

LEGAL APPENDIX

The Economic Sanctions Imposed by the European Union on the Russian Federation and the Law of the World Trade Organization

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*The escalation of the crisis in Ukraine reached a tipping point upon the annexation of Crimea by the Russian Federation, resulting in the European Union showing greater-than-ever capacity to demonstrate a cohesive foreign policy and to opt for the introduction of economic sanctions against the Russian Federation. Beyond general restrictive economic and commercial measures, these sanctions also include specific measures imposed on individuals as well as punitive economic diplomacy. Since the EU, its Member States and Russia are all members of the World Trade Organization, this raises the question of how these sanctions can be interpreted in the framework of WTO law. To this end, this paper intends to examine the general background to the sanctions, place them in the context of WTO law, and consider how these measures might claim to be justified.**

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1. Introduction

The escalation of the crisis in Ukraine reached a tipping point upon the annexation of Crimea by the Russian Federation, resulting in the European Union showing greater-than-ever capacity to demonstrate a cohesive foreign policy and to opt for the introduction of economic sanctions against the Russian Federation. The restrictive measures imposed by the Union are considered unilateral economic sanctions¹ – i.e. lacking a United Nations mandate – that suggest a combination of heterogeneous measures. Beyond general restrictive economic and commercial measures, such as the ban on military goods, dual-use products and technologies as well as the restriction of investment activity, the sanctions also include specific measures imposed on individuals as well as punitive economic diplomacy.

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¹ The concepts of economic sanctions and embargoes will not be comprehensively discussed here due to space constraints and the applied nature of this article. See also: Alexander [2009], pp8–28.; Palásti [2005].

Since the EU, its Member States and Russia are all members of the World Trade Organization, this raises the question of how these sanctions can be interpreted in the framework of WTO law, and thereby how the EU's measures can be qualified. The article will attempt to investigate this relationship. Following the presentation of the general background to the economic sanctions imposed by the EU (*2. Background to the economic sanctions imposed by the European Union*) it places the sanctions into the context of World Trade Organization law (*3. The economic sanctions in light of WTO law*), and classifies the measures on the basis of WTO obligations, then hypothetically examines on what legal grounds they could be justified. A summary of the conclusions of the analysis follows in closing. (*4. Conclusions*).

2. Background to the economic sanctions imposed by the European Union

2.1 The introduction, goals and legal characteristics of the EU sanctions

The European Union's diplomatic efforts – intended to compel the Russian Federation to act decisively to prevent the further unravelling of the Ukrainian crisis, and to abandon its policy promoting escalation – had been proven ineffective by March 2014.² As a result, the Council decided to implement a new round of sanctions. The legislation passed as part of economic sanctions primarily contained restrictions on Russian and Ukrainian individuals (freezing of private assets and travel bans)³, but subsequently, as the deepening conflict between Russia and Ukraine became almost reminiscent of war, the Council repeatedly amended the sanction legislation and expanded both the types and scope of application of the restrictive measures. The most recent substantive amendments were effected at the end of 2014⁴ and the sanctions have been recently extended until 15 September 2016.⁵

The aim of the economic sanctions imposed by the European Union was to condemn and punish Russia for its role in the escalation of the Ukrainian crisis and the related legal measures build on two main objectives.

² On the historic context of the escalation of the Russia-Ukraine crisis and the imposition of EU sanctions, see: Mátyás [2015a]; pp189–204; Mátyás [2015b]; pp157–174; Horváthy–Nyírcsák [2014]; and Lekhadia [2015], pp151–176. For an analysis of the background of Russian-Ukrainian relations, see: Karácsony–Kocsis–Kovály–Molnár–Póti [2014], pp99–134.

³ See: Council Decision 2014/145/CFSP (OJ L 78/16, 17/03/2014); and Council Regulation (EU) No 269/2014 (OJ L 78/16, 17/03/2014).

⁴ See: Council Decision 2014/855/CFSP (OJ L 344/29, 29/11/2014); and Council Regulation (EU) No 1290/2014 (OJ L 349, 05/12/2014).

⁵ See: Ukraine territorial integrity: EU extends sanctions by 6 months (Press Release of the Council, 10/03/2016). Downloadable: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/10-ukraine-territorial-integrity/>; and Lester [2016].

First, as a general objective, the sanctions put pressure on Russia to abandon policies that escalate the Ukrainian crisis, i.e. any actions that undermine the territorial integrity and sovereignty of Ukraine, thereby endangering the stability and security of the region (e.g. cessation of military support for pro-Russian separatists). Second, the economic sanctions also constitute a response to the violations of human rights committed in Ukraine and to the annexation of part of Ukraine and are aimed at decision-makers, politicians, companies and other legal entities that can be held liable for the occurrence of these infringements. On the basis of these objectives, it is therefore evident that the economic sanctions imposed by the European Union serve the purpose of achieving broader foreign policy and security policy goals, and should be considered relevant not merely on the basis of their economic content. Hermann van Rompuy, former President of the European Council was therefore apt when he described the nature of the EU sanctions as belonging to the arsenal of foreign policy, and representing "not an objective in themselves, but a means of achieving an objective".⁶

2.2 Types of EU sanctions

According to the above, therefore, the economic sanctions are markedly easier to interpret as instruments of foreign policy rather than as legal instruments. However, it cannot be disputed that the Treaties lay down the basic legal framework, and thereby limit the European Union's scope for policy action when it comes to applying economic sanctions. In line with this, since no international (UN) embargo is in force relating to the Ukrainian crisis, the economic sanctions studied here may be considered autonomous instruments of the European Union (connected to its common foreign and security policy).

Three types of sanctions imposed by the European Union can be distinguished. Some are general economic and trade restrictions, others are restrictive measures on the assets and movement of individuals, and there are particular provisions of economic diplomacy.

The first category, namely economic and trade sanctions against the Russian Federation and the Crimean Peninsula entails the introduction by the EU of a general export and import ban on products on the Common Military List of the European Union.⁷ These restrictions were subsequently extended to include the export of so-called dual-use goods and technologies, and

⁶ EU strengthens sanctions against actions undermining Ukraine's territorial integrity (Council of the European Union; Press Release 8049/14; 21 March 2014). Downloadable: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141741.pdf.

⁷ See: Common Military List of the European Union (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 17 March 2014), OJ C 107/1 (09/04/2014).

special import restrictions were imposed on products from the Crimean region. An exception to these rules are cases where the "clean" origin of a product is certified by official Ukrainian documents.⁸ In addition, certain investment activities are also subject to restrictions. These restrictions impact investments in Russia in the transport, telecommunications and energy sectors, including projects in oil and gas production as well as mining. The hold on investment was augmented by a ban on the export of vital products and technologies for these strategic sectors, with the provision of financial and insurance services related to such projects also being prohibited.

The second category of sanctions includes the freezing of certain assets and shares as well as travel bans for individuals (natural persons and companies). According to the latest data (10 March 2016), asset freeze and travel bans are in force against 146 persons and 37 companies, which includes a number of companies in the Crimean region whose ownership changed – in the wake of the annexation – in contravention of Ukrainian law.⁹

Measures aimed at the freezing of assets include investments and economic interests of any kind of the persons designated by the EU provisions, including cash, cheques, bank deposits, stocks and shares, etc. In practice, this means that the persons concerned do not have access to, and cannot sell or transfer these assets. Travel restrictions affect individuals in that the person is denied entry into the European Union. The Council maintains the list of sanctioned persons in addendums to the legislation while also providing for legal remedy: the persons concerned have the right to comment on the list, as well as have the opportunity to challenge the Council decision at the European Court of Justice.¹⁰

⁸ See: Council Decision 2014/386/CFSP.

⁹ See: The current list of persons and entities under EU restrictive measures is available in the Annex of the consolidated version of Council Decision 2014/145/CFSP. Downloadable: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014D0145-20160313&from=EN>.

¹⁰ Of the procedures started, a decision has so far been reached in the case of Andriy Portnov, former deputy leader of the Ukrainian president's administration: the Court upheld Portnov's appeal, annulled the freezing of his assets and stated that listing Portnov's name had not complied with the criteria for listing a person subject to the freezing of assets. See also other cases before the Tribunal involving well-known persons: T-331/14 Mykola Yanovych Azarov v. Council (Prime Minister of Ukraine 2010 to 2014); T-339/14 Serhiy Vitaliyovych Kurchenko v. Council (Ukrainian businessman); T-347/14 Viktor Fedorovich Yanukovych v. Council (President of Ukraine 2010 to 2014); T-434/14 Sergej Arbuzov v. Council (Prime Minister of Ukraine February to January 2014); T-717/14 and T-720/14 Arkady Rotenberg v. Council (Russian businessman). The cases involving companies include the proceedings initiated by Russian oil company Rosneft: T-715/14. NK Rosneft et al v. Council.

In addition to the previously discussed types, the second category also includes specific restrictions imposing obligations on EU citizens and businesses in the context of the action against Russia. Of particular note are restrictions on Russian state-owned banks, based on which EU citizens and businesses may not conduct financial transactions with the banks under sanctions, nor trade financial instruments (bonds, etc.). Consequently, economic sanctions in this category do not only impact foreign persons, but may also restrict the activities of EU citizens and economic entities.

The third category includes specific punitive measures of economic diplomacy against Russia, which were introduced by the European Union in order to enhance the political clout and effects of the economic sanctions. This includes the Council decision requesting that the European Commission reassess, on a case by case basis, partnership programs between the EU and Russia, and to suspend certain programs.¹¹ Exempt from this review are programs implementing cross-border cooperation, as well as those involving Russian civil society. Furthermore, the Union last year cancelled a planned EU-Russia summit¹² and decided against holding the usual bilateral negotiations, among others suspending negotiations on visa policy cooperation and on a new partnership agreement. As a joint diplomatic move, EU Member States prompted the suspension of accession negotiations between Russia and the OECD, as well as its associated International Energy Agency. In addition, the 40th G8 summit, originally planned for Sochi last year was cancelled, and instead, a G7 meeting without Russia was held in Brussels on 4-5 June 2014.¹³ Also of significance is that the European Council on 16 July 2014 urged the European Investment Bank to postpone the signing of a new financing scheme for Russia,¹⁴ with Member States indicating that they would be taking similar steps before the Board of Directors of the EBRD regarding approval of new funding schemes.

3. The economic sanctions in light of WTO law

¹¹ See: EU sanctions against Russia over Ukraine crisis. European Union Newsroom. Downloadable: http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

¹² See: EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council of the European Union, Background Note, Brussels, 29 July 2014). Downloadable: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144159.pdf.

¹³ See: The Brussels G7 Summit Declaration (European Commission, Memo, Brussels, 5 June 2014). Downloadable: http://europa.eu/rapid/press-release_MEMO-14-402_en.htm.

¹⁴ See: EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council of the European Union, Background Note, 29 July 2014). Downloadable: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144159.pdf.

3.1 Preliminary legal classification of the sanctions

Out of the components of the economic sanctions imposed by the European Union discussed above, of primary significance are those trade related provisions that can be shown to fall under the scope of WTO law. For this reason, we cannot assess here the measures of economic diplomacy, presented above, and aimed at limiting Russia's room to manoeuvre within international economic relations; similarly, sanctions limiting movement of individuals also bear no relevance here. Consequently, in terms of WTO law, what may be assessed are the restrictions on weapons, dual-use products, goods and services related to special investments, the import ban on goods from the Crimean and breakaway territories, as well as restrictions on business transactions involving certain companies on blacklists.

At first glance, these sanction measures are contrary to the principle of *most favoured nation treatment*¹⁵ that requires a Member State of the WTO to grant, in respect to its provisions on imports and exports, other Member States any discount immediately and without conditions, which the Member State in question provides to third-party states. Stated another way, this means that a Member State of the WTO must not give less favourable treatment to another Member's product than that which it gives similar products of other countries, i.e. underlying this is the principle of non-discrimination. GATS also incorporates the principle of most favoured nation treatment,¹⁶ therefore the principle also involves the aspects of the EU sanctions on trade in services, such as the ban on oil industry investments or the activities of banks. In addition, the sanctions imposed by the EU are not compatible with the principle of *national treatment* (equal treatment). Under this principle, WTO members may not give products of other Member States inferior treatment from a regulatory perspective, than they do their own domestic products.¹⁷

¹⁵ See: Article I of the General Agreement on Tariffs and Trade ("GATT"). If there is express significance of the citing of the earlier revision of the GATT text, this will be indicated by the expression "GATT 1947"); Published in: Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (hereinafter: "WTO Treaty"), Appendix 1 (b), OJ L 336 (23/12/1994) page 1.

¹⁶ WTO Treaty, Appendix 1 (b): General Agreement on Trade in Services (GATS) Article II paragraph (1). GATS defines the principle of most favoured nation treatment as follows: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

¹⁷ See: GATT Article III.

Therefore, upon initial assessment, it can be concluded without any doubt that certain elements of the economic sanctions imposed by the European Union are in breach of the above principles, i.e. the EU's obligations based on GATT 1994 and GATS. Thus the question arises of whether or not WTO law provides a legal basis for the exemption of such measures, that is, if it indeed justifies, by way of exception, the economic sanctions introduced by the EU in breach of the above principles. Putting aside exceptions that can be excluded *prima facie*,¹⁸ the only exceptional provision whose application could reasonably be considered within the framework of the facts is a reference to the essential security interest.¹⁹ We will subsequently focus on this exception provision.

3.2 National security exceptions in GATT and GATS

The provision on *essential security interest* had been present in the original 1947 text of GATT, and was left unchanged by the 1994 revision. This same text was also used in Article XIV*bis* of GATS. On the whole, this exception provides Member States vital leeway in cases where their essential security and their national security or security policy interest is at stake, and in such cases authorizes them to derogate from the obligations laid down by GATT 1994 and GATS. It identifies three types of justification for this. First, Member States may refuse any provisions that would oblige them to issue information the disclosure of which would be contrary to the security interests of the Member State.²⁰ Second, it authorizes Member States to freely take measures necessary for the protection of their national security interests, specifically referring to the trade in arms, munitions and war material, as well as to times of war and to other emergencies in international relations.²¹ As the third option, it reaffirms that Member States may take measures to implement their tasks serving the maintenance of

¹⁸ Because of the special facts of the case, the general exceptions (GATT Article XX) do not apply and any other exemption allowing deviation from the principles is also logically excluded, such as free trade zones and customs unions (GATT Article XXIV).

¹⁹ See: GATT Article XXI and GATS Article XIV*bis*.

²⁰ See: GATT Article XXI section (a): „[Nothing in this Agreement shall be construed] to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests [...].”

²¹ See: GATT Article XXI section (b): „[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations (...).”

international peace and security under the UN Charter.²² Of these three cases, the second bears substantive significance in the context of EU sanctions, with the applicability of the third option requiring further analysis.

3.3 Justification of the essential security interest based on past practice

Past practice involving national security exceptions is restricted to a few concrete disputes, and so far no final decision has ever been issued in any dispute settlement procedure where a Member State has successfully based its justification of restrictive measures on the exception provisions of GATT Article XXI or GATS Article XIVbis. However, some concrete cases in practice – without exception involving GATT Article XXI – where consideration of national security interests was raised, suggest criteria that are relevant to the evaluation of the case in point.

Applicability of GATT Article XXI was raised for the first time in proceedings²³ brought by Czechoslovakia against the United States in 1949, the subject of which were export controls and a licensing system introduced by the USA. According to the United States, these restrictive measures were needed for national security reasons, and were applicable only to a narrow range of goods usable for military purposes. The basis of the measures was cited to be GATT Article XXI section (b) paragraph (iii), i.e. it referred to an emergency in international relations to justify the measures. The contracting parties to GATT subsequently rejected Czechoslovakia's application²⁴ and did not set up a working group for an inquiry into the dispute.²⁵ In addition, no definition of the essence of the essential security interest had been formulated, which at the end of the negotiations Czechoslovakia interpreted as Member States themselves being able to determine what measures they consider necessary for the protection their security interests.²⁶

While not considered formal dispute resolution, the relevance of GATT Article XXI was broached in connection with Portugal's accession in 1961. At that time, Ghana maintained a

²² See: GATT Article XXI section (c): „[Nothing in this Agreement shall be construed] 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.”

²³ See: US – Export Restrictions, GATT/CP. 3/SR.22 (8 June 1949), Third Session – Summary Record of the Twenty-Second Meeting, pp4–10. Downloadable: https://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf. Case cited by: WTO [2012]; Lekhadia [2015], p160.

²⁴ See: US – Export Restrictions, pp8–10.

²⁵ This initial case arose before the establishment of the WTO panel.

²⁶ See: US – Export Restrictions, p10.

boycott of goods originating from Portugal, in response to the Portuguese Government's policy towards Africa, specifically in reference to the crisis in Angola. Similarly to the previously discussed case, Ghana also cited GATT Article XXI section (b) paragraph (iii) as the basis for its restrictive measures and concluded that both concrete or potential dangers may threaten the security interests of a state.²⁷

In 1975, in the case of a ban introduced by Sweden on footwear used by the military,²⁸ reference was also made to GATT Article XXI, however, that case also did not make it to formal dispute resolution. Sweden argued that the import ban served to maintain – in reality, protect – its crisis-hit domestic production, a measure necessary for Swedish national security policy.²⁹ Member States made an important determination to the effect that GATT Article XXI does not require consultation, i.e. a state whose interest is served by restrictions may take the necessary measures unilaterally.³⁰ As elsewhere, it is apparent in this case that the applicability of the article is greatly influenced by who is able to interpret the scope of GATT Article XXI, i.e. in this case, for what types of military-use footwear a restriction could be acceptably justified. In other words, whether the Member State itself is allowed to autonomously determine the scope of goods considered national security risks, or whether there are objective conditions for that.³¹ These questions still remain unanswered.³²

The past case closest to the current sanctions against Russia concerns the economic sanctions imposed on Argentina by the EEC, Canada and Australia, the background to which was the armed conflict in the Falkland Islands between the United Kingdom and Argentina, as well as the implementation of the subsequent UN Security Council decision 502 of 1982.³³ As a result of the negotiations of the GATT contracting parties, a separate decision was adopted on issues

²⁷ Summary Record of the Eleventh Meeting, SR.19/11/Corr.1 (28 December 1961), p196. Downloadable: https://www.wto.org/gatt_docs/English/SULPDF/90280183.pdf.

²⁸ Sweden – Import Restrictions on Certain Footwear, L/4250, 17 November 1975. Downloadable: https://www.wto.org/gatt_docs/English/SULPDF/90920073.pdf.

²⁹ See: Sweden – Import Restrictions on Certain Footwear, p3.

³⁰ See: GATT Council Meeting, Minutes of Meeting (10 November 1975), C/M/109. p9. Downloadable: https://www.wto.org/gatt_docs/English/SULPDF/90430147.pdf.

³¹ To use a concrete example: the connection between army boots and the essential security interest is palpable, but it is questionable whether a state should be able to restrict trade, for example, in slippers used by the military.

³² Alford [2011], pp704–705.

³³ The decision acknowledged that the UK may cite self-defence if Argentine troops did not leave the Falkland Islands. See: Resolution 502 (1982) of 3 April 1982. Downloadable: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/502%281982%29.

concerning the application of GATT Article XXI.³⁴ The importance of the decision lay in that it clarified several procedural issues around the application of the national security exception. First, it stated that signatories subject to restrictions must be provided the broadest possible information by the sanctioning state about the measures implemented. Above all, this was meant to clarify the application of the exception referred to by GATT Article XXI section (a). In other words, it sought to prevent interpretation of the above-mentioned GATT Article XXI section (a) in a way that allowed the sanctioning state to fully restrict the disclosure to the affected state of information relating to the sanctions. Second, it also made it clear that states subject to sanctions retain all their rights deriving from their GATT membership. Last, the decision authorized the GATT Council to specify, on request, further criteria with reference to specific economic sanctions. The decision did not address the substantive issues, however, two additional aspects are evident from the text. Firstly, the wording of the document implied that judging the existence of national security interests is at the full discretion of Member States.³⁵ Secondly, the decision clearly stated that signatories introducing restrictions must take into account the interests of affected third states.³⁶

It is also worth mentioning the dispute in the wake of the embargo imposed by the United States on Nicaragua in 1985. The United States cited GATT Article XXI as justification for the economic sanctions on the grounds that the revolutionary Sandinista leadership governing Nicaragua at the time posed a real threat to US national security and foreign policy.³⁷ Nicaragua rejected this argument, and requested that a panel be set up. However, since the panel's authority did not allow it to examine the USA's justification referencing GATT Article XXI, i.e. it had to take for granted the existence of the national security interest cited by the USA, the panel in its conclusions could not state that the USA had complied with the requirements arising from GATT Article XXI, nor that it was in violation of its obligations under GATT.³⁸ The limited authority of the panel and its self-restriction allows us to conclude

³⁴ See: Decision concerning Article XXI of the General Agreement (30 November 1982), L/5426 (2 December 1982). Downloadable: https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf.

³⁵ See: Decision concerning Article XXI of the General Agreement, first paragraph of the preamble: "Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"

³⁶ See: Decision concerning Article XXI of the General Agreement, third paragraph of the preamble.

³⁷ Lekhadia [2015], pp162–163. and Bossche-Zdouc [2013], pp597–598.

³⁸ US – Trade Measures Affecting Nicaragua (Report by the Panel, L/6053, 13 October 1986), 5.3 pont. Elérhető: https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

that GATT Article XXI leaves to Member States the justification of the existence of the national security interest, i.e. it is up to each Member State's judgment and discretion what it considers circumstances essential to its security.

After the establishment of the WTO, there has been one case under the new dispute settlement proceedings where the possibility of exemption based on GATT Article XXI was raised: the dispute settlement procedure initiated by the EC against the United States,³⁹ in the wake of the sanctions introduced by the Helms Burton Act.⁴⁰ The restrictions imposed by the USA included sanctions on goods of Cuban origin, entry restrictions on Cuban nationals and other economic sanctions against Cuban companies. The EC argued that the embargo measures violated several obligations arising from GATT. According to the US, imposition of sanctions served its essential security interests, and also cited the fact that it was not considered entirely commercial in nature, so it argued that the dispute did not fall within the scope of the provisions of GATT-WTO.⁴¹ After consultation, the Dispute Settlement Body set up a panel, but later suspended its proceedings at the request of the EC, and eventually the proceedings ended without a decision on the case's merits.

Lastly we should note that the facts in GATT Article XXI section (c), i.e. taking measures to implement tasks serving the maintenance of international peace and security under the UN Charter has not been cited in any dispute settlement case so far. Similarly, there has not been any past practice to date involving the exception provision in GATS Article XIVbis, however, since the text of that article is identical to GATT Article XXI, the past practice examined above is also applicable to GATS.

3.4 The application of the national security exception to the EU sanctions against Russia

Taking into account the criteria set out above from past practice, the relevance of the national security exception for trading in goods arises for GATT Article XXI sections (b) and (c), whereas for trading in services, the application of GATS Article XIVbis may be relevant. The exception in GATT Article XXI section (a) does not bear significant relevance, since the

³⁹ US – The Cuban Liberty and Democratic Solidarity Act (Helms Burton) (DS38).

⁴⁰ See: The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act, Pub.L. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091). The federal law was intended to further tighten the embargo on Cuba. A 1996 incident in which the Cuban air force downed two private aircraft flying American colours played a part in the bolstering of the legislation. The aircraft were operated by an association established by Cuban refugees, and which they used to regularly fly into Cuban airspace to spread flyers.

⁴¹ See: Minutes of DSB meeting of 16 October 1996 (WT/DSB/M/24), p7. Downloadable: https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/21715/Q/WT/DSB/M24.pdf.

economic sanctions imposed by the EU were adopted and published in a transparent way as part of the foreign and security policy decision-making process, so justification on the retention of information is likely not necessary. It is important to note, moreover, that GATT Article XXI – and also similarly GATS Article XIVbis – does not define additional criteria beyond the aforementioned exceptions, i.e. it does not contain requirements like the introductory provisions of GATT Article XX (the so-called *chapeau*). Accordingly, the application of the exception provisions and justification of the EU's restrictive provisions – hypothetically – could unfold in the following way.

3.4.1 Applicability of GATT Article XXI section (b)

When applying the exceptions under GATT Article XXI section (b), the EU must justify the existence of national security interests, the necessity of the action and the circumstances of any special cases (trade in fissile material or weapons and war or emergency). Justification of the existence of the national security interest in the case of the European Union sanctions provides much leeway, since on the basis of the above-mentioned practice (above all, the Czechoslovakia-USA trade dispute and the decision issued on the embargo by the EEC, Canada and Australia on Argentina) the determination of the national security interest is at the discretion of the state concerned. In particular, the argument appearing in the US-Nicaragua dispute implies that the merits of such a decision on the existence of the security interest cannot be examined from above.

As a result, it is up to the discretion of the EU to determine the extent to which the Russian-Ukrainian crisis, deepening in the wake of the annexation of Crimea, is considered a threatening circumstance to the national security and foreign policy of Member States. Such a circumstance could be the fact that the Russian Federation had violated the sovereignty of Ukraine, had engaged armed forces, something the heads of state and government condemned in their declaration of 6 March 2014 and also called on Russia to immediately recall its forces to their permanent bases in accordance with the relevant agreements.⁴² In addition, the aspects emerging from the Portugal-Ghana dispute further expand the room for manoeuvre in that according to the arguments therein, not only actual but potential security risks may also be cited as circumstances threatening the national security interest.

Another question is what requirements to apply for the justification of necessity. In contrast with GATT Article XX, which in the case of several facts requires the express justification of necessity, it is a plausible interpretation of GATT Article XXI that proof of necessity is

⁴² See Council decision of 2014/145/CFSP, first paragraph of the preamble (OJ L 78/16, 17/03/2014).

merely a formal requirement. This can be deduced grammatically from the wording of the text, which refers to a national security interest "*which [the contracting party] considers necessary*". It also follows logically from the above that if the definition of a national security interest is entirely at the discretion of the Member State, then the national security interest thus freely declared also in itself implies that the sanctions imposed are necessary for the protection of this interest. Thus if we accept broad discretion, the latter interpretation seems probable.

Finally, it should be noted that in justifying the special circumstances in the context of the application of the EU sanctions, GATT Article XXI section (b) paragraph (i), which justifies restrictions on fissile materials, is irrelevant for the case in point. In contrast, either of the other two options may be considered as the legal basis for justification. In the cited paragraph (ii) the provisions on the traffic in arms, ammunition and implements of war for the purpose of supplying a military establishment are related to the parts of the EU economic sanctions dealing with the arms embargo. Due to the aspects of past practice, however, it is not determined whether this exception is applicable to dual-use goods such as war supplies serving, among others, military establishments. Fundamentally, deciding this point is not necessarily essential, since of the third basis for exception, i.e. the special circumstances in paragraph (iii), namely war or other emergency in international relations, the latter appears to be justifiable in the context of the escalation of the Russian-Ukrainian conflict. This exception allows for the justification of provisions with substantially broader and general scope and without specific focus on particular goods and, could therefore, if necessary be applied to restrictions on dual-use products. The interpretation of "other emergency" is not clear, but as before, the grammatical interpretation here also allows for a great degree of discretion. In addition to war, "other emergency" could mean a broader set of international conflicts, however, on the basis of the context, these are supposedly serious conflicts in essence comparable to war.⁴³

In cases relying on this as the legal basis for justification, it is therefore assumed that the grave nature of the crisis cited would play a role, however we could not find examples in past practice which would provide guidance for this issue. Of the previously cited examples, the boycott imposed by Ghana on Portuguese goods is comparable to the Russia-Ukraine crisis. In this case, Ghana claimed that the crisis afoot in Angola constituted a continued threat to peace and security in the whole of Africa, and used this to cite GATT Article XXI section (b)

⁴³ Singh [2012], p20.

paragraph (iii), but as mentioned above, the proceedings did not result in a decision on the merits of the case. Consequently, in justifying the EU sanctions, the events following the annexation of the Crimean peninsula, tacit support for armed resistance in breakaway areas and the consequent crisis may be argued to support the reference to "other emergency".

3.4.2 Applicability of GATT Article XXI section (c)

Although, in contrast to the legal basis for justification discussed in the previous section, GATT Article XXI section (c) has no substantive past practice, the interpretation of the exception regulated in this section leaves fewer questions unanswered. This exception concerns restrictive measures by WTO Member States which are taken in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security. Thus, this section exempts Member States' commercial embargo provisions that are introduced on the basis of Article 41 of the UN Charter,⁴⁴ with the authorization of the Security Council. These sanctions are binding on UN Member States according to Article 25 of the UN Charter,⁴⁵ therefore GATT Article XXI section (c) serves to resolve the conflict arising from this.⁴⁶ In contrast with the facts discussed in the previous section, this ground for exception is substantially more precise since its applicability depends solely in the existence of a UN mandate. However, since the economic sanctions imposed by the European Union on the Russian Federation were introduced unilaterally rather than on the basis of a UN mandate, this possibility for exception has no consequence in this case.

3.5 Counter-sanctions introduced by the Russian Federation

Although the analysis is aimed primarily at evaluating sanctions introduced by the EU, Russia's counter-sanctions must be mentioned. Vladimir Putin signed a presidential decree⁴⁷ on 6 August 2014, banning the import of foodstuffs from the European Union – and not

⁴⁴ UN Charter Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

⁴⁵ UN Charter Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

⁴⁶ Note that no substantive conflict arises, since the UN Charter itself sets this out in Article 103: in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

⁴⁷ See: Government meeting – On measures to implement the Presidential Executive Order On Applying Certain Special Economic Measures to Ensure the Security of the Russian Federation. (7 August 2014). Downloadable: <http://government.ru/en/news/14199/>.

incidentally, from the United States, Australia, Canada and Norway – in response to the economic sanctions imposed by the West. The ban affects the import of beef, pork, poultry, fish, vegetables, fruit, cheese, milk and other dairy products to Russia. Since Russia is the EU's second largest export market for foodstuffs with a 10% share,⁴⁸ the full ban seriously impacted the EU's food industry; the agricultural sector in particular faced severe negative effects with Russia being the largest importer of EU vegetable and fruit.⁴⁹ The European Commission tried to react quickly and took immediate measures to aid the dairy, vegetable and fruit sectors, while as a medium-term measure, boosting by EUR 30 million⁵⁰ the funding for financing schemes launching this year under the auspices of the Common Agricultural Policy. In addition to the compensatory measures, the Foreign Affairs Council on 15 August 2014, politically condemned⁵¹ the Russian sanctions and – using somewhat more diplomatic wording – expressed its expectation of third party states and of candidate countries for EU membership to refrain from taking measures that could exploit the economic sanctions imposed against the EU.

Even without detailed legal examination of the Russian counter-sanctions, it can be surmised that based on WTO law, the Russian measures raise the same issues that we analysed above in connection with the EU sanctions. Specifically, the Russian measures also violate GATT principles and this is unchanged by the fact that these measures were brought by Russia – effectively as retaliatory instruments – in response to the EU sanctions. Neither would it affect the merits of the classification if we assumed – by way of a thought experiment – that justification of the sanctions was not sufficient. Differently put, the EU economic sanctions, even if hypothetically considered infringing, do not grant legal authorization for Russia to automatically and immediately introduce countermeasures. Such sanctions should only be imposed if the European Union was ruled against in a dispute settlement procedure, after which the EU did not comply with the decision of the dispute resolution proceedings and finally, the Russian Federation received express authorization from the Dispute Settlement

⁴⁸ See: Russia hits West with food import ban in sanctions row. BBC News, (7 August 2014). Downloadable: <http://www.bbc.com/news/world-europe-28687172>.

⁴⁹ See: Moscow retaliates with import ban on EU, US food. Euractiv, (7 August 2014). Downloadable: <http://www.euractiv.com/sections/europees-east/moscow-retaliates-import-ban-eu-us-food-307770>.

⁵⁰ See: Boost for promotion of EU agricultural products as medium-term response to Russian embargo (European Commission, Press release, 3 September 2014). Downloadable: http://europa.eu/rapid/press-release_IP-14-961_en.htm.

⁵¹ See: Council conclusions on Ukraine (Council of the European Union, Press release, 15 August 2014.). Downloadable: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144314.pdf.

Body to introduce counter-sanctions. Because these conditions are not met, justification of Russia's measures is only possible in the manner mentioned above, principally on the basis of the essential security exception.

4. Conclusions

Justification of the sanctions imposed by the EU may be possible by reference to the essential security interest. GATT Article XXI grants great discretion for justifying the existence of an essential security interest and of special circumstances, but fundamentally due to the slight significance of relevant case history, the correct interpretation of the specific provisions of the exception clauses is not clear in all respects. In addition, both past practice as described above and the case in point clearly demonstrate that economic sanctions are considered instruments that can be interpreted by way of trade policy considerations, but in practice their fundamental objectives unavoidably stretch considerably beyond trade policy, and viewed from that perspective, they may appear to merely serve foreign policy. That is important because this nature of economic sanctions inherently makes legal review difficult and hard for these instruments to be legally "transformed" in WTO proceedings. A direct consequence of this is that Member States instead opt to manage their disputes on economic sanctions outside the WTO. The above notwithstanding, it is questionable whether the dispute settlement mechanism is in fact capable of deciding on the merits of Member States' disputes involving sanctions, since behind each one is a disagreement of a political or foreign policy nature. Based on all of this, it is likely that the questions raised by the EU economic sanctions introduced against the Russian Federation will not be answered by dispute resolution proceedings, but will instead be settled through international negotiations.

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The Economic Sanctions Imposed by the European Union on the Russian Federation and the Law of the World Trade Organization

The escalation of the crisis in Ukraine reached a tipping point upon the annexation of Crimea by the Russian Federation, resulting in the European Union showing greater-than-ever capacity to demonstrate a cohesive foreign policy and triggering a concerted response in the form of a series of restrictive measures labelled “economic sanctions”. Beyond restrictive economic and commercial measures against Russia and Crimea, these sanctions also include

specific measures imposed on individuals as well as punitive economic diplomacy. Since the EU, its Member States and Russia are all members of the World Trade Organization, this poses the question of how these sanctions can be interpreted in the light of WTO law. This paper intends to analyse these questions, examine the general background of the sanctions, place them in the context of WTO law, and hypothetically consider how these measures could be justified under WTO obligations.