The Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law

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Introduction

In response to Russia’s annexation of Crimea and its military involvement in Eastern Ukraine (denied by Russia but accepted as a fact by most Western nations), a number of Western states (including Australia, Canada, Norway and the United States (US)) as well as the European Union (EU) have introduced various sanctions. The sanctions implemented thus far are of a varied nature – some of them consist of travel bans and freezes on the assets of certain individuals connected with the Kremlin, while others prohibit financial transactions with specified individuals and selected Russian companies (mainly from the energy and banking sectors), and still others impose restrictions on trade in arms, dual-use equipment, and oil-industry technologies. These sanctions have been tightened over time, both in terms of their coverage (i.e. more individuals and companies) and intensity (stricter conditions for permissible financial transactions).

Russia’s highest officials, including President Putin and Prime Minister Medvedev, have claimed consistently that Western sanctions are incompatible with World Trade Organization (WTO) law, violating, i.a., the rules on market access and the most favoured nation principle. Russia has not only introduced its own counter-measures (in the form of economic sanctions), but also threatened to initiate formal WTO dispute settlement proceedings against the US and the EU.

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The aim of this chapter is to assess the legality of the sanctions thus far imposed on Russia. However, in the light of both space limitations and the complexity of the legal problems tackled, the scope of this study is restricted in two ways.

First, this work only analyses EU measures (and even within this category, only those which have been exerting the greatest impact on the Russian economy). While many of our conclusions are of direct relevance to the assessment of other Western sanctions, some caution is also required, e.g. due to differences in specific commitments made under the General Agreement on Trade in Services (GATS).

Secondly, we do not discuss the legality of the EU actions under the rules on state responsibility (i.e. secondary rules) as our examination is limited to the provisions of WTO law (primary norms). In fact such an approach requires a further caveat. Even though the notion of ‘economic sanctions’ seems ubiquitous in the public discourse on international relations, the use of the term raises legal concerns. Traditionally, the notion of ‘sanctions’ has been reserved for coercive measures adopted by international organisations on the basis of their constituent acts. Although we are focusing on acts of the EU, the analysis under WTO law would apply to state actions in the same way. Hence, our understanding of economic sanctions merely overlaps, to a certain extent, with the classic public international law approach.

Alternatively, economic sanctions could be understood as measures adopted in response to another state’s wrongful act, i.e. in the form of economic countermeasures (reprisals). However, such a reading is equally unsatisfactory for our purposes.

Here, it is enough to note that the working thesis of this chapter is that the EU actions were taken in accordance with WTO law, and not that their wrongfulness is precluded, as would be the case with countermeasures (reprisals). Furthermore, under general public international law the EU’s conduct could qualify as retorsions. Accordingly, economic measures assessed in the light of public international law constitute a hybrid of actions or abstentions, different aspects of which may fall under various legal regimes. There is no generic term “economic sanctions” under general public international law, hence the legality of such acts requires a multi-step analysis.

Taking into account the above caveats, this chapter is structured in the following way. The following Part 2 provides a detailed description of the measures introduced by the EU against Russia, and summarises the reasons underpinning their approval. Against this background, Part 3 assesses the legality of the sanctions under two relevant WTO treaties: the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and the GATS. The security exception provided in each agreement is also analysed in detail. The last part offers conclusions and attempts to predict future developments with respect to EU sanctions.

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2. Sanctions against the Russian Federation, and the Russian reaction to them

The forging of an EU-wide compromise on the Ukrainian crisis did not ‘come easy’, as the geographical distance from the possible threat and the level of economic ties with Russia weighed differently on each Member State’s foreign policy priorities. Eventually, the EU agreed to adopt a strategy of mounting pressure, which would reflect the progress (or lack thereof) in making Russia comply with its international obligations.

2.1. Diplomatic measures

The first explicit EU disapproval of the developments in Ukraine took the form of diplomatic sanctions. In March 2014 the Foreign Affairs Council condemned Russia’s actions and suspended preparations for the G8 summit planned in Sochi later that year. The bilateral EU-Russian cooperation framework was also suspended, including talks on visa matters; and European states supported the suspension of negotiations on Russia’s accession to the OECD and the International Energy Agency.

2.2. Individual restrictive measures

Also in March, the European Council, while calling on the parties to resolve the crisis through negotiations, initiated preparations to adopt individual measures, including asset freezes and travel bans. In two consecutive steps, sanctions were imposed on 21 Russian and Ukrainian officials, and broadened to include 12 additional persons. The sanctions already turned towards the application of economic pressure as they entailed, alongside travel bans, freezes on assets. The scope of individual measures

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was broadened by the Foreign Affairs Council in 2015.\(^9\) Leaders also agreed to request that the European Investment Bank suspend new financing operations in Russia.

Given the objective of this chapter, it would be counterproductive to list all the acts imposing individual sanctions. Suffice it to say that, as of February 2016, 149 persons and 37 entities were on sanctions lists. The application of these measures has been prolonged until 15 March 2016.\(^10\)

2.3. Sanctions adopted in response to the annexation of Crimea and Sevastopol

As the situation continued to deteriorate, particular measures were taken in response to the annexation of Crimea and Sevastopol, which was not recognised, and was condemned roundly and officially by the EU.\(^11\) In June 2014, the Foreign Affairs Council imposed an embargo on the import of goods originating in Crimea and/or Sevastopol.\(^12\) The only exception applied to goods examined by the Ukrainian authorities and granted a certificate of origin by the Government of Ukraine. At the same time, the Council decided to sign the EU-Ukraine Association Agreement, including a Deep and Comprehensive Free Trade Area (DCFTA).\(^13\)

These measures were strengthened by the end of the year, as the European Union imposed a ban on investments in the area\(^14\), and later prolonged it through to June 2016\(^15\) and beyond.


\(^10\) Council Decision (CFSP) 2015/1524 of 14 September 2015 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 239/157, 15.9.2015. It is worth adding that, as of 3 July 2017 the measures are still in force; they have been prolonged on the basis of the subsequent Council decisions.


\(^13\) Council of the European Union, Technical preparations for signing the Association Agreement with Ukraine finalised, Luxembourg, 23 June 2014 (11067/14).


2.4. Economic sanctions

From the WTO law perspective, the most interesting issues concern restrictive measures imposed against certain sectors of the Russian economy. The Council imposed an export embargo on dual-use (i.e. civil and military) goods and technology for military use or military end-users in Russia with respect to exports based on agreements concluded since 1 August 2014. An embargo on the export of military goods and technologies intended for use by Russian entities or in Russia was imposed as well. The EU also decided to adopt a general policy of refusing to grant export authorisations with respect to technologies pertaining to deep-water oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia.

In addition to trade measures, the EU financial sanctions prohibited the direct or indirect purchase, sale or provision of brokering services (subsequently referred to as investment services), assistance in the issuance of, or otherwise dealing with, transferable securities and money-market instruments with a maturity date exceeding 90 days, issued directly or indirectly, by:

- entities promoting the Russian economy and investments established in Russia with over 50% public ownership or control (five banks were listed),
- other legal entities established outside the Union (emphasis by the authors) and legal representatives thereof, whose majority shareholder was one of the listed Russian banks.

One month later, the Council broadened the scope of the embargo on dual-use materials by prohibiting corresponding transactions with a number of natural and legal persons. Measures against the oil sector and the financial embargo were also strengthened (e.g. the maturity threshold was decreased to 30 days, and new entities were added to the list).

As new hope arose with the Minsk Agreements (I and II), the European Council decided to tie sectoral economic sanctions against Russia to progress in the Minsk Process (as implementation of Agreement II was supposed to take place by 31 December 2015).

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17 Ibidem, Art. 4.
18 Ibidem, Art. 3.
19 Ibidem, Art. 5.
Accordingly, sanctions that were originally designed to last until 31 July were prolonged until 31 January 2016, and then until 31 July 2016 and beyond.

3. Assessment of sanctions under WTO law

As it was already mentioned, different top Russian officials have consistently claimed that Western economic sanctions breach various WTO rules. Their legality was also discussed at the WTO after the issue was raised formally by the Russian Delegation at the meetings of both the Council for Trade in Goods (as a potential violation of the GATT 1994) and the Council for Trade in Services (with respect to a possible GATS violation). Nevertheless, no formal dispute settlement procedure has been initiated by Russia up to now.

3.1. The EU sanctions under GATT 1994

Three categories of sanctions appear to fall within the ambit of GATT 1994 (as they relate to the trade in goods): (i) an embargo on the import and export of arms and related materials, (ii) a prohibition on exports of certain dual-use products, and (iii) export restrictions on certain equipment related to the energy sector (combined with the automatic denial of authorisation for deep-water oil exploration and production, Arctic exploration, and shale oil projects). Note that GATT 1994, unlike some other international trade treaties, does not exclude military equipment and related goods from its scope.


24 Cf. Council for Trade in Services, Report of the meeting held on 20 June 2014, Note by the Secretariat, 15 August 2014, S/C/M/118, paras. 7.1-7.12; Council for Trade in Goods, Report of the meeting held on 19 June 2014, Note by the Secretariat, 31 October 2014, G/C/M/119, paras. 9.1-9.7. Interestingly, during the meetings of the Committees, Russia never explicitly pointed to the EU measures as being incompatible with the WTO provisions (as opposed to the US, Canadian and Australian sanctions).

25 Jurisdiction of WTO dispute settlement bodies over the claims relating to various restrictions on trade with Crimea (with respect to both goods and services) is more problematic in this regard. Since the initial declaration of independence and subsequent accession of the Peninsula to the Russian Federation should be regarded as an illegal annexation (which is generally not recognised by the international community),
All these measures can be assessed in the context of at least two of the GATT 1994 provisions: the prohibition on quantitative restrictions (Art. XI); and the most-favoured nation principle (Art. I). As far as the first provision is concerned, its plain wording indicates that it covers restrictions imposed, not only on imports, but also on exports. It is also clear that an export embargo, for example like the one applied by the EU on dual-use products, falls within its scope – the provision explicitly identifies export prohibition as an illegal quantitative restriction. Although the export of energy-related equipment is not prohibited, but only made subject to authorisation, this also should be regarded as a form of prohibited quantitative restriction, because this requirement operates as a *de facto* export ban.

The EU sanctions may also violate Art. I, which prohibits discrimination between products imported from or exported to different WTO Members. The scope of this provision is broad and includes, apart from customs duties and charges, all law, regulations and requirements that affect sales. In the case analysed here there is clear discrimination. Certain goods cannot be exported to Russia, while no such restrictions are imposed on their export to other WTO Members.

3.2. The EU sanctions under the GATS

Assessing the legality of the EU sanctions under the GATS is a more demanding task than that relating to GATT 1994. Note that certain disciplines provided by the GATS (e.g. national treatment and market-access obligations) apply only if a WTO Member has made a specific commitment with respect to a particular sector. Therefore, it is not enough to look solely at the text of the GATS, as reference also needs to be made to Members’ schedules of commitments. Moreover, the existing jurisprudence is rather limited, and leaves many important questions unanswered.

Potentially three measures may be covered by the agreement: (i) travel bans for certain individuals, (ii) asset freezes for listed individuals, groups and legal entities, and (iii) any claim in the WTO dispute settlement system regarding these restrictions will arguably be regarded as inadmissible.

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26 Art. XI:1 specifically provides that “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”


28 The relationship between Arts. I and XI of GATT 1994 is not entirely clear (i.e. whether concurrent or cumulative application applies). Due to the broad formulation of Art. I, it seems that the provision can also apply to quantitative restrictions (but cf. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr. 1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, para. 7.22 where the panel, exercising judicial economy, decided not to review the measure under Art. I after finding a violation of Art. XI).
(iii) restrictions on financial transactions involving pre-specified Russian companies. As far as the first two measures are concerned, it should be noted that the GATS sets standards for measures affecting trade in services (Art. I of the GATS). Consequently, if an individual or a legal entity cannot be qualified as a service supplier or a recipient (or a person acting therefor) the agreement will not apply. A quick look at the EU list of persons and entities subject to EU restrictive measures shows that it mostly covers high governmental officials or other people connected with actions against Ukraine's territorial integrity (e.g. leaders of the Donetsk People's Republic), who therefore remain outside the scope of the GATS. Although the list also includes some commercial entities, such as the Russian National Commercial Bank (a bank which is based in Moscow but currently operates in Crimea only), as well as businessmen such as Mr. Arkady Rotenberg (a chair and owner of various Russian companies also operating in the EU), these are the exceptions of limited economic importance. Therefore those restrictive measures are not analysed further in this chapter.

Given their economic impact, restrictions on certain financial transactions deserve some additional attention. Depending on how one classifies commercial activity consisting of selling bonds, equity or similar financial instruments (supply or receipt of services), these restrictions could be considered a violation of the most favoured nation principle provided for in Art. II of the GATS (if qualified as a supply of services, a view to which we subscribe). In particular, Russia can claim that its service suppliers included on the EU lists are treated less favourably than service suppliers from any other country (because there are no such restrictions on them as they render the services identified above). Alternatively, one may argue that measures relating only to the (domestic) consumer/recipient of a service, i.e. the potential purchaser in the EU of Russian-issued bonds, are covered as well, insofar as services or service suppliers of other Members are affected.

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29 However, it should be noted that there is no de minimis standard in the GATS. In other words, a measure with a very limited economic impact can still constitute a violation of a GATS provision. Nevertheless, if no serious economic interests are involved in a dispute, there is little chance that a case will be brought to the WTO dispute settlement system.

30 Note that the asset freeze will be a more important issue in the case of American sanctions, under which assets of different Russian commercial entities were frozen (e.g. SMP Bank, Bank Rossiya and its subsidiary Sobinbank, weapons maker KBP Instrument Design Bureau), cf. RT, US freezes $640mn in sanctioned Russian bank assets, https://www.rt.com/business/238297-russian-banks-frozen-assets/ [accessed: 03.07.2017]. Such a freeze in practice prevents Russian service suppliers from providing their services to the US market.

31 As noted by Adlung “[w]hile the foreign suppliers must be treated on a par, pursuant to the MFN requirement, measures that differentiate between potential destinations or recipients, i.e. service users of different nationality, are not restricted [by the MFN] per se” (R. Adlung, Export Policies and General Agreement on Trade in Services, 18 Journal of International Economic Law 487 (2015), p. 494).

It is not clear whether the restrictions on the provision of loans (or other financial services not discussed above) to the listed Russian entities are incompatible with GATS market-access obligations (Art. XVI). One may argue that they impose de facto “ceilings on the supplies originating from domestically established foreign suppliers that are destined for users abroad” (e.g. foreign-controlled EU banks providing loan services to the listed Russian firms), which would constitute a trade barrier prohibited by Art. XVI:2 of the GATS (unless explicitly provided in a relevant schedule of commitments, which is not the case for the EU schedule). On the other hand, it is possible to argue that the relevant EU sanctions constitute limitations, neither on the total value of service transactions nor on service operations (as de facto restrictions do not qualify as prohibited market-access barriers). Since there is no case law on this issue, it is difficult to predict what the approach of the WTO dispute settlement bodies would be.

Last but not least, the EU restrictions on financial transactions may also violate Art. VI of the GATS – a provision which requires reasonable, objective and impartial administration of measures of general application that affect trade in services. In particular, it may be argued that the EU measures were not applied in a transparent manner or/and were discriminatory and arbitrary (e.g. with respect to the criteria used for the selection of listed entities).

Without settling the above controversies, one may safely conclude that there is at least a risk of some of the EU sanctions being regarded as incompatible with the GATS.

3.3. Justification of the EU sanctions under the WTO security exceptions

However, the identification of violations of specific GATT and GATS provisions does not exhaust the analysis of the EU measures under international trade rules. Both agreements include so-called ‘security exception clauses’, which allow Members to justify actions otherwise inconsistent with the WTO regime. Since Art. XIV bis of the GATS mirrors the GATT provision (i.e. Art. XXI), at least with respect to those parts of relevance to this chapter, only the latter will be analysed here. However, it needs to be noted that our conclusions are the same with respect to the two agreements.

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33 Adlung, supra note 31, p. 496. Cf. also the observation of the panel in China – Electronic Payment Services: “[n]othing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the ‘export’ of services from that Member’s territory to a recipient in the territory of another Member or to a foreign recipient located in the ‘exporting’ Member’s territory” (Panel Report, China – Certain Measures Affecting Electronic Payment Services, WT/DS413/R, adopted 31 August 2012, para. 7.618).

34 Cf. WTO, Communication from the European Communities and its Member States, Draft consolidated GATS Schedule, S/C/W/273, 9 October 2006.

35 With the exception of the notification requirement. Art. XIV bis: 2 explicitly requires WTO Members to inform the Council for Trade in Services on their measures taken for security reasons, as well as about their termination. Note also that there are some secondary differences resulting from the fact that the GATT 1994 is concerned with the trade in goods, while the GATS covers trade in services.
Art. XXI GATT specifically provides that:

Nothing in this Agreement shall be construed
a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to its fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or
c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Clearly subparagraph (b) is the most relevant for our purposes. Subparagraph (a) relates to a different issue, and with respect to subparagraph (c), the fact of the Russian Federation being a Permanent Member of the Security Council ensures that the latter organ has obviously not adopted any Resolution condemning, or even offering legal qualification of, the Russian aggression perpetrated against Ukraine. However, it is important to note that, due to the incapacity of the Council to react to this threat to international peace and security, the General Assembly (GA) adopted Resolution 68/262,\(^{36}\) by virtue of which it called upon states to refrain from actions aimed at the disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means. Furthermore, the GA “welcomed” the efforts of international and regional organisations to assist Ukraine in protecting the rights of all persons in Ukraine. Accordingly, while in the following part we focus on legal defences under WTO law, it needs to be kept in mind that, should such arguments prove insufficient, the relevance and importance of the GA's Resolution should not be underestimated, even without recourse to *Uniting for Peace*.\(^{37}\)

Art. XXI(b) consists of two elements: an introductory clause and an exhaustive list of situations that may serve as a possible justification for exceptions. The introductory clause makes it clear that the security exception has a wide scope of application and is able to justify a “violation” of any provision of GATT (“Nothing in this Agreement…”). Neither are any limits set on the types of actions that may be taken by a WTO Member under subparagraph (b) ('any action'). In other words, Members can adopt a great variety of trade restrictive measures if motivated by security concerns (e.g. import and export


bans, quotas, export licences, restrictions on transit). What may be problematic is how the normative content of subsequent conditions – in particular “necessity”, “essential national security interests”, (subparagraph (b)(ii)) and “emergency in international relations” (subparagraph (b)(iii)) – is to be understood. On the other hand, it would seem to be relatively easy to show that the EU export and import ban on arms and related materials can qualify under subparagraphs (b)(i) or (b)(ii), while restrictions on dual-use items will either fall under the same subparagraphs or will be caught by the residual category of measures taken ‘in time of war or other emergency in international relations.’

The existing literature is divided over the meaning of these conditions. While most (if not all) authors agree that “necessity” in Art. XXI(b), unlike in Art. XX, needs to be construed as a subjective category (“it [a WTO Member] considers necessary for the protection of …”), they disagree about the consequences of such a classification. Some who rely on textual (“it considers…”) or teleological arguments, claim that a decision regarding the necessity of a measure is left entirely to a WTO Member, with a panel being prohibited from judging this condition (because the WTO is competent to decide on economic, but not purely political, questions). This self-judging character also extends to the second condition (on the textual level, since the expression ‘it considers’ is regarded as relating to both necessity and national security interests). However, others argue that, under the ‘necessity’ requirement, WTO Members enjoy a very wide, but not unlimited, discretion, because a panel can always check whether a contested action does or does not constitute an abuse of a right (i.e. WTO Members are generally required to act in conformity with the principle of good faith, with ‘abuse of a right’ forming a part of that concept). Some believe that the second condition (national security) should be approached in the same way, while other scholars think that it may be assessed by a panel in a standard way, i.e. whether a particular situation indeed involves essential national security interests. At the same time, it is submitted that this category is broad and covers, not only military security, but also “civilian

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38 It should be recalled that the authors focus on primary norms of WTO law, which should be distinguished from a secondary norm of a state of necessity precluding the wrongfulness of an act, as confirmed under ILC Draft Articles on State Responsibility (cf. “Reading an NPM clause as equivalent to the customary defence of necessity would render the clause pointless”: W. Burke-White & A. von Staden, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, 48(2) VA J. Int’l L. 307 (2008), p. 324).
42 E.g. Cottier & Delimatis, supra note 40, p. 339.
telecommunication infrastructure, environmental concerns and financial/banking interests”. Economic security, however, does not qualify.

The same is true with respect to the expression “emergency in international relations”. Some authors believe that this condition is also subject to self-judging and prevents any review by a panel. Others disagree, and again see this phrase as calling for an objective assessment by WTO dispute-settlement bodies. These authors highlight that such an emergency needs to reach a certain level of gravity. In this context, they refer to the literal meaning of the term (“emergency” indicates something serious), and as well make the contextual argument by pointing out that the relevant paragraph starts with the word “war”, which is then followed by the phrase “or other” (which would seem to require that an “emergency” have a comparable level of seriousness).

At the same time, many of the scholars who see Art. XXI(b) as reviewable advocate for a deferential standard of review, which would guarantee that a wide margin of discretion is enjoyed by WTO Members, with respect to both their determining of essential security interests and the existence of a state of emergency in international relations. Thus a panel could enquire whether a WTO Member has rational grounds to consider a particular situation as involving its essential security interests or relating to an emergency in international relations, but not determine these issues de novo, i.e. substitute with its own judgment. Deference is justified by the character of the provision, which is predominantly concerned with political, rather than economic, questions, and as such should be interpreted on a case-by-case basis, somewhat similarly to the margin of appreciation doctrine developed by the European Court of Human Rights.

Unfortunately, there is no case law which would settle this issue conclusively. Although the security exception has been referred to by the GATT Parties/WTO Members on several occasions, it has never been addressed by a WTO panel or the Appellate Body (except in one GATT report which was never actually adopted). At the same time, the practice of GATT parties/WTO Members, which constitutes an

44 Cottier & Delimatsis, supra note 40, p. 339.
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element which must be taken into account when interpreting a treaty, is very limited
and rather contradictory (and as a consequence can hardly be regarded as the “practice
of parties to a treaty”). As early as in the 1940s, Art. XXI was referred to by the US in order
to justify its export controls (in the form of export licences) on certain dual-use products
destined for Czechoslovakia, among other countries. Although the contracting parties
eventually shared the US position, their decision was primarily of a diplomatic, rather
than legal character and has limited value for the current discussion. The exception
was also referred to by Ghana in the context of the discussion over Portugal’s accession
to GATT (in 1971). When explaining its embargo on Portuguese products, Ghana
stated that, “under … Article [XXI], each contracting party was the sole judge of what
was necessary in its essential security interest”. Ghana added that such interests might
be threatened, not only by actual, but also by potential danger (in this case, peace on
the African continent). At the end of the day, however, Ghana did not base its decision
on Art. XXI, but relied on Art. XXXV (i.e. non-application of GATT between particular
contracting parties). For this reason, the precedential force of this case is also limited.

A similar stance was taken by the European Communities (EC), Australia, Canada
and the US in 1982, when defending their trade sanctions against Argentina (i.e.
a comprehensive import embargo), in the wake of the Argentinean invasion and occu-
pation of the Falklands islands. E.g. the EC stated that it “had taken certain measures
on the basis of their inherent rights, of which Article XXI of the General Agreement
was a reflection. The exercise of these rights constituted a general exception, and
required neither notification, justification nor approval, a procedure confirmed
by thirty-five years of implementation of the General Agreement [sic!]. … [T]his
procedure showed that every contracting party was – in the last resort – the judge
of its exercise of these rights”. Not only Argentina, but also several other Parties

49 WTO dispute settlement bodies are required to interpret WTO provisions in accordance with
customary rules of interpretation as embodied in the Vienna Convention on the Law of Treaties (VCLT)
(cf. Art. 3.2. of the Understanding on rules and procedures governing the settlement of disputes). Art.
31.1 of the VCLT asks for account to be taken, not only of the context, but also of any subsequent practice
in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
Moreover, Art. XVI:1 of the WTO Agreement provides that the organisation “shall be guided by the deci-
sions, procedures and customary practices followed by the Contracting Parties to GATT 1947”.

50 GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting, 8 June
1949, CP.3/SR22-II/28. For example, it was unambiguously stated during the discussion that “every coun-
try must be the judge in the last resort on questions relating to its own security. On the other hand, every
contracting party should be cautious not to take any step which might have the effect of undermining
the General Agreement”.

51 The boycott was connected with the Angolan war of independence. The revolt, initiated by Angolans,
was brutally suppressed by the Portuguese colonial military forces. The fighting continued until 1975, when
the country finally declared its independence.

1995, p. 600.

53 Ibidem.
argued against such a view. Although no panel was eventually formed, the GATT contracting parties decided to adopt a special decision on Art. XXI, which required that any party resorting to trade-related security measures should inform all other parties, albeit with no special procedure for this established. Except for this procedural obligation, the decision remained silent on the substantive content of the conditions contained in the security exception. It only confirmed, but again without details, that all affected contracting parties shall retain their rights under GATT.

A defence based on the security exception was also raised in the dispute between Nicaragua and the US following the comprehensive American embargo introduced to undermine the Sandinista government. This dispute actually led to the establishment of a panel, but, at the request of the US, its terms of reference excluded any examination of the validity of the invocation of Art. XXI(b)(iii) of GATT. Despite the panel’s limited mandate, during the proceeding the US stressed the self-judging character of the clause, by observing that the formulation of the provision left the validity of the security justification to the exclusive judgement of a party taking an action. Although the panel did not rule on this issue, it remained sceptical, and asked the rhetorical question: “if it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?” It should be noted that the report was never adopted by the GATT Contracting Parties.

The issue of the security exception was also touched upon at the WTO. In the case of United States – The Cuban Liberty and Democratic Solidarity Act, the dispute concerned a secondary trade ban on all entities engaged in commercial activity with Cuba (whenever American property nationalised by the Castro government was involved). The EC, whose companies were affected by the ban, requested consultation with the US. During the debate at the meeting of the Dispute Settlement Body, the US stressed that “certain measures… had been expressly justified by the United States under GATT 1947 as measures taken in pursuit of [its] essential security interests.”

54 Schloemann & Ohlhoff, supra note 48, p. 437.
57 Ibidem, para. 5.17. It is worth noting that the approach hinted at by the panel is consistent with the International Court of Justice’s judgment in Nicaragua v. the US, wherein the Court differentiated between what is considered necessary under GATT Art. XXI, and necessary measures under the 1956 Treaty of Friendship, Commerce and Navigation between those two states: Case concerning military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States), Judgment of 27 June 1986, para. 222.
58 Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 16 October 1996, 26 November 1996, WT/DSB/M/24, para. 7.
This reminder suggested indirectly that such measures could not be reviewed by a WTO panel. The dispute was eventually resolved by way of bilateral negotiations; hence a panel did not have a chance to examine the measure. The second case in which reference to the security exception was made was Nicaragua – Imports from Honduras and Colombia.\(^{59}\) Nicaragua argued that Art. XXI:(b)(iii) “confirmed the inherent right of a State to protect its security, and constituted an exception to the multilateral trade rules” and that therefore it was outside the jurisdiction of the panel.\(^{60}\) The panel was established but was never composed.

No more conclusive is the preparatory work also considered a relevant element of treaty interpretation under Art. 32 of the VCLT. As noted by Pickett and Lux, “it … indicates disagreement and confusion as to how to balance these two interests [national security and prevention of abuses – authors] in the event of a dispute”.\(^{61}\) Therefore it cannot provide any additional help as the relevant provision(s) is/are interpreted.

So what conclusions can be drawn from the above discussion, when it comes to the analysis of the legality of the EU’s sanctions on Russia? If one subscribes to the position that Art. XXI(b) is an entirely self-judging provision, then a simple invocation of the clause by the EU would suffice to justify its measures. However, it seems to us that it is more probable (and correct) to see a panel engaging in some kind of review of the contested measures.\(^{62}\) Note that giving WTO Members a carte blanche with respect to any security-motivated action would undermine the stability and predictability of the whole system.\(^{63}\) Although in the past WTO Members have

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\(^{59}\) Nicaragua – Measures Affecting Imports from Honduras and Colombia – Request for Consultations by Colombia, WT/DS188, 28 March 2000.

\(^{60}\) Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 18 May 2000, 26 June 2000, WT/DSB/M/80, paras. 28–30.

\(^{61}\) Pickett & Lux, supra note 43, pp. 13.

\(^{62}\) The issue of whether Art. XXI of GATT is self-judging has also been considered by investment tribunals (referred to in the process of interpretation of security exceptions in specific bilateral investment treaties). The CMS tribunal stated that “…if legitimacy of such measures is challenged before an international tribunal, it is not for the State in question, but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness” (CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, paras. 339–340, 373). In the Enron award it was stated that recognition of the self-nature of the necessity test would deprive it of any substantive meaning (Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, paras. 299, 326–327, 331–332). The Sempra tribunal stated that “the very fact that such [Art. XXI] has not been excluded from dispute settlement is indicative of its non-self-judging nature” (Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, para. 384, 389). Such a conclusion is supported by the ICJ: referring to a similar exception under an FCN in the above-quoted judgement in Nicaragua v. the US; with respect to necessity under ILC Draft Articles on International Responsibility of States, Art. 25 (Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, paras. 50–51); assessing the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran (Oil Platforms (Islamic Republic of Iran v. United States of America) Judgment of 12 December 1996 (preliminary objections); as well as in Judgment of 6 November 2003 (merits), para. 40.

\(^{63}\) Cf. also Cottier & Delimatsis, supra note 40, pp. 339–340.
shown surprising self-restraint in this area (by neither invoking the exception nor challenging such measures), this practice alone is insufficient to safeguard against possible abuses. Moreover the Appellate Body has made it clear on several occasions that, as WTO exceptions are interpreted, “a balance must be struck between the right of a Member to invoke an exception … and the duty of that same Member to respect the treaty rights of the other Members. 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”.64 This balance can only be guaranteed if some form of review of a contested measure is available to a panel.65

We agree with the majority of scholars that an assessment of necessity calls only for a good-faith review (because it is qualified by the subjective condition “it considers”). At the same time, we do not wish to settle the debate over the nature of the review that should be applied by WTO dispute-settlement bodies when examining the existence of essential security interests (i.e. only a good-faith review or some form of (deferential) assessment).66 As will be shown below, the EU’s actions should pass this test even if some more-demanding standard is applied. The same is true with respect to the third condition. Arguably the EU has sufficiently strong arguments to show that there is a real emergency in international relations (in the event a panel decides to go beyond a review of good faith).

The task of a panel under a good-faith review is very limited. According to the Appellate Body, WTO Members are prohibited from abusive exercise of their rights provided for by a treaty. In other words those rights need to be exercised bona fide or reasonably.67 At the same time, WTO dispute-settlement bodies have held consistently that there is a presumption of states acting in good faith. This would mean that the burden of proof, traditionally borne under any WTO exception by a defendant (i.e. in this case the EU), would switch in the context of the first condition to the complainant (i.e. Russia).68 At the same time, it is not clear what Russia would

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64 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, para. 156. Although this argument was made in the context of the chapeau of Art. XX, on the systemic level, it is also valid when it comes to Art. XXI (which does not include a similar introductory clause).


66 Note that in some cases there might be very little (if any) practical difference between good faith review and a highly deferential standard.


need to show to establish the existence of *abus de droit*. If it is a subjective intent on the part of the EU (i.e. to evade WTO obligations under the guise of the security exception), this task will be extremely difficult.\(^69\) If instead an assessment of some objective elements is required, Russia would still need to prove that the EU could not have considered rationally (on the basis of facts available to it) that its measures were warranted by the factual circumstances in eastern and southern Ukraine; and nor could the EU have considered its measures able to contribute to its national security. Taking into account the seriousness of the developments in Ukraine, the gradual strengthening of sanctions (from very light restrictions to stronger, but still selective, measures), their design (as they are aimed at those entities closely connected to the Kremlin, or cover goods that have either a military or strategic potential), and the openness of the EU to terminate them once the conditions of the Minsk Agreements are fulfilled, the task would seem to be a very difficult, if not impossible, one.

A number of different factors should be taken account of in analysing whether the EU could have rationally considered its essential security interests to be at stake. It must be noted that Russia’s actions are widely perceived as violating various norms of public international law, particularly those rules that prohibit aggression and other actions against the territorial integrity and sovereignty of another state.\(^70\) The redrawing of European borders in violation of international law norms creates a dangerous (geo-)political precedent for the future (especially if one considers the turbulent European history of the 20th century). Therefore it may be persuasively argued that the new aggressive approach employed by Russia could, if not opposed by other countries, be repeated with respect to other countries and threaten the military security of Europe. This risk is particularly high for the former Soviet Republics (i.e. the newly independent countries which emerged after the dissolution of the Soviet Union), with these being considered by many high Russian officials as exclusively within the Russian sphere of influence as part of the so-called “near-abroad”.\(^71\) Three of these countries (namely Lithuania, Latvia and Estonia) are members of the EU. The large number of incidents involving Russian troops at the borders of the Baltic Republics following the Ukrainian crisis only serve to suggest that the existing threats are not purely theoretical.\(^72\) Note also that this concern was mentioned explicitly by the EU in one of its statements: “[t]he illegal annexation of Crimea and Sevastopol by the Russian

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\(^70\) Cf. UN GA, Resolution 68/262.


Federation is … a direct challenge to international security, with grave implications for the international legal order.”

Another important factor suggesting that the EU’s essential security interests are at stake is the geographical proximity of Russia and Ukraine (with both actually bordering on to the EU). A full-scale Russian invasion of Ukraine would not only change the entire geopolitical situation in the Central Eastern European region, but it would also produce a number of direct and imminent threats to the EU’s security interests (e.g. increased inflow of refugees from Ukraine). While all these situations involve potential, rather than actual threats, Art. XXI of GATT implies that WTO Members have the power to take preventive actions (therefore potential threats may also be considered essential security interests). At the same time, the shooting down of Flight MH17 by Russian-sponsored rebels shows that actual security threats are already involved. Note further that most of MH17’s 298 casualties were citizens of the EU Member States.

Finally, it would also be no problem to show that the various events occurring in Ukraine amount to an emergency in international relations. This is evidenced by a number of statements issued by different international organisations (a type of proof that is typically accepted by the WTO dispute-settlement bodies). Alongside the above-mentioned GA Resolution, one could refer, e.g. to the statement of the Parliamentary Assembly of the Council of Europe, which in April 2014 declared that “the actions of the Russian Federation leading up to the annexation of Crimea, and in particular the military occupation of the Ukrainian territory and the threat of the use of military force, the recognition of the results of the illegal so-called referendum and subsequent annexation of Crimea into the Russian Federation constitute … a grave violation of international law, including of the United Nations Charter and the … Helsinki Final Act. The launch of military action by Russia was in violation of a memorandum signed between Russia, the United States and the United Kingdom, and Ukraine, Belarus and Kazakhstan in 1994, which undermines the trust in other international instruments” (para. 3). The Assembly also observed that Russia rejected the diplomatic efforts of the international community aimed at de-escalation of the situation (para. 5) and that by its violation of the “sovereignty and territorial integrity of Ukraine, Russia has created


\[\text{74 Cottier & Delimatis, supra note 40, p. 340 (arguing that WTO Members are entitled under Art. XXI GATT to define what they consider necessary for the protection of their national interests, and that such entitlement will be greatly compromised if only actual threats are relevant).}\]

\[\text{75 While no official results of the Dutch criminal investigation are available, there is a range of evidence which suggests that the plane was shot down by the mobile Soviet-designed \textit{Buk} missile system provided by Russia and operated by the rebels (cf. MH17 The Open Source Evidence. A Bellingcat Investigation, 8 October 2015, http://bit.ly/1Lo0SCL [accessed: 22.2.2016]).}\]

a threat to stability and peace in Europe” (para. 6). Particular attention was focused on the unanimous vote in the Council of the Russian Federation authorising the use of military force in Ukraine, the approval of constitutional amendments allowing for the annexation of Crimea, and the ratification of the illegal treaty on unification (para. 7). For all these reasons, the Parliamentary Assembly suspended the voting rights of the Russian delegation and its representation in leading bodies of the Assembly, as well as its participation in election observation missions. The Committee of Ministers also condemned the Russian actions.77

In March 2014, the OECD suspended accession negotiations with Russia and decided to strengthen cooperation with Ukraine.78 Talks on membership have not been relaunched since.

At the same time, the North Atlantic Council condemned Russia’s military actions in Ukraine as being in violation of international law and contravening the principles of the NATO-Russia Council and the Partnership for Peace79, as well as the “both illegal and illegitimate” referendum in Crimea.80 In April, the NATO-Russia Council and other forms of cooperation were suspended.81

While it goes beyond the scope of this article to list all the statements issued by individual states, one should recall here that UN GA Resolution 68/262 was adopted with 100 votes in favour, 11 against and 58 abstentions. Most interestingly, the statements by the countries opposing the Resolution tended to stress that the current crisis should be resolved in another fashion, without questioning its emergency nature.82

Conclusions

Due to the lack of relevant WTO jurisprudence, it is difficult to determine with certainty the legality of the EU sanctions imposed on Russia. Nevertheless, it seems that the position of the Union under WTO law is relatively strong. While some of its trade-restrictive measures may prima facie violate various provisions of GATT and the GATS (e.g. the most-favoured nation principle, market access, and the prohibition on quantitative restrictions), they seem to be justified by the security exceptions provided for in both agreements.

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77 Council of Europe, Committee of Ministers welcomes cease-fire agreement and urges Russia to withdraw all its troops from Ukraine, Press release – DC107(2014).
78 OECD, Statement by the OECD regarding the status of the accession process with Russia & co-operation with Ukraine, 13 March 2014.
81 NATO, NATO’s relations with Russia (last update 11 November 2015), http://bit.ly/1SxV8z7 [accessed: 22.2.2016].
Considering the above, one may try to project possible scenarios. Due to its relatively small chances of prevailing in a dispute, Russia is not likely to initiate a formal dispute-settlement process. The numerous statements made by top Russian officials should be regarded as political in nature, rather than as legal threats. A formal proceeding, at least in the current state of affairs, is also improbable because of specific features of the WTO dispute-settlement system. WTO law does not provide for retroactive compensation to a complainant. This means that, even in the unlikely event of Russia being successful in a WTO dispute-settlement proceeding, the EU would only be obliged to withdraw or modify its measures, and not to pay compensation for damages suffered. If one adds to this the fact that the whole process may last two or more years (including a possible appeal and other ancillary proceedings), there are limited incentives for Russia to actually initiate a proceeding, and its use of counter-sanctions (as currently) seems a more likely path. Together with this course of action, the more-probable scenario is that Russia will try to break solidarity among the EU Member States with respect to the upholding of sanctions.

Naturally, the above prediction would need to be changed drastically if a serious escalation of Russian military activities in eastern Ukraine were to take place. In such a case, EU sanctions might even be strengthened, and Russia might then decide to challenge them at the WTO – not so much because of the prospects of winning, but rather for political reasons (to show itself a strong player at the international level).

Abstract: The aim of this chapter is to assess the legality of the EU sanctions on Russia under WTO law. In this context, the authors claim, after providing a detailed description of the measures introduced by the EU, that some of the sanctions either fall outside the scope of WTO law (i.e. the travel bans and asset freezes of certain individuals that cannot be considered service providers) or are related to aspects which are not covered by specific commitments made by the EU (i.e. certain restrictions on financial transactions). Consequently, they cannot be deemed to constitute a breach of the General Agreement on Trade in Services. The authors also argue that those measures which fall within the scope of WTO law (e.g. bans on sale of dual-use equipment and oil industry technologies) and which may be regarded as incompatible with certain obligations (e.g. prohibition of quantitative restrictions introduced by Art. XI of the General Agreement on Tariffs and Trade), can still benefit from the justification provided by the security exceptions included in respective WTO agreements. In this context, the authors analyse the specific conditions envisaged by such exceptions. Special attention is paid to the meaning of two elements: (i) the clause requiring a sanction to be an ‘action which [a WTO Member] considers necessary for the protection of its essential security interests’ and (ii) the clause speaking about measures ‘taken in time of war or other emergency in international relations’. The authors observe that due to a lack of relevant WTO jurisprudence, it is difficult to ascertain the precise standards required by WTO law. Nevertheless, they come to the conclusion, by relying on the interpretation methods traditionally employed by the WTO dispute settlement bodies (textual, systemic and
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teleological interpretation as provided by Art. 31 of the Vienna Convention on the Law of Treaties supplemented by a reference to the preparatory work) and referring to the practice of other international courts, that the relevant provisions grant wide discretion to WTO Members. On that basis, the authors argue that specific sanctions imposed by the EU should be regarded as justified under WTO law.

**Keywords:** EU, GATS, GATT, Russia, sanctions, security exception, Ukraine, WTO.