

Can the West Justify its Sanctions against Russia under the World Trade Law?

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ABSTRACT

The United States as well as several European Nation's government in March 2014 declared that the actions and policies of deploying the military forces in Crimea by the Government of the Russian Federation with respect to Ukraine's internal dispute undermined the democracy in Ukraine. They concluded that this constituted an unusual and extraordinary threat to the national security and foreign policy by the United States, European Union as well as several other nations. Thereafter, these nations imposed several trade restrictions with Russia. Russia challenged the trade restrictions on the ground that it violated principles of GATT. If Russia challenges these trade restrictions in front of the WTO appellate body then it would mount the first formal challenge to trade sanctions in the global trade body. The main defence that shall be taken by the United States and the European Union shall be the security exception under Article XXI of the General Agreement on Tariffs and Trade which gives the WTO's 159 members the right to take actions that might otherwise violate the body's rules in the event of an "emergency in international relations". This paper shall critically analyse the jurisprudence of Article XXI of GAAT to determine whether the sanction imposing nations could validly argue the Security Exceptions to justify their trade sanctions against Russia.

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I. INTRODUCTION

On March 16, 2014, the United States government declared that the actions and policies of the Government of the Russian Federation with respect to Ukraine, including the recent deployment of Russian Federation military forces in the Crimea region of Ukraine, undermine the democratic processes and institutions in Ukraine. They also threaten its peace, security, stability, sovereignty, and territorial integrity, in addition to contributing to the misappropriation of its assets. This was considered to be an unusual and extraordinary threat to the national security and foreign policy of the United States. The European Union has also taken a similar position on this issue. Thereafter, the United States government and the European Union imposed several restrictions on the financial dealings with prominent Russian businesses as well as restrictions on trade with the Russian companies.⁵⁸⁵

Russia has challenged the trade restrictions on the ground that they violate principles of the General Agreement on Tariffs and Trade (“GATT”). The

⁵⁸⁵ West Sanctions, ‘Follow the roubles’ (The Economist 2014) <<http://www.economist.com/news/briefing/21599409-how-america-and-europe-hope-put-pressure-russia-follow-roubles>> accessed 01 March 2015.

only possible line of defence that the sanction imposing nations can take is to rely on the security exception under Article XXI⁵⁸⁶ of the GATT. This paper shall critically analyse the jurisprudence of Article XXI of the GATT to determine whether the United States and the European Union could validly argue the security exceptions to justify their trade sanctions against Russia.

The paper has been divided into four main parts. The first part shall briefly discuss the geopolitical conflicts between Russia and Ukraine and how the same has an impact on international peace and security. The second part shall discuss the trade sanctions that have been imposed by the United States and the European Union. The third part shall study the existing jurisprudence under Article XXI of the GATT. The final part shall critically analyse the existing jurisprudence to determine whether the security exception can be successfully pleaded by the United States and European Union were this to come before the World Trade Organisation's dispute settlement gateway and the possible arguments that Russia could raise against the invocation of Article XXI by the United States and European Union.

586 Article XXI of the General Agreement on Tariff and Trade states 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 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.

II. GEO-POLITICAL CONFLICTS BETWEEN RUSSIA AND UKRAINE

Ukraine has been in economic and political crises since early 2000. In November 2013, Mr. Yanukovich, the then President of Ukraine who was an ardent supporter of Russia, decided to abandon the free trade negotiations with the European Union for easy money and political asylum from Russia.⁵⁸⁷ This action of the President infuriated thousands of Ukrainians who saw it as a further blow to their economy and thereafter started the 'EuroMaidan' protests.⁵⁸⁸

The protests turned violent and the violence escalated when the Government machinery dealt with the situation by attacking the protestors.⁵⁸⁹ The interactions between the Government and the protestors were closely observed by other nations, and the foreign ministers of Germany, Poland and France decided to mediate the same.⁵⁹⁰ This round of negotiations resulted in Ukraine adopting the Constitution that it followed prior to 2004.⁵⁹¹ However, the protestors wanted the President to step down by the end of February 2014.⁵⁹² Amidst the protests, Ukraine's President Mr. Yanukovich took political asylum in Russia. Thereafter, Ukraine was taken over by an ad-hoc government formed by the protestors.⁵⁹³

587 Kharkiv, Kiev, Lviv, 'The February Revolution' (The Economist 2014) <<http://www.economist.com/news/briefing/21597974-can-ukraine-find-any-leaders-who-will-live-up-aspirations-its-battered-victorious>> accessed 01 March 2015.

588 *ibid.*

589 *ibid.*

590 *ibid.*

591 The Orange Revolution was a series of protests and political events that took place in Ukraine from late November 2004 to January 2005, in the immediate aftermath of the run-off vote of the 2004 Ukrainian presidential election which was claimed to be marred by massive corruption, voter intimidation and direct electoral fraud. Kiev, the Ukrainian capital, was the focal point of the movement's campaign of civil resistance, with thousands of protesters demonstrating daily.

592 Cf Kharkiv (n3).

593 *Ibid.*

Historically, one of Ukraine's eastern territories, Crimea had been a part of Russia until 1954. Thereafter, it was transferred to the Soviet Republic of Ukraine by Nikita Khrushchev.⁵⁹⁴ Furthermore, Crimea's largest city Sevastopol is largely populated by Russian speakers. Amidst the protests in Ukraine, on February 23, 2014, around twenty thousand people in Sevastopol, the capital city of Crimea, overthrew their mayor who had been appointed by the Central Government and instead appointed a Russian citizen in his place. In response, Russia deployed 150,000 soldiers to Crimea which resulted in a large scale massacre.⁵⁹⁵ On March 6, 2014, Crimea's Parliament voted to join Russia.⁵⁹⁶ Thereafter, based on the result of a referendum that was held in a predominantly Russian region in Crimea, it declared independence and formally applied to join Russia on March 17, 2014.⁵⁹⁷ Mr. Putin announced in the Russian Parliament that Crimea, that had been taken over by the pro-Russian forces, has historically been a part of Russia.⁵⁹⁸ He then moved for an amendment of the Russian Constitution to include Crimea within its territory⁵⁹⁹ which was opposed by the majority of the countries across the globe as they declared the referendum to be illegal under international law.⁶⁰⁰ The United States called a G7 crisis meeting to respond to the crisis in Crimea.⁶⁰¹ French President Mr. François Hollande

594 Buttonwood, 'Crimea and punishment' (The Economist 2014) <<http://www.economist.com/blogs/buttonwood/2014/03/markets>> accessed 01 March 2015.

595 Ibid.

596 The Economist explains, 'What the original Crimean war was all about' (The Economist 2014) <<http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-5>> accessed 01 March 2015.

597 Ibid.

598 Kharkiv, Kiev and Lviv, 'Can Ukraine find any leaders who will live up to the aspirations of its battered, victorious but sceptical protesters?' (The Economist 2014) <<http://www.economist.com/news/briefing/21597974-can-ukraine-find-any-leaders-who-will-live-up-aspirations-its-battered-victorious>> accessed 01 March 2015.

599 Ibid.

600 Ibid.

601 Ibid.

also urged the European community to give “strong and coordinated European response” to the Russia’s rampant violation of the principles of international law.⁶⁰²

On the other hand, Mr Putin appeared before crowds in Moscow’s Red Square and declared that Crimea shall become part of Russia again.⁶⁰³ Thereafter, amidst all the international uproar, Mr. Putin, Crimea’s Prime Minister Mr. Sergei Aksyonov, the region’s Speaker Mr. Vladimir Konstantinov and mayor of Sebastopol, Mr. Alexei Chaliy, signed the treaty making Crimea a part of Russia.⁶⁰⁴ This secession movement had been declared illegal by majority of the countries of the world who stated that the decision of Crimea’s secession should be taken based on an all Ukrainian referendum instead.⁶⁰⁵ On the other hand, Russia has compared the situation in Crimea to that of Kosovo in 2008 and has accused the Western nations of double standards and hypocrisy in the present situation.⁶⁰⁶ However, it is not the secession, but the rampant violation of human rights in Crimea by the Russian troops who attacked and killed several Ukrainian supporters causing rampant destruction of property and life that has troubled the Western nations.⁶⁰⁷

III. TRADE SANCTIONS AGAINST RUSSIA

The West unanimously held that Russia’s secession of Crimea into its territory was against the international principle of State Recognition and

602 Bridget Kendall, ‘Ukraine crisis: Putin signs Russia-Crimea treaty’ (BBC News 2014) <<http://www.bbc.com/news/world-europe-26630062>> accessed 01 March 2015.

603 The Economist explains, ‘Whether secession in Crimea would be legal’ (The Economist 2014) <<http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-10>> accessed 01 March 2015.

604 Ibid.

605 Ibid.

606 Ibid.

607 Simferopol, ‘Hugs and thugs’ (The Economist 2014) <<http://www.economist.com/news/briefing/21599407-some-crimeans-welcome-annexation-violence-not-far-surface-hugs-and-thugs>> accessed 01 March 2015.

that Russia was committing a ‘use of force’ in Crimea that is against the recognized International Law obligations. Therefore, many countries imposed trade and political sanctions against Russia.⁶⁰⁸ Common political sanctions imposed by several countries were freezing assets and banning travel for the Russian political elite.⁶⁰⁹ However, the West soon realized that stand-alone political bans would not deter Russia. Hence, it gradually started imposing several trade sanctions to deter Russia and indirectly force it to give up Crimea.⁶¹⁰ For example, France suspended its delivery of two *Mistral*-class amphibious assault ships to Russia;⁶¹¹ Britain suspended military sales and co-operation with Russia; the United States issued Executive Orders in March, 2014 to suspend credit finance that encouraged exports to Russia and finance for economic development projects in Russia.⁶¹² Additionally, the United States prohibited exportation of goods, services and technology in support of exploration or production for projects that had the potential to produce oil in the Russian Federation.⁶¹³

The European Council condemned Russia’s acts as a clear violation of the sovereignty and territorial integrity of Ukraine.⁶¹⁴ It imposed an embargo

608 Office of the Press Secretary, ‘Statement by the President on New Sanctions Related to Russia’ (The White House 2014) <<http://www.whitehouse.gov/the-press-office/2014/09/11/statement-president-new-sanctions-related-russia>> accessed 01 March 2015.

609 Ibid.

610 Ibid.

611 Cf Sanctions (n1).

612 Public Release, ‘Ukraine and Russia Sanctions’ (US Department of State 2014) <<http://www.state.gov/e/eb/tfs/spi/ukrainerussia/>> accessed 01 March 2015.

613 Press Release, ‘Announcement of Expanded Treasury Sanctions within the Russian Financial Services, Energy and Defence or Related Materiel Sectors’ (United States 2014) <<http://www.treasury.gov/press-center/press-releases/Pages/jl2629.aspx>> accessed 01 March 2015.

614 Press Release, ‘EU sanctions against Russia over Ukraine crisis’ (European Union Newsroom 2014) <http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm> accessed 01 March 2014.

on the import and export of arms and ammunitions with Russia.⁶¹⁵ It also prohibited exports of dual-use goods and technology for military use in Russia.⁶¹⁶ Moreover, the restrictions governing the prior authorisations by Member States of exports of certain energy-related equipment and technology to Russia were further extended and amended on September 08, 2014 and December 04, 2014 respectively.⁶¹⁷

Canada also imposed a similar export restriction on Russian arms, energy as well as financial corporations.⁶¹⁸ Correspondingly, Japan too restricted imports from Crimea and froze funds for new projects in Russia.⁶¹⁹ Norway decided to adopt tougher sanctions against Russia than the ones adopted by the European Union and the United States by banning export of equipment, technology and assistance to Russian oil sector.⁶²⁰

615 Press Statement, 'Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the name of the European Union on the agreed additional restrictive measures against Russia' (European Council 2014) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf> accessed 01 March 2014.

616 Factsheet, 'EU Restrictive Measures' (European Council 2014) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf> accessed 01 March 2015.

617 Commission Notice, 'Commission Guidance note on the implementation of certain provisions of Regulation (EU) No 833/2014' (European Commission 2014) <http://europa.eu/newsroom/files/pdf/c_2014_9950_en.pdf> accessed 01 March 2015.

618 Thomson Reuters, 'Ukraine crisis: U.S., EU, Canada announce new sanctions against Russia' (CBC News 2014) <<http://www.cbc.ca/news/world/ukraine-crisis-u-s-eu-canada-announce-new-sanctions-against-russia-1.2721836>> accessed 01 March 2015.

619 Tokyo, 'Japan Formally OKs Additional Russia Sanctions' (ABC News 2014) <<http://wayback.archive.org/web/20140806143916/http://abcnews.go.com/International/wireStory/japan-formally-oks-additional-russia-sanctions-24842209>> accessed 01 March 2015.

620 Saleha Mohsin, 'Norway 'Ready to Act' as Putin Sanctions Spark Fallout Probe' (Bloomberg Business 2014) <<http://www.bloomberg.com/news/2014-08-12/norway-ready-to-act-as-russian-sanctions-trigger-fallout-probe.html>> accessed 01 March 2015.

All the major nations of the world including United States, nations of the European Unions and Russia⁶²¹ have joined the World Trade Organization. Hence these nations are ‘contracting parties’ under the General Agreement on Tariff and Trade (“GATT”). The abovementioned trade restrictions imposed by the Western nations prohibits imports from Russia. These nations do not place similar import restriction on any other country. This is in clear violation of Article I of GATT that prohibits favourable treatment to one nation over the other nations for custom duties and charges imposed on importation and exportation of goods. Moreover, Article III of GATT mandates that a State should give ‘like’ treatment for national and international goods. In this case, Article III too has been violated as export of arms and related materials has been prohibited from Russia. Therefore, it is evident that restrictions imposed by the Western countries on Russia have *prima facie* violated the obligations under the GATT. Therefore, it is open to Russia to challenge the restrictions imposed on it in the World Trade Law dispute settlement forum.

IV. ANALYSIS OF THE EXISTING JURISPRUDENCE UNDER ARTICLE XXI OF THE GATT

Article XXI of the GATT talks about the security exceptions. This exception grants immunity to the State imposing restrictions on the ground that it was doing the same to protect its security interest in the wake of any international unrest. If the sanction imposing nations want to defend themselves from the violation of their GATT obligations while imposing the restrictions on Russia, they will have to plead that it was done to protect their security interest.

At the time of drafting the security exception, it had been decided that the same should not be too strict or too broad as the same would either prohibit

⁶²¹ Russia recently became part of WTO in 2012.

genuine measures or enable countries to impose commercial measures in the guise of security exceptions.⁶²² Since its inception in 1994, the WTO dispute settlement body has never had to adjudicate upon a case wherein the trade sanctions imposed by a party have used the defence of the security exception. There has not been a single instance before the advent of World Trade Organization in 1994 when the case was challenged on the ground of misuse of Security Exception under Article XXI of GATT. However, there have been certain instances where the security exception as a possible defence was deliberated upon.

In *Czechoslovakia v. United States dispute*⁶²³, Czechoslovakia argued that the United States had breached its obligations under Articles I and XIII of the GATT by administering export licensing and short-supply controls.⁶²⁴ These controls discriminated amongst destination countries.⁶²⁵ The United States justified these controls by arguing that they were necessary for “security reasons” Article XXI (b) (iii) of the GATT and that it only “applied to a narrow group of exports of goods which could be used for military purposes.”⁶²⁶ Czechoslovakia’s claim was rejected by sixteen out of the seventeen Contracting Parties who held that Article XXI begins with the word “necessary” and hence, United States will not have to adhere to any GATT obligations if it can establish that it has validly used the Article XXI exception.⁶²⁷ They also concluded that every country will have the last say on what matters affect their security interests.⁶²⁸

622 WTO, ‘Article XXI Security Exceptions’ (Analytical Index of the GATT) <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf> accessed 01 March 2015.

623 Summary Record of the Twenty-Second Meeting, June 08, 1949, CP.3/SR22-II/28.

624 Ibid.

625 Ibid.

626 Ibid.

627 Ibid.

628 Ibid.

Thereafter, in the case of *Swedish Import on Restrictions on Certain Shoes*,⁶²⁹ Sweden had imposed a global import quota system for certain footwear that was used by the military personnel. Since there was decrease in the domestic production of this footwear, Sweden justified its restriction on the ground that this quota helped in maintenance of minimum production capacity in vital industries and this in turn was necessary to meet the basic needs in case of any emergency.⁶³⁰ This interpretation of the term “essential security interest” under Article XXI is not definitive as this case never went before the dispute settlement body.

In the dispute between Ghana and Portugal in 1962, Ghana relied on Article XXI to restrict its trade with the new member Portugal.⁶³¹ It held that Portugal’s policies concerning its African territories had led to an emergency in international relations under Article XXI (b)(iii) and therefore, it was justified in boycotting goods from Portugal.⁶³² One interesting aspect that came out in this case was that Ghana asserted that the “danger” may be actual or potential.⁶³³ It argued that the situation in Angola was a constant threat to international peace and by bringing trade measures, Ghana intended to pressurise the Portuguese government to act in direction of lessening the danger.⁶³⁴ Since no formal complaint was launched with the dispute settlement body of the WTO, Ghana’s assertions could not form the definitive interpretation of Article XXI.

In 1982 European community, Canada and Australia indefinitely suspended imports from Argentina.⁶³⁵ These measures were taken to address the

629 *Sweden- Import Restrictions on Certain Footwear*, L/4250 (November 17, 1975).

630 *Ibid.*

631 cf WTO (n38).

632 *Ibid.*

633 *Ibid.*

634 *Ibid.*

635 Decision of 30 November 1982, ‘*Decision concerning Article XXI of the General Agreement*’ WTO L/5426.

Security Council Resolution 502 (the Falkland/Malvinas issue).⁶³⁶ The background to this resolution was that Argentina had engaged in an armed attack in the Falkland Islands. Argentina sought the interpretation of Article XXI from the other contracting parties in the wake of these restrictions. After detailed discussion by the contracting parties, a “Decision Concerning Article XXI of the General Agreement” was adopted.⁶³⁷ This decision lays down certain procedural safeguards that each State imposing trade restrictions under Article XXI should follow. The salient features are:

- a. The contracting party upon whom the trade restrictions are being imposed should be informed about the measures to the fullest possible extent,⁶³⁸ and
- b. The contracting party upon whom the trade sanctions are being imposed has the full right to challenge this action under the dispute settlement mechanism,⁶³⁹ and
- c. The council may be requested to give further consideration in this matter in the due course of time.⁶⁴⁰

This decision merely lays down some procedural guidelines but does not aid in any substantive interpretation of Article XXI.

Thereafter, the United States justified its trade restriction under the cloak of Article XXI at two instances. In the first instance, the United States prohibited all imports and exports to and from Nicaragua because the policies and actions of the latter’s government constituted “*an unusual and extraordinary threat to the national security and foreign policy of the United*

636 Ibid.

637 Ibid.

638 Ibid

639 Ibid.

640 Ibid.

States”.⁶⁴¹ Nicaragua contended that it is impossible for a small country like itself to constitute an extraordinary threat to United States’ national security.⁶⁴² India too contended that there should have been a genuine nexus between the essential security interest and the trade sanctions for imposing such drastic trade measures.⁶⁴³ United States defended its position by stating that the other contracting parties had no *locus standi* to question the validity of or motivation for invocation of article XXI (b) (iii).⁶⁴⁴ After long negotiations, the Council stated that “*the panel cannot examine or judge the validity of or motivation for the invocation of Article XXI (b) (iii) by the United States*”.⁶⁴⁵ This meant that the determination of the “essential security interest” has remained the sole prerogative of the nation invoking Article XXI (b) (iii).

In another instance, the United States passed Cuban Liberty and Solidarity Act, 1996 also known as the Helms-Burton Act in response to a Cuban jet shooting down unarmed civilian planes, killing four people, including three American citizens.⁶⁴⁶ The controversial portions of this Act are Title III and Title IV. Title III imposed damages on foreign companies that dealt in the property of United States nationals that had been confiscated by the Cuban government.⁶⁴⁷ Title IV imposed further restrictions on United States persons

641 Federal Register, ‘Executive Order 12513—Prohibiting trade and certain other transactions involving Nicaragua’ (United States National Archives 1985) <<http://www.archives.gov/federal-register/codification/executive-order/12513.html>> accessed 01 March 2015.

642 Peter Lindsay, “The ambiguity of GATT Article XXI: Subtle Success or Rampant Failure” [2002-2003] 52 Duke L.J. 1277, 1290.

643 *United States v Nicaragua*, GATT Council, Minutes of Meeting Held May 29, 1995, GATT Doc. C/7/188 (June 28, 1985) at p.11 (Restricted).

644 *United States- Trade Measures affecting Nicaragua*, Report of the Panel (unadopted) (L/60533) 13 October 1986.

645 Ibid.

646 *Exiles Commemorate Downing of Planes by Cuba 5 Years Ago*, CHI. TRIB., Feb. 25, 2001, at C7 as seen in cf Lindsay (n58).

647 22 U.S.C.A. § 6082 (West Supp. 2002).

who trafficked in the above said property.⁶⁴⁸ This legislation was opposed by Canada, Mexico and the European Union as the same violates the principles of free trade under GATT. Eventually, the parties resolved their differences by mutual consultation and compromises without involving WTO adjudicatory bodies.⁶⁴⁹ Thus, the abovementioned instances conclude that the States have taken the aid of Article XXI to justify violation of their obligations under the GATT. However, the WTO dispute settlement body has, so far, not given any decision supporting or opposing the justification of Article XXI.

Leading international trade law scholars have stated that the sanctioning members are not obliged to justify their determination of 'essential security interest' under Article XXI to the World Trade Organisation or its members.⁶⁵⁰ Furthermore, the sanctioning member does not require any prior approval or subsequent ratifications of its measures from the World Trade Organisation.⁶⁵¹ Therefore, the only conclusion with regard to the substantive interpretation of Article XXI is provided by the Council in *United States v Nicaragua*⁶⁵² dispute which held that the determination of 'essential security interest' is left on the State invoking Article XXI. The other jurisprudence under Article XXI comprises mainly of the contentions and assertions made by the affected parties when they had violated their obligations under the World Trade Law. Hence, the limited jurisprudence under Article XXI leaves a wide scope for its interpretation in any future dispute where Article XXI is used as a defence for violation of provisions under the GATT.

648 22 U.S.C.A. § 6091(a) (West Supp. 2002).

649 cf Lindsay (n58).

650 R. Whitt, "The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defence in the Context of the U.S. Embargo of Nicaragua", [1987] 19 Law & Pol'y Int'l Bus. 603.

651 *ibid.*

652 cf *United States v Nicaragua* (n59).

V. APPLICATION OF ARTICLE XXI DEFENCE IN THE PRESENT CASE

The GATT has two kinds of exceptions – general exceptions under Article XX and security exceptions under Article XXI. In order to apply a general exception under Article XX, a State needs to follow a two pronged test. A State first needs to establish that the imposed restriction falls under any one of the ten categories under Article XX. Thereafter, the State has to ensure that the restriction is in compliance with the chapeau which states that the exception “*would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*”.⁶⁵³ The grounds for general exception under Article XX relate to instances where the concerned State will be affected by action of any other State. While the security exception under Article XXI is invoked when the action of other State imposes threat to its national security interests. Hence the requirement of chapeau is absent from Article XXI. Therefore, the restrictions imposed by any country on the ground of security exception can be targeted at one particular country instead of applying them across the board for all the nations, like the restrictions under Article XX. Therefore, the sanction imposing nations can unilaterally impose restrictions on Russia under Article XXI.

There are two aspects to Article XXI – a procedural and a substantive aspect. The procedural aspect is the guidelines laid down in the “*Decision Concerning Article XXI of the General Agreement*”⁶⁵⁴ that was adopted by the Contracting Parties in 1982. The main crux of the procedural requirement is that the State against whom the restrictions have been imposed will need to be made aware of the full extent of the measures.⁶⁵⁵ In the present case of trade

653 Article XX, General Agreement on Tariff and Trade 1994.

654 cf Decision of 30 November 1982 (n51).

655 Ibid.

restrictions against Russia, it has been observed that the countries who have imposed trade restrictions on Russia have widely publicized their restrictions through their official websites as well as through the popular media. Hence, it can be safely concluded that the countries that have imposed restrictions on Russia have followed the procedural requirement of notification of the restrictions.

Now that it is established that the sanction imposing states had followed the basic procedural requirements essential for imposing sanctions under Article XXI of GATT, the next issue that needs to be examined is whether the sanction imposing nations have followed all the substantive requirements that are necessary for imposing sanctions under Article XXI. Sanction imposing nations intending to defend their actions under Article XXI(b)(iii) of GATT will have to prove that their measures were taken in time of emergency in international relations. The text of Article XII (b) (iii) necessitates the fulfilment of three substantive requirements for successfully invoking the said Article. Firstly, the sanction imposing country will have to prove that the measures were taken in the time of “emergency in international relations”. Secondly, that country will have to prove that there has been a threat to its “essential security interest”. Lastly, it will have to prove that the measures that have been taken are “necessary” to protect its essential security interest. The next section shall critically analyse whether each of the three substantive requirements have been fulfilled by the sanction imposing countries in the present case.

A. The measures were taken in time of emergency in International relations

This is the factual interpretation and the same needs to be determined by the concerned countries. The following contentions can be raised by the parties:

Russia's argument

Russia could argue that if the sanction imposing nations believe that the secession in Crimea is illegal, then the same could have been dealt with by collective action under the United Nations charter. The United Nations' charter lays down detailed procedure for determining whether there has been any use of force against territorial integrity and political independence of any other State.⁶⁵⁶ If there is a 'use of force' by one country against the other, then the said dispute needs to be resolved by peaceful methods such as mediation, conciliation, negotiation or judicial settlement.⁶⁵⁷ If the matter is not resolved by peaceful means, only the United Nations has the power to act.⁶⁵⁸ To do so, the Security Council will have to determine the existence of threat to peace.⁶⁵⁹ Thereafter, it shall decide the collective measures to be adopted against the erring party.⁶⁶⁰ In the present case, the nations that imposed trade sanctions on Russia unilaterally and arbitrarily decided that the situation in Crimea is a threat to international peace without resorting to the pacific dispute settlement means under Chapter VI of the United Nations charter.

There are instances where the Security Council will be unable to act as its members are parties to the dispute concerned. In such cases, The United Nations provides for United for Peace Resolution⁶⁶¹. As per the said resolution, the General Assembly shall issue any recommendations it deems necessary to restore international peace and security when Security Council

656 Article 2 (4) of the United Nations Charter.

657 Article 33 (1) of the United Nations Charter.

658 Chapter VII of the United Nations Charter.

659 Article 39 of the United Nations Charter.

660 Article 41 of the United Nations Charter.

661 United Nations General Assembly (UNGA) resolution 377 A (United Nations 1950) <[www.un.org/en/sc/repertoire/otherdocs/GAres377A\(v\).pdf](http://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf)> accessed 01 March 2015.

is unable to help. In the present situation, if it is argued that the Security Council was unable to help, then the General Assembly had the power under Resolution 377A to issue United for Peace Resolution. However, the sanction imposing countries disregarded the dispute settlement mechanisms that were available to them under various international charters and unilaterally imposed the trade restrictions on Russia.

Russia could also argue that due process of law and democratic methods was followed in Crimea. The citizens of Crimea voluntarily decided to join the Russian Federation. Moreover, the treaty of secession between Russia and Crimea was also ratified by the Russian Parliament. Therefore, the secession pact between Russia and Crimea is purely a bilateral affair between the two nations and therefore, no other nation has any *locus standi* to interfere in their bilateral affairs.

Moreover, the objective of the GATT is to ensure that there is a rise in the standard of living of the population and steady growth in the volume of real income by expanding the production as well as the exchange of goods.⁶⁶² Therefore, since GATT primarily deals with the promotion and protection of free trade among nations, it should not be used as a political tool by the nations to further their own economic self-interest.

Arguments by the sanction imposing countries

The concerned States that have imposed the measures on Russia can defend their action by demonstrating that Russia's actions violated basic principles of international law. The fundamental principle of territorial integrity was interpreted further and expounded in the United Nations General Assembly 'Friendly Relations Declaration'.⁶⁶³ This resolution primarily stated that '*any total or partial disruption of the national unity or territorial integrity of the*

662 Objective of General Agreement on Tariffs and Trade, 1947 [*Bare text*].

663 UN Doc. A/RES/2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970.

*State... is incompatible with the principles of the [United Nations] Charter*⁶⁶⁴. Moreover, the principle of sovereign equality under Article 2(1) of the United Nations Charter presupposes the existence of territorial integrity and political independence.⁶⁶⁵ The act of interference by the Russian troops with the internal protests in Crimea is an attempt to disrupt the national unity of Ukraine and hence Russia has breached the customary international law principle of territorial integrity.

Furthermore, a valid secession requires full consent of the concerned government.⁶⁶⁶ In the present case, the mayor appointed by the Central Government was ousted by the Russian revolutionary forces at the time when the Ukraine government was struggling after the EuroMaidan revolution. In the said circumstances, Crimea could not have validly seceded to Russia as it failed to wait for the restoration of effective government in Ukraine before holding the referendum that declared Crimea to be a part of Russia.⁶⁶⁷

The sanction imposing nations could also claim that Russia's argument of valid self-determination by the people of Crimea would not sustain as the principle of self-determination encompasses two aspects – the internal and the external.⁶⁶⁸ The internal aspect refers to the right of the people to

664 Ibid.

665 Ibid.

666 Georg Schwarzenberger, *International Law* (3rd, Stevens & Sons, Ltd., London 1957) 303.

667 See also *Republic of Somalia v. Woodhouse Drake and Carey (Suisse) SA et al.*, UK High Court, QBD Judgment, 13 March 1992, (1994) 94 ILR 608-23.

668 European Commission for Democracy through Law, 'Opinion on "Whether Draft Federal Constitutional Law No. 462741-6 on amending the Federal Constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law"' (Venice Commission Opinion no. 763/2014, CDL-AD(2014)004 2014) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)004-e)> accessed 01 March 2015.

determine their political status and the external aspect refers to the right of the people to freely determine their place in the international arena.⁶⁶⁹ There have been reports from non-Russians that have stated that the referendum was done only in the Russian speaking region of Crimea.⁶⁷⁰ The presence of Russian troops in Crimea at the time of referendum also raises doubts about the free will of the Crimean citizens when they voted for secession. Therefore, it can be strongly presumed that the internal aspect of self-determination has been vitiated in the present case.

As Russia has violated fundamental customary international law obligations, Article 2(4) of the United Nations charter and its commitments under several bilateral and multilateral treaties,⁶⁷¹ the other nations across the globe were justified in raising concerns regarding the rampant human rights violation by Russian troops in Crimea as well as the breach of territorial integrity of Ukraine. The shooting of Malaysian Airline Flight 370 in a territory controlled by the pro-Russian separatists further enraged the international community.⁶⁷² The sanction imposing nations did not expect the United Nations to take collective security in this situation as Russia is one of the five permanent members in the Security Council, thus enjoying veto power.⁶⁷³ Since the United Nations Security Council is crippled in this case,

669 Ibid.

670 Cf Simferopol (n23).

671 See Treaty of Good-Neighbourliness and Friendly Co-operation between the People's Republic of China and the Russian Federation (24 July 2001); Article 2 of the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (31 May 1997).

672 See Jethro Mullen, 'Report: MH17 hit by burst of 'high-energy objects' from outside' (CNN News 2014) <http://edition.cnn.com/2014/09/09/world/europe/netherlands-ukraine-mh17-report/index.html?hpt=hp_t2> accessed 01 March 2015 and Andrew Higgins and Nicola Clark, 'Malaysian Jet Over Ukraine Was Downed by 'High-Energy Objects,' Dutch Investigators Say' (The New York Times 2014) <http://www.nytimes.com/2014/09/10/world/europe/malaysian-airliner-ukraine.html?_r=1> accessed 01 March 2015

673 Article 27 of the United Nations Charter.

the General Assembly passed a resolution⁶⁷⁴ stating that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine.⁶⁷⁵ Therefore, the resolution called upon the States to refrain from actions aimed at partial or total 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 as the same would amount to a violation of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.⁶⁷⁶ Russia went ahead with secession of Crimea into its territory, thus disregarding the General Assembly Resolution 68/262. This left the countries around the globe, who were signatories of the said resolution with two options – either to deploy their troops to Ukraine and fight against the Russian military or to use economic measures to indirectly force Russia to stop the blatant human rights violation in Crimea. The act of deploying military troops in Ukraine would have escalated the dispute and hence, several countries in the West decided to impose trade sanctions to indirectly compel Russia to stop the rampant violation of human rights and destruction of life and property in Crimea by the Russian forces. Thus, it can be concluded that the acts of sanction imposing nations were undertaken as a method of last resort after the peaceful mechanism of asking Russia to refrain from using unlawful means in Crimea region through the passage of the General Assembly Resolution had failed.

674 United Nations General Assembly Resolution 68/262 (March 27, 2014) 68th Session of UN General Assembly.

675 It is to be noted that 100 countries voted in favour of the resolution while 11 countries voted against it and 58 countries remained absent for the vote.

676 Ibid.

B. Threat to essential security interest

Russia's arguments

Although the determination of essential security interest is subjective and has been left on the concerned country, there should be a reasonable nexus between the sanctions imposed and the threat that the sanction imposing country is facing. In this case, the countries like United States and nations of European Union had no imminent or potential threat from the secession of Crimea by Russia. Russia could further argue that Article XXI has been designed for a hyper-sensitive government. Therefore, each sanction imposing country will have to show that there had been a credible threat to the respective nations and not simply cry wolf.

Arguments by the sanction imposing countries

In the present era of globalisation, there is an increased dependence of one country on another. Therefore, the sanction imposing countries can claim that if basic human rights are violated in one country, then it could have a spill-over effect on other nations as well. Moreover, secession of one nation by another without following the principles of international law like non-interference in domestic matters of another nation and not following the principles of use of force as enshrined in Article 2(4) of the United Nations Charter is not acceptable in the present century and hence, the sanction imposing countries have well-founded fears that if Crimea's situation is left unattended to, then it could lead to potential threats to their sovereignty as well. The case of Ghana-Portugal trade sanctions clearly states that the danger need not only be actual but it could also be potential.⁶⁷⁷ Russia's illegal secession is a potential threat to the security interests of all the nations around the globe and hence this move needs to be nipped in the bud. Moreover, it can be argued that the very fact that security exception that stems from the

⁶⁷⁷ cf WTO (n38).

fear of political upheaval has been provided under the financial treaty such as GATT implies that the makers had envisaged situations where the countries would need to use economic measures to meet political ends.⁶⁷⁸

C. The measures were “necessary” to safeguard the national interest of the concerned country

If the sanction imposing countries are able to successfully plead the first two criteria, then they would need to prove that the necessity of their specific sanctions to safeguard their security interests. There is no case under Article XXI where the word ‘necessary’ has been interpreted. General rule of treaty interpretation states that ordinary meaning shall be given to the terms of the treaty ‘in their context and in light of its object and purpose’.⁶⁷⁹

The contexts in which Article XX and Article XXI of GATT were drafted are similar as both these Articles provide exceptions that allow deviations from the obligations under the GATT. Since both these Articles use the term ‘necessary’, therefore, the interpretation of the term ‘necessary’ under Article XX could aid in the possible interpretation of the term ‘necessary’ under Article XXI. However, under Article XXI, the word ‘necessary’ has been qualified by the term ‘essential security interest’. Therefore, to impose any restriction under Article XXI, the State will have to first determine that the restriction has been imposed to safeguard its ‘essential security interest’. The State is allowed to impose any restriction under Article XXI that it deems ‘necessary’ to protect its ‘essential security interest’. The determination of ‘essential security interest’ under Article XXI is left to the concerned State.⁶⁸⁰ Therefore, once a country determines that the act of any other country is a threat to its ‘essential security interest’, then, it shall

678 Ibid.

679 Article 31 of the Vienna Convention of the Law of the Treaties, 1969.

680 cf United States v Nicaragua (n59).

have the power to impose any measure that it deems ‘necessary’ in that situation.

The term ‘necessary’ has been used in Article XX at three instances; *first*, to protect public morals;⁶⁸¹ *second*, to protect human, animal or plant life or health;⁶⁸² and *finally*, to ‘secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement’.⁶⁸³ While interpreting the term ‘necessary’ under Article XX, it has been held that the same should be judged by assessing the extent to which the measure ‘contributes to the realization of the end pursued’.⁶⁸⁴ Moreover, ‘necessary’ measure not only includes ‘indispensable’ measure but also includes any measure that is deemed necessary in a particular situation.⁶⁸⁵ Furthermore, it is not required to ensure that the measure must achieve its result with absolute certainty.⁶⁸⁶

The sanction imposing nations have claimed that Russia’s action in Crimea violates the international peace and security and hence it is an ‘essential security threat’ to their sovereignty as well. They may argue that their sanctions come within the purview of ‘necessary’ measures since these have

681 Article XX (a) of the General Agreement to Tariff and Trade, 1947.

682 Article XX (b) of the General Agreement to Tariff and Trade, 1947.

683 Article XX (d) of the General Agreement to Tariff and Trade, 1947.

684 WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (03 December 2007) para. 150. See also Juan Ochoa, ‘General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS’ (Faculty of Law, University of Oslo 2012) <<http://www.uio.no/studier/emner/jus/jus/JUS5850/h12/tekster/ochoa-general-exceptions.pdf>> accessed 01 March 2015; WTO Appellate Body, Report of the Appellate Body: *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001).

685 WTO Appellate Body, Report of the Appellate Body: *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R and WTO Doc WT/DS169/AB/R (11 December 2000), para. 7.511.

686 WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (06 March 2006)

gradually increased the gravity of their sanctions based on the changing political scenario. Moreover, initially, the Western nations imposed political sanctions like travel and visa restrictions on the political elites. When the Western nations realized that the political sanctions have failed to deter Russia, then these nations gradually imposed restrictions on financing and trade of arms and ammunition related sectors. It can be asserted that arms and ammunition sector has a direct impact on Russia's deployment of military forces in Crimea and hence the financial and trade restriction on arms and ammunitions related sector was 'necessary' to deter Russia from undertaking any further military actions in Crimea.

VI. CONCLUSION

This paper has evaluated the arguments that the sanction imposing states and Russia can take if the trade sanctions are challenged before the dispute settlement body of the World Trade Organisation. Russia will primarily argue that the sanction imposing nations are detrimentally affecting the Russian economy by restricting free trade in the cloak of political upheaval and are misusing the restrictions granted under Article XXI of GATT. It will further state that the sanction imposing nations should have ideally resorted to peaceful dispute settlement mechanisms provided under the United Nations Charter instead of unilaterally imposing the measures against Russia. It can also claim that the situation in Crimea in no way affects the 'essential security interest' of nations like Japan and United States and hence it does not necessitate the use of Article XXI which should ideally be used as a means of last resort. On the other hand, the sanction imposing nations will assert that Crimea's secession to Russia is a threat to international peace and security. Moreover, it will argue that the measures undertaken were absolutely necessary to prevent Russia from violating Ukraine's territorial sovereignty and from causing rampant violation of human rights in Crimea.

As seen in this paper, many countries have imposed trade restrictions during political disputes in the latter half of the twentieth century. Most of these nations have defended their trade restrictions under the security interest. However, the dispute settlement body under the WTO did not have opportunity to decide on the same as most of these disputes were settled with mutual consultation and compromise. If Russia brings its trade dispute to the WTO dispute adjudication body, then it will set a precedence by giving the dispute settlement body an opportunity to examine and interpret the use of security exception under Article XXI of the GATT.