages of goods and services that arose due to new sanctions by Western countries. At the same time, it is separately indicated that this regulation will not apply to companies selling their goods, works, services in Russia, including those manufacturing their products in Russia. The measure will concern both objects of copyright (in particular, software), as well as patents and trade marks. With regard to trade marks, in practice, this will mean the legalisation of parallel imports of products, the supply of which to Russia is limited'). Available at <https://epam.ru/ru/legal-updates/view/novoe-regulirovanie-i-praktika-v-sfere-intellektualnoj-sobstvennosti> (accessed 25 February 2023); 'Changes in the field of intellectual property in early 2022' (*Lawyers' Gazette*, 20 April 2022) ('In other words, the Government of the Russian Federation has the right to suspend the said norms. These include, for example, provisions on liability for infringement of exclusive rights to works, phonograms, performances and trade marks'). Available at <https://www.advgazeta.ru/ag-expert/news/izmeneniya-v-sfere-intellektualnoy-sobstvennosti-nachala-2022-goda/> (accessed 25 February 2023).

27 In accordance with law No. 213-FZ that entered into force on 28 June 2022.

and product categories (96 positions) for which parallel import into Russia is allowed. The list includes goods such as petroleum products, chemical compounds, electric motors, batteries, phones and their components, devices for recording and storing data, monitors, TVs and projectors and video game consoles.<sup>28</sup>

### 3. IP-related measures taken by Russia violate its obligation under TRIPS

Being a part of the World Trade Organization (WTO) package, the TRIPS Agreement establishes important principles such as national treatment and most-favoured-nation (MFN) treatment. In particular, Article 3 TRIPS provides the rules on national treatment obliging members to accord to the nationals of other members treatment no less favourable than that it accords to its own nationals with regard to protection of IP.<sup>29</sup> Furthermore, the principle of MFN in Article 4 means that any extra benefit provided to a member nation of the WTO, in relation to an IP right, must be provided to all members of the WTO.<sup>30</sup> TRIPS also establishes minimum standards of protection for IP rights, which all WTO Members are obliged to ensure. Such minimum standards of protection cover copyright and related rights, trade marks, geographical indications, industrial designs, patents (including the protection of new varieties of plants), the layout designs of integrated circuits and undisclosed information (including trade secrets and test data).<sup>31</sup> Non-compliance with the TRIPS obligations may give rise to a dispute settlement procedure under the WTO rules that may lead to trade sanctions against a non-compliant country; this mechanism ensures the enforcement of TRIPS rules. The following sections will explain why the new IP-related measures implemented by Russia violate

its TRIPS obligations. It will further be argued that Russia cannot rely on security exceptions under Article 73 TRIPS to justify its non-compliance.

#### 3.1. Russia's IP-related measures violate its TRIPS obligations

##### 3.1.1. Regarding the changes to the compulsory licensing regime

The essence of the changes to the compulsory licensing regime is that patent owners from 'unfriendly states' will not receive compensation for the use of their patents without their permission. Such a rule violates several basic principles and provisions of the TRIPS agreement. First of all, since this rule is focused on patent owners from 'unfriendly nations' (as opposed to a general exclusion of compensation for all patent owners when issuing a compulsory licence), such a rule violates national treatment commitments under Article 3 TRIPS. This is because Russian patent owners continue to receive compensation when a compulsory licence is issued in relation to their patent rights. Therefore, this rule essentially provides less favourable treatment to nationals from 'unfriendly states' than that they accord with Russian nationals. In addition, this new compulsory licensing rule violates the MFN commitment under Article 4 TRIPS. This is because the patent owners from other countries that are not 'unfriendly' will continue to receive compensation should their patents be subject to a compulsory licence in Russia.

Moreover, Article 31 TRIPS contains a specific mechanism in the form of compulsory licensing which allows certain limitations to be placed on the exercise of exclusive rights under the patent.<sup>32</sup> A compulsory licence is a permission issued by a state authority that permits the licensee to use a patented invention without the patent holder's consent. This provision establishes certain requirements that a WTO Member must ensure when granting a compulsory licence. One such requirement is Article 31(h) TRIPS, which states that 'the rightholder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization'. As it was explained earlier, in its Decree No. 299, Russia introduced amendments to the compensation methodology set in the Government Decision No. 1767, establishing that compensation to the owners from the 'unfriendly countries' will be set at zero percent. This means that such IP rightsholders will receive no compensation for the use of their IP rights. This is, therefore, a clear violation of Article 31(h) TRIPS, which requires

28 'Parallel Imports to Russia Could Reach US\$16 Billion By Year End' (*Russia Briefing*, 15 August 2022) (this allows 'secondary parties external from Russia who are free from sanctions, the ability to resell them onto the Russian market'). Available at <https://www.russia-briefing.com/news/parallel-imports-to-russia-could-reach-us-16-billion-by-year-end.html/> (accessed 25 February 2023).

29 Art 3 of the TRIPS Agreement: 'Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.'

30 Art 4 of the TRIPS Agreement provides that: 'with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members'. Susy Frankel and Daniel J Gervais, *Advanced introduction to international intellectual property* (Elgar Advanced Introductions, 2016, 1st edn) 55.

31 WTO 'Overview: the TRIPS Agreement' Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (accessed 25 February 2023).

32 Art 31 of the TRIPS Agreement.

that compensation must be paid in case a compulsory licence is granted; no exceptions to this rule are indicated in Article 31 TRIPS. Moreover, no exceptions and limitations under Article 30 TRIPS may be applicable to Article 31.<sup>33</sup> This means that such an exception in the compulsory licensing regime is not permissible under the TRIPS Agreement.

### 3.1.2. Regarding the IP waiver in relation to any goods (groups of goods)

As detailed earlier, all WTO Members, including Russia,<sup>34</sup> are obliged to ensure a minimum level of protection for IP rights in their jurisdictions. Waiving such rights, therefore, violates Russia's obligations under TRIPS. Moreover, Article 18 of the law No. 46-FZ, while allowing the government to waive IP rights in relation to any goods or groups of goods, does not set any requirements or limitations for exercising such a power by the government. This extremely broad wording provides for an open mandate to the government<sup>35</sup> and makes the violation of TRIPS especially grave. In addition, since the IP waiver and the new regime on parallel importation concern nationals from 'unfriendly states', they also violate both national treatment and MFN principles envisaged in TRIPS based on the arguments discussed earlier.

## 4. Russia has no right to rely on security exceptions under Article 73 TRIPS

### 4.1. Security exceptions under Article 73 TRIPS

Article 73 TRIPS, mirroring an equivalent provision in Article XXI GATT, contains security exceptions, which can be relied upon by a WTO Member in certain circumstances.<sup>36</sup> It states that

Nothing in this Agreement shall be construed:

- ...
- (b) to prevent a member from taking any action which it considers necessary for the protection of its essential security interests;
- ...
- (iii) taken in time of war or other emergency in international relations.

33 See footnote to Art 31 TRIPS "Other use" refers to use other than that allowed under Article 30'.

34 Russia joined WTO in 2012. See [https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russia\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_russia_e.htm) (accessed 25 February 2023).

35 Pestryakova (n 21).

36 Tania Voon, 'Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL unbound 45–50; Jacob Gladysz, 'The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction' (2021) 52 Geo J Int'l L 835.

Under this provision, a WTO Member may not be prevented from taking an action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.<sup>37</sup> As the panel in *Russia—Traffic in Transit* explained '[t]his provision acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated.'<sup>38</sup> The purpose of this provision is, therefore, to ensure that WTO Members have the right to protect their essential security interests by adopting measures that may be inconsistent with the TRIPS Agreement. Therefore, Article 73 TRIPS essentially acts as an exception or defence for such measures.<sup>39</sup>

Some authors suggest that Russia may rely on this provision to justify its non-compliance with the obligations under TRIPS discussed earlier.<sup>40</sup> This article, however, argues that Russia should not be allowed to do this, because, as it will be explained in the following sections, this will be against a fundamental principle of good faith and will constitute an abuse of rights.

### 4.2. Provisions of WTO agreements must be invoked in good faith

Good faith is a general principle that forms part of the sources of international law. According to Article 31(1) of the Vienna Convention on the Law of Treaties ('VCLT'), '[a] treaty shall be interpreted in good faith...'. In addition, Article 26 of the VCLT provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. These provisions of the VCLT essentially codify the obligation of good faith.<sup>41</sup> It is applicable to all WTO Members in their interpretation and application of the WTO agreements, including the security exceptions provisions in Article XXI GATT

37 Frederick Abbott, 'The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic' (2021) The South Centre Research Paper 116 (in this paper, Abbott discusses whether the COVID-19 pandemic may be considered an 'emergency in international relations' and how WTO members may invoke Art 73 ('Security Exceptions') of the TRIPS Agreement as the legal basis for overriding IP rights otherwise required to be made available or enforced).

38 *Russia—Traffic in Transit* (n 13), para 7.108.

39 Olga Gurgula, 'Saving Ukrainian Lives during the Russian War: Ukraine Must Waive IP Rights under Article 73 TRIPS to Provide Access to Essential Medicines' (2022) 71/8 GRUR International 719.

40 Enrico Bonadio and Alina Trapova 'How Russia is Using Intellectual Property as a War Tactic' (*The Conversation*, 18 March 2022). Available at <https://theconversation.com/how-russia-is-using-intellectual-property-as-a-war-tactic-179260> (accessed 25 February 2023).

41 Peter Van den Bossche and Sarah Akpofure, 'The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994' (2020) Beijing Conference on the New Global Economic Order University of International Business and Economics, Beijing, 26 and 27 September 2019, 21.

and Article 73 TRIPS.<sup>42</sup> Moreover, when interpreting and applying WTO provisions, the panels and the Appellate Body have repeatedly referred to the obligation of good faith.<sup>43</sup> For example, in *Cotton Yarn*, the panel acknowledged ‘the “pervasive” general principle of good faith that underlies all treaties.’<sup>44</sup> Similarly, the panel in *Sardines* stated that ‘[w]e must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the Vienna Convention.’<sup>45</sup>

While the provisions of WTO agreements, including security exceptions, must be applied/invoked in good faith, the application of such provisions in bad faith would constitute an abuse of rights. For example, Article XX chapeau (one of the exceptions in GATT) contains an explicit wording designed to prevent abuse of the exceptions contained in this article. In *United States—Gasoline*, the panel stated that ‘the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [Article XX].’<sup>46</sup> It further stated that

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.<sup>47</sup>

The Appellate Body of the World Trade Organization referred to abuse of rights in the *Shrimp-Turtle* case.<sup>48</sup> In applying Article XX of the GATT to the US claim that its efforts to change foreign fishing practices fell within the Article XX(g) exception ‘relating to the conservation of exhaustible natural resources’ the panel stated

156. ...To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue

the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.<sup>49</sup>

...

158. The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.” An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.<sup>50</sup>

Unlike Article XX GATT, Article XXI GATT and Article 73 TRIPS do not specifically mention that these provisions must be applied in good faith, nor they contain an obligation of WTO Members to refrain from abusing their rights when applying these provisions. However, based on the principles of Articles 26 and 31(1) of the VCLT, discussed earlier, all the provisions in WTO agreements must be applied in good faith. This also includes the invocation of security exceptions under Article XXI GATT and Article 73 TRIPS.

#### 4.3. Russia’s invocation of Article 73 TRIPS would constitute an abuse of rights

As mentioned, some authors suggest that Russia may refute its TRIPS violations discussed earlier by relying on security exceptions under Article 73 TRIPS.<sup>51</sup> It is submitted that Russia should not be allowed to invoke this provision. As explained, this provision may be relied upon when a WTO Member aims to protect its essential security interests ‘in time of war or other emergency in international relations.’ Since there is no war in Russia (Russia also denies any war in Ukraine calling it a ‘special military operation’), the only relevant basis for invoking this provision would be if such measures were taken ‘in time [...] of other emergency in international relations.’

It is true that currently, such an emergency in international relations objectively exists. However, it is caused by Russia’s full-scale, unprovoked and unjustified war against Ukraine. It is in response to this aggression that a

42 *ibid.*

43 Andrew Mitchell, M. Sornarajah, and Tania Voon *Good Faith and International Economic Law* (OUP, Oxford, 2015).

44 *United States—Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan*, 8 October 2001 (WT/DS192/AB/R), para 81.

45 *European Communities—Trade Description of Sardines*, 26 September 2002 (WT/DS231/AB/R), para 278.

46 *United States—Standards for Reformulated and Conventional Gasoline*, 20 May 1996 (WT/DS2/AB/R) 22.

47 *ibid.*

48 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998 (WT/DS58/AB/R).

49 *ibid.*, para 156.

50 *ibid.*, para 158.

51 Bonadio and Trapova (n 40).

number of western countries imposed various sanctions against Russia, while the latter, in turn, retaliated with its own countersanctions against these countries, including by implementing IP-related measures that violate the TRIPS Agreement.

In the circumstances when a WTO Member creates an emergency in international relations by unlawfully invading another country, it should not be allowed to violate its obligations under a WTO agreement and then shield itself from liability by relying on security exceptions (ie, by claiming that it must protect its essential security interests in time of an emergency in international relations). In such circumstances, Russia's invocation of this provision would be against the principle of good faith and would effectively allow Russia 'to degrade its own treaty obligations as well as to devalue the treaty rights of other Members'.<sup>52</sup>

While establishing that the emergency in international relations was caused by Russia's unlawful actions would not be difficult in this case, as its aggression has been condemned/confirmed by various authoritative bodies (such as the UN General Assembly,<sup>53</sup> the Parliamentary Assembly of European Council,<sup>54</sup> and the International Court

of Justice,<sup>55</sup> etc.), and, as a result, to conclude that Russia's invocation of security exceptions would be against good faith, caution must be exercised in less clear-cut situations. This issue will be discussed in Section 5.

## 5. Russia—Traffic in Transit: a dangerous precedent that should be overturned

Russia should not be permitted to rely on security exceptions in Article 73 TRIPS to justify its violations of TRIPS as this would be against the principle of good faith. However, in a recent WTO case, Russia was allowed to rely on security exceptions to refute its violations of a WTO agreement in similar circumstances. This has set a dangerous precedent for future invocations of the security exceptions provision in WTO agreements, including in relation to Russia's current violations of TRIPS. The following sections will, therefore, challenge the approach taken by the panel in *Russia—Traffic in Transit*,<sup>56</sup> suggesting an adjustment to the current test for assessing the invocation of security exceptions that would help to avoid abusive invocations of such exceptions in future cases and ensure compliance with the fundamental principle of good faith.

### 5.1. Russia—Traffic in Transit: a background to the dispute

The security exceptions provision was first interpreted by the panel in *Russia—Traffic in Transit*,<sup>57</sup> which provided an in-depth analysis of Article XXI GATT (an equivalent of Article 73 TRIPS) and set the requirements that must be met by a WTO Member invoking this provision. In this case, Ukraine challenged the transit restrictions and the transit bans imposed by the Russian authorities on traffic in transit from Ukraine, through Russia, to Kazakhstan and other countries.<sup>58</sup> In its submission, Ukraine argued that such actions were inconsistent with

52 *Shrimp-Turtle* (n 48), para 156.

53 UN General Assembly Resolution ES-11/1 adopted on 2 March 2022 (the resolution included 'demands that the Russian Federation immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders (para 6)'); UN General Assembly Resolution ES-11/2 adopted on 24 March 2022 entitled 'Humanitarian consequences of the aggression against Ukraine' (it demanded the protection of civilians, medical personnel, aid workers, journalists, hospitals and other civilian infrastructure. It also demanded an end to the siege of cities, in particular, Mariupol. The resolution echoes the 2 March General Assembly text by demanding that Russia stop fighting and withdraw its troops from Ukraine); UN General Assembly Resolution ES-11/3 adopted on 7 April 2022 (it suspended the membership of Russia in the UN Human Rights Council over the 'grave concern at the ongoing human rights and humanitarian crisis in Ukraine [...] including gross and systematic violations and abuses of human rights committed by Russia'); UN General Assembly Resolution ES-11/4 adopted on 12 October 2022 (declares that Russia's 'so-called' referendums in the Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts and the subsequent attempted annexation are invalid and illegal under international law. It calls upon all states to not recognize these territories to be part of Russia. Furthermore, it demands that Russia 'immediately, completely and unconditionally withdraw' from Ukraine as it is violating its territorial integrity and sovereignty); UN General Assembly Resolution A/ES-11/L adopted on 23 February 2023 'Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine' (the resolution deplored 'the dire human rights and humanitarian consequences of the aggression by the Russian Federation against Ukraine, including the continuous attacks against critical infrastructure across Ukraine with devastating consequences for civilians, and expressing grave concern at the high number of civilian casualties, including women and children, the number of internally displaced persons and refugees in need of humanitarian assistance, and violations and abuses committed against children' and reiterated its demand 'that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders, and calls for a cessation of hostilities').

54 Resolution 2463 of the PACE dated 13 October 2022 (the Assembly called on Council of Europe Member States to declare the current Russian

regime as 'a terrorist one' and strongly condemned the attempted annexation of Ukrainian regions by Russia, describing the so-called referendums in these regions as 'an affront to international law' and 'null and void, with no legal or political effects'). Available at <https://pace.coe.int/en/files/31390/html> (accessed 25 February 2023).

55 Case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. In this case, Ukraine seeks to establish that Russia has no lawful basis to take military action in Ukraine on the basis of unsubstantiated allegations of genocide. The ICJ on 16 March 2022 ordered Russia, as provisional measures, to immediately suspend its military operations in Ukraine, stating that 'the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine'. Available at <https://www.icj-cij.org/en/case/182> (accessed 25 February 2023).

56 *Russia—Traffic in Transit* (n 13).

57 *ibid.*

58 *ibid.*



Articles V and X of the GATT 1994 and with commitments in Russia's Accession Protocol. In response, Russia invoked security exceptions under Article XXI(b)(iii) GATT. It asserted that the measures were among those that Russia considered necessary for the protection of its essential security interests, which it took '[i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests'.<sup>59</sup> Russia also argued that the panel lacked jurisdiction to evaluate measures in respect of which Article XXI GATT was invoked.<sup>60</sup>

The panel found that it had jurisdiction to determine whether the requirements of Article XXI(b)(iii) GATT were satisfied.<sup>61</sup> It then proceeded with the analysis of the case in two stages: first, the panel assessed whether the measures taken by Russia fall within the scope of Article XXI(b)(iii) as measures taken in time of war or other emergency in international relations; second, while the panel noted that there was no need to examine whether Russia violated its obligations under GATT if it met the requirements of Article XXI GATT (and it considered that they were met), for the purpose of a potential appeal, it assessed whether Russia violated its obligations under GATT.<sup>62</sup>

Before undertaking the assessment under Article XXI GATT, the panel provided the following account of the events that preceded and were essentially the causes of the dispute:

7.5. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014.<sup>63</sup> Both parties have avoided referring directly to this change in government and to the events that followed it. *It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other*

international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events (emphasis added).

7.6. Ukraine had, since 18 October 2011, been a party to the Treaty on a Free Trade Area between the members of the Commonwealth of Independent States (CIS-FTA), with Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Moldova and Armenia. On 29 May 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Establishment of the Eurasian Economic Union (EaEU Treaty), with Armenia and the Kyrgyz Republic joining in January and August of 2015, respectively. The EaEU Treaty entered into force on 1 January 2015.

7.7. While it took part in the initial negotiations to establish the EaEU, Ukraine decided, following on the 'Euromaidan events', not to join the EaEU Treaty. Instead, it elected to seek economic integration with the European Union. Accordingly, on 21 March 2014, the newly sworn-in Ukrainian Government signed the political part of the 'Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part' (EU-Ukraine Association Agreement). The objectives of the EU-Ukraine Association Agreement are to facilitate Ukraine's closer political and economic integration with Europe. The economic part of the EU-Ukraine Association Agreement provides for a Deep and Comprehensive Free Trade Area (DCFTA) between the European Union and Ukraine. This part of the EU-Ukraine Association Agreement was signed on 27 June 2014.

7.8. In March 2014, Ukraine, along with certain other countries, introduced a resolution in the General Assembly of the United Nations (UN General Assembly), which welcomed the continued efforts by the UN Secretary-General and the Organization for Security and Cooperation in Europe, as well as other international and regional organizations, to support 'de-escalation of the situation with respect to Ukraine'. The UN General Assembly recalled 'the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means'. A subsequent UN General Assembly Resolution in December 2016 condemned the '*temporary occupation of part of the territory of Ukraine, i.e., the "Autonomous Republic of Crimea and the city of Sevastopol" by the Russian Federation, and reaffirmed the non-recognition of its 'annexation'*'. This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of declared war or other armed conflict between High Contracting Parties (emphasis added).

7.9. The events in Ukraine in 2014 were followed by the imposition of economic sanctions against Russian entities and persons by certain countries.

59 *ibid.*, para 7.4. Russia further argued that 'the situation that gave rise to the need to impose the transit measures at issue in this dispute as an internationally wrongful act, or an unfriendly act of a foreign state or its bodies and officials, which involved unilateral actions applied in respect of Russia, particularly by the European Union and Ukraine "in violation of the UN Charter and that are impairing the authority of the UN Security Council"' (*ibid.*, footnote 62, page 30).

60 *ibid.*, para 7.30.

61 *ibid.*, para 8.1.

62 *ibid.*, para 7.154.

63 David M. Herszenhorn, 'Ukraine President Claims Win for Pro-West Parties' (*The New York Times*, 26 October 2014) ('With the country still on a war-footing with Russian separatists in the east, Mr Poroshenko hailed Sunday's vote as a resounding endorsement of his government's efforts to break free of Kremlin influence and shift hard toward Europe... The results [...] would complete a transformation of the government that began in February when President Viktor F. Yanukovich fled after sustained, bloody street protests over his decision to align more closely with Russia'). Available at <https://www.nytimes.com/2014/10/27/world/europe/ukrainian-parliamentary-elections.html> (accessed 25 February 2023).

7.10. On 7 August 2014, Russia imposed import bans on specified agricultural products, raw materials and food originating from countries that had imposed sanctions against it (initially, the United States, European Union Member States, Canada, Australia and Norway). Russia also imposed certain restrictions in connection with the transit of goods subject to these import bans, prohibiting their transit through Belarus and permitting their transit across Russia only through designated checkpoints on the Russian side of the external border of the EaEU. These 2014 transit restrictions are among those challenged by Ukraine in this dispute.

Having this background in mind, the panel considered the arguments of the parties. While it agreed with Ukraine that Russia's actions were inconsistent with its certain obligations under GATT and commitments in Russia's Accession Protocol,<sup>64</sup> the panel, nevertheless, found that Russia lawfully invoked security exceptions under Article XXI GATT, which, in turn, allowed Russia to avoid liability for violating its obligations.<sup>65</sup>

In particular, when assessing whether Russia met the requirement of Article XXI, the panel examined several issues, which were later succinctly structured by the panel in the *Saudi Arabia-IPRs* dispute.<sup>66</sup> According to this analytical framework, the following issues must be considered when assessing the invocation of security exceptions:<sup>67</sup>

- (i) whether the existence of a 'war or other emergency in international relations' has been established in the sense of subparagraph (iii) to [Article 73(b)];
- (ii) whether the relevant actions were 'taken in time of' that war or other emergency in international relations;
- (iii) whether the invoking member has articulated its relevant 'essential security interests' sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests and
- (iv) whether the relevant actions are so remote from, or unrelated to, the 'emergency in international relations' as to make it implausible that the invoking member considers those actions to be necessary

for the protection of its essential security interests arising out of the emergency.

As a first step in its analysis, the panel in *Russia—Traffic in Transit* considered whether the measures were 'taken in time of war or other emergency in international relations' within the meaning of Article XXI(b)(iii).<sup>68</sup> More specifically, whether the situation between Ukraine and Russia that existed since 2014 constituted an emergency in international relations.<sup>69</sup> Importantly, the panel noted that it was 'not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor was it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general.'<sup>70</sup> The panel, thus, applied an objective test for determining whether such an emergency exists. It assessed various evidence, including the UN General Assembly resolution, which recognized that the situation between Ukraine and Russia involved armed conflict,<sup>71</sup> and concluded that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations. It then concluded that each of the measures at issue was taken in time of this emergency within the meaning of Article XXI(b) (iii) GATT.<sup>72</sup>

The third step in this analytical framework requires assessing whether a WTO Member has sufficiently articulated its 'essential security interests' in the sense of the chapeau of paragraph (b).<sup>73</sup> When considering the term 'essential security interests', the panel noted that this concept refers to those interests that relate 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.'<sup>74</sup> Importantly, it stated that '[t]he specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances.'<sup>75</sup> Therefore, according to the panel, it should be left, in general, to every member to determine what it considers to be its essential security interests.<sup>76</sup> However,

64 *Russia—Traffic in Transit* (n 13), para 7.257.

65 *ibid*, para 7.149.

66 *Saudi Arabia-IPRs* (n 13). While the *Saudi Arabia-IPRs* dispute concerned the application of Art 73 TRIPS, the panel acknowledged that the wording of Art 73(b)(iii) of the TRIPS Agreement was identical to that of Art XXI(b)(iii) of the GATT 1994, and thus, the *Russia—Traffic in Transit* panel's interpretation of Art XXI(b)(iii) gave rise to an analytical framework that could guide the assessment of whether a respondent properly invoked Art XXI(b)(iii) of the GATT 1994, or, for the purposes of that dispute, Art 73(b)(iii) of the TRIPS Agreement (*ibid*, para 7.241).

67 *ibid*, para 7.242.

68 *Russia—Traffic in Transit* (n 13), para 7.5.5.

69 *ibid*, para 7.120.

70 *ibid*, para 7.121.

71 *ibid*, para 7.122 referring to UN General Assembly Resolution No. 71/205, 19 December 2016, which makes explicit reference to the Geneva Conventions of 1949, which apply in cases of *declared war or other armed conflict* between High Contracting Parties.

72 *ibid*, para 7.125.

73 *ibid*, para 7.131.

74 *ibid*, para 7.130.

75 *ibid*, para 7.131.

76 *ibid*.

the panel noted that this did not mean that a member was free to elevate any concern to that of an ‘essential security interest.’<sup>77</sup> While a member has the discretion to classify a particular concern as ‘essential security interests,’ this is limited by its obligation to interpret and apply Article XXI(b)(iii) GATT in good faith.<sup>78</sup> Such an obligation of good faith requires that members not use the security exception as a means to circumvent their WTO obligations.<sup>79</sup>

Therefore, under this condition, it is important to sufficiently articulate the ‘essential security interests’ that a WTO Member by implementing certain measures at issue is necessary to protect. The panel explained that ‘what qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue.’<sup>80</sup> It found that given the character of the 2014 emergency, as one that was recognized by the UN General Assembly as involving armed conflict, and which affected the security of the border with an adjacent country and exhibited the other features identified by Russia, the articulation of essential security interests that thereby arose for Russia was minimally satisfactory in these circumstances.<sup>81</sup>

The last step of the analytical framework is aimed at assessing the connection between the measures taken by a WTO Member and the essential security interests. The formulation of the specific essential security interests ‘serves primarily to provide a benchmark against which to examine the “action” under the chapeau of [Article 73(b)].’<sup>82</sup> This means that this analytical step allows the panel to assess whether the challenged measures found to be inconsistent with a WTO agreement is plausibly connected to the protection of those essential security interests.<sup>83</sup> The *Russia—Traffic in Transit* panel considered that the ‘obligation of good faith’ must apply not only to the member’s articulation of ‘its essential security interests’ said to arise from the particular emergency in international relations but also to the connection between the measures at issue and those interests.<sup>84</sup> This obligation, according to the panel, ‘is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.’<sup>85</sup> An important element of

this condition, however, is the ‘necessity’ of actions. In this regard, the panel noted that members have substantial discretion to decide what measures they ‘consider necessary’ to protect their essential security interests.<sup>86</sup> Nevertheless, despite the fact that members have a wide discretion to decide on measures necessary to protect their essential security interests, such discretion must be ‘plausibly related’ to the emergency that the member aims to tackle.<sup>87</sup> The panel found it plausible that Russia implemented the measures under review to protect its essential security interests arising out of the emergency in international relations established in the first step.

Based on the aforementioned analysis, the panel found that Russia met the requirements for invoking Article XXI(b)(iii) and that the measures at issue were covered by this provision.<sup>88</sup>

## 5.2. The panel in *Russia—Traffic in Transit* has set a dangerous precedent

It is important to note that when discussing the background of the dispute, the panel failed to clearly mention one significant detail that clarifies the relations between the parties. In February 2014, the Russian army unlawfully invaded and annexed Crimea, the sovereign territory of Ukraine. Russia also triggered a separatist rebellion in the east, followed by the Russian army’s overt invasion of the eastern Ukraine to support the rebels.<sup>89</sup> It is in response to these unlawful actions that some governments and international organizations, led by the USA and the European Union, imposed sanctions referred to by the panel in para 7.9 and which were condemned by the UN General Assembly in 2014 and then again in 2016, mentioned in para 7.8. As the aggression expanded into other parts of eastern Ukraine and further escalated into the ongoing war in the Donbass region, the scope of the sanctions increased. Russia retaliated with its own counter sanctions, which also included travel bans that were the subject of the complaint by Ukraine in *Russia—Traffic in Transit*.

This is an important clarification that should have been considered by the panel when assessing the invocation of security exceptions under Article XXI GATT. The omission of these facts and an explicit disregard of the reasons for the existence of the emergency in international

77 *ibid.*, para 7.132.

78 *ibid.*

79 *ibid.*, para 7.133.

80 *ibid.*, para 7.135.

81 *ibid.*, para 7.137.

82 *Saudi Arabia-IPRs* (n 13), para 7.281.

83 *ibid.*

84 *Russia—Traffic in Transit* (n 13), para 7.138.

85 *ibid.*

86 *ibid.*, paras 7.146–7.147.

87 *ibid.*, para 7.138.

88 *ibid.*, para 8.1.

89 Max Fisher ‘Everything You Need to Know About the 2014 Ukraine crisis’ (*Vox*, 3 September 2014). Available at <https://www.vox.com/2014/9/3/18088560/ukraine-everything-you-need-to-know> (accessed 25 February 2023).



## 6. Readjusting the test for invoking security exceptions to avoid abuse of rights by WTO Members

To avoid an abusive use of security exceptions (as exemplified by the *Russia—Traffic in Transit* case discussed earlier), this article proposes an adjustment to the current legal framework for assessing the invocation of security exceptions. It submits that a WTO panel's analysis in such cases must include an assessment of whether a member invoked a WTO security exception in good faith. Specifically, while the panel in *Russia—Traffic in Transit* provided a framework for applying security exceptions (as later formulated in *Saudi Arabia-IPRs*<sup>96</sup>), the standard of review under Article XXI GATT must first and foremost include an assessment of whether a WTO Member has invoked security exceptions in good faith. Therefore, the invocation of the security exceptions provision must be assessed in two stages. The first stage is to assess whether a WTO Member invoked security exceptions in good faith. While WTO Members are permitted to rely on security exceptions to protect their essential security interests in time of war or other emergency in international relations, based on the principle of good faith, they should not be permitted to invoke such security exceptions if such a war or other emergency in international relations was caused by their own unlawful actions. Once the first stage of the 'good faith invocation' is passed, then the panel would proceed to the assessment of the elements of security exceptions, as formulated by the panel in *Saudi Arabia-IPRs*.

Several issues are important to take into account during the first stage, ie when assessing whether the security exceptions provision was invoked in good faith. First, as was discussed earlier, the current 'necessity' test, as an element of the security exception provision, is considered to be self-judging. This means that a WTO Member has a substantial discretion to decide what measures it 'considers necessary' to protect its essential security interests. However, if the panel concludes that the security exception provision was invoked in bad faith, this would effectively mean that the self-judging nature of the 'considers necessary' element of Article 73 TRIPS has been nullified. Simply speaking, such a WTO Member would not be able to rely on security exceptions and has no right to implement any measures that would violate the TRIPS Agreement.

It is also important to note that in such clear-cut cases as the Russia's war against Ukraine, there would be no difficulty in establishing that Russia is an aggressor and its

actions, ie invasion of Ukraine, are the cause of an emergency in international relations, ie the war. Thus, when assessing whether the security exception provision was invoked by a WTO Member in good faith, and since it is not the task of a WTO panel to decide on the legality of actions that have caused an emergency in international relations, the panel should consider decisions/resolutions of other authoritative bodies that have confirmed the illegality of actions of a WTO Member. In other words, acts that have been identified as unlawful by the most authoritative decision makers (eg the UN General Assembly) cannot be the basis for relying on security exceptions under Article 73 TRIPS.

It must be also noted that, in cases like this, it is important to consider not only the facts of a particular case but also how the suggested approach will affect future disputes. In this case, there is an archetypal 'bad actor', Russia, that unlawfully invaded its neighbouring country Ukraine. However, it is rare that there is such a clear-cut division on good and bad actors as in the *Russia—Traffic in Transit* case and the subsequent full-scale invasion of Ukraine in February 2022. It may, therefore, be more difficult to establish the cause of an emergency in international relations in less clear-cut cases as, as was mentioned earlier, it is not the competence of a WTO panel to determine whether a WTO Member is liable for creating an emergency. Nevertheless, the proposed changes to the assessment of security exceptions will not affect such less clear-cut cases. This is because if there is no evidence of the unlawfulness of actions that led to an emergency in international relations, then the good faith invocation of security exceptions may be presumed. In that case, the panel would simply move to the analysis of the elements of security exceptions developed in *Russia—Traffic in Transit* and formulated in *Saudi Arabia-IPRs*. Therefore, the proposed changes in this article will act as an additional safeguard in the application of security exceptions that will help to avoid obvious violations and will bring no significant changes to the practice in this field in general.

Applying the suggested approach to the circumstances of the *Russia—Traffic in Transit* case, the panel would have reached an opposite conclusion. This is because, as was discussed earlier, the emergency in international relations was triggered by Russia's unlawful invasion of Ukraine in 2014. The unlawful nature of such actions was confirmed by the UN General Assembly in 2014 and 2016 referred to by the panel in para 7.8. Therefore, Russia should not have been allowed to invoke security exceptions as a defence for violating its obligations under GATT as this contradicts the principle of good faith and constitutes an abuse of its rights. The panel,

96 *Saudi Arabia IPRs* (n 13).

