

## BETWEEN LAW AND POLITICS: NUCLEAR NON-PROLIFERATION AND STATE-INDUCED COMPLIANCE IN INTERNATIONAL TRADE

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### Abstract

The US economic sanctions (including sweeping export restrictions) against Iran and Russia, while presented as aiming at non-proliferation, appear to have ineluctably undermined the negotiations to revive the Joint Comprehensive Plan of Action, an agreement meant to deter Iran from pursuing nuclear status. The present paper approaches this situation as a telling example of how unrestrained export control can come into tension with international security, in this case within the nuclear non-proliferation regime. Drawing on this illustrative case, this article seeks to formulate more general conclusions as regards the potential side-effects of broad export restrictions, their necessary limits under WTO law, and the significance of the WTO system in the non-proliferation process. First, this paper contextualises export controls as part of this regime, and then addresses the causal implications of the above situation, concluding that it does demonstrate the involvement of a foreign policy element that is ultimately at odds with the stated goals of nuclear non-proliferation. Finally, the paper examines the substance of Article XXI of the General Agreement on Tariffs and Trade, which the sanctioning State will most likely use to justify its trade restrictions in a WTO dispute. It finds that a good faith interpretation and available practice indicate that the exceptions of Article XXI involve demanding standards and are to be interpreted so as to screen out, as far as possible, measures that covertly pursue other (e.g. foreign policy) interests. Meanwhile, non-WTO Member States could try to advance cases through friendly Members if they could establish a breach of WTO law that concerns the latter, though the chances are admittedly very thin. Ultimately, the WTO system is revealed as a valuable element in ensuring and maintaining international security and non-proliferation.

### Key words

nuclear non-proliferation regime, Treaty on the Non-Proliferation of Nuclear Weapons, Joint Comprehensive Plan of Action, export controls, comprehensive sanctions, GATT Article XXI

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### Introduction

The current failure of the Joint Comprehensive Plan of Action (hereinafter — JCPOA) — an agreement meant to deter Iran from pursuing nuclear status, commonly known as the Iran nuclear deal — presents a pressing challenge for the global nuclear non-proliferation regime (hereinafter — NNPR). Subsequent to the 2018 US withdrawal, the JCPOA parties attempted to renew the deal, but were unable to negotiate the lifting of sanctions against Iran and Russia. Among other primary components, these sanctions include broad export control measures that have themselves been advertised as ensuring non-proliferation through minimising allegedly sensitive exports. This unfortunate occurrence may present a peculiar example of how excessive export control (and, perhaps, sanctions more broadly) can come into tension with international security, which warrants an inquiry into the refraction of such sweeping restrictions through international trade law and their true acceptable boundaries. This research problem requires answering the following questions: are these measures really capable of compromising international security, what standards are to be applied to them under international trade law in order to rule out possible excesses, and, hence, how this can strengthen the global non-proliferation and security processes?

The modern literature on the subject presents a clear understanding that export control is intended to strike a balance between international trade and national security.<sup>2</sup> In practice, the existing approaches demonstrate two basic observational standpoints. The first appears to represent the domestic policymaker,

<sup>1</sup> The opinions expressed in this article are exclusive and personal opinions of the author and do not in any way reflect the position of any other person or organisation.

<sup>2</sup> For examples see Reinsch W. A. *China as Best Customer and Biggest Threat — Trade Policy in the Biden Era II Schwerpunkt Außenwirtschaft* 2021/2022. 2022. P. 183; Joyner D. H. *International Law and the Proliferation of Weapons of Mass Destruction*. Oxford : Oxford University Press, 2009. P. 126; Berndorfer T. *Nuclear Commerce: Its Control Regime and the Non-Proliferation Treaty*. Hamburg : Diplomatica Verlag, 2009. P. 84–85.

who is interested in managing the consequences of undercontrolling potentially sensitive exports (risks of employment by adversaries) and overcontrolling them (loss of profit by the domestic industry).<sup>3</sup> An international lawyer is more likely to profess a broader view, represented in the writings on non-proliferation law by D. Joyner and T. Berndorfer.<sup>4</sup> Such would seek an adequate balance through establishing clear and transparent export control while abstaining from excessive and unnecessary hindrances to international trade. This latter approach does not divorce national security from the common interests, rights and obligations of States in international trade and global security, and thus works to uphold both. Still, in the absence of clear, common and binding international standards, States may abuse export controls in pursuit of broad national policy objectives. Works by W. Reinsch and C. Whang demonstrate how some States' vision of national security has progressively blurred with the development of modern technology, which is now seen as a military edge in itself.<sup>5</sup> For instance, the US sanctions pressure on China involved a fierce export control component (later extended to Russia, as will be discussed) and has been described as a "tech war" and an attempt to advance the so-called "rules-based order" in international trade.<sup>6</sup>

There have also been strong attempts at critically assessing such sanctions regimes, including their legality, notably by P. Terry and M. Menkes.<sup>7</sup> These mainly concerned the context of finance and investment, and mostly in relation to individuals and entities. In contrast, the present work seeks to complement this discourse with regard to international trade in goods and in the context of strengthening the NNPR, focusing on export control measures as its principal instrument. As such, this article will, firstly, establish the importance of export control to the NNPR and the approaches of the key States; secondly, contrast this with the substance and consequences of the US-initiated trade sanctions against Iran and Russia (behavioural dimension); and, thirdly, assess the viability of such measures under international trade law (legal dimension). As a final step, the article also seeks to formulate some understanding of the significance of the WTO system to non-proliferation and international security. This varied study will require the use of not only doctrinal sources, but also the relevant WTO law and jurisprudence, as well as domestic export control legislation and guidance (in particular the US, and to a lesser extent the EU). Since the traditional positivistic approach appears ill-equipped for issues that concern the relationship of law and policy, this research will make use of notions and instruments developed by such disciplines as sociology and international relations, which informs the methodological approach. This will allow the present work to ostensibly formulate the relevant national approaches to export control and contrast them with the pertinent international trade and non-proliferation law.

Admittedly, the failure of the recent JCPOA negotiations is a rather unique situation. However, this *sui generis* incident may not only help to map out the existing problem in a topical context, but also demonstrate how the effects of broad export restrictions could undermine the motivation of the targeted State to cooperate on common and significant security matters. Thus, this research uses the above situation as an illustrative basis for drawing some general conclusions that could be helpful to other targeted States in similar circumstances, or may help to avoid their recurrence by contributing to the discourse on the necessary limitation of export restrictions. Moreover, it will become evident that the issue of permissibility of export restrictions stands separate from the legality of sanctions, even though the latter may incorporate the former. Thus, the (already extensively researched) topic of legality of sanctions as such under international law is beyond this article's scope and will not be discussed, although some of the reached conclusions may still be relevant, especially in what concerns State responses to outside pressure.

<sup>3</sup> See Reinsch W. A. *China as Best Customer and Biggest Threat...* P. 183. Some other risks are also at stake, such as the viability of domestic enterprises on the international market, increased unemployment if they fail to compete, and the non-return of those who have lost their jobs to the economy. Not to fall into heavy-handed protectionism, this view must be balanced with the appreciation of liberalised trade. See Reinsch W. A. *The False Choice of Free Trade vs. Protectionism* // MarshMcLennan. 4 December 2017. URL: <https://www.brinknews.com/the-false-choice-of-free-trade-vs-protectionism/> (accessed: 01.03.2023).

<sup>4</sup> Joyner D. H. *Op. cit.*; Berndorfer T. *Op. cit.*

<sup>5</sup> Reinsch W. A. *China as Best Customer and Biggest Threat...* P. 182–183; Whang C. *Trade and Emerging Technologies: A Comparative Analysis of the United States and the European Union Dual-Use Export Control Regulations* // Security and Human Rights. 2021. Vol. 31. № 1/4.

<sup>6</sup> Jiangyu W., Hewett D. *U.S.-China Trade Relations in the Biden Era: Trade War, Industrial Policy, and Rule-Based International Order* // Proceedings of the ASIL Annual Meeting. 2021. Vol. 115. P. 317–319.

<sup>7</sup> Terry P. C. R. *Enforcing US Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?* // Washington International Law Journal. 2020. Vol. 30. № 1; Menkes M. J. *The Legality of US Investment Sanctions against Iran before the ICJ: A Watershed Moment for the Essential Security and Necessity Exceptions* // Canadian Yearbook of International Law/Annuaire canadien de droit international. 2019. Vol. 56.

## 1. Export controls as a key compliance mechanism in the global nuclear non-proliferation regime

### 1.1. The role of trade limitation in the NNPR

The NNPR is a multilateral undertaking that seeks to maintain and improve global nuclear security through suppressing, firstly, further increase in the number of States and non-State actors (e.g. terrorists, armed militias) that possess military nuclear capabilities ('horizontal proliferation'), and, secondly, quantitative and qualitative enhancement of the existing nuclear arsenals ('vertical proliferation').<sup>8</sup> For these purposes, efforts against nuclear proliferation extend to nuclear weapons themselves, as well as the means of acquiring, evolving or using them: nuclear technologies (e.g. delivery systems), materials (e.g. weapons-grade plutonium) and expertise (e.g. know-how).<sup>9</sup>

Beyond its legal carcass, represented by the NPT and a number of other treaties and agreements, the NNPR also relies on certain verification tools and mechanisms<sup>10</sup> to control the spread of nuclear weapons<sup>10</sup>. Since international trade is the primary channel for acquiring components required to produce nuclear weapons, it constitutes the principal object of control.

The NPT lays down differentiated obligations for the parties based on their status as regards nuclear weapons possession: 'nuclear-weapon States' (the five 'original nuclear powers', hereinafter — NWS)<sup>11</sup> and 'non-nuclear weapon States' (all other parties, hereinafter — NNWS). Article I of the NPT requires the NWS, firstly, not to transfer nuclear explosives to any recipient and, secondly, not to facilitate the NNWS in acquiring them. Under Article II, the NNWS in turn shall, firstly, not receive transfers of nuclear explosives or control over them, secondly, not acquire them by any other means, and, thirdly, not seek or receive any assistance to do so.

By all evidence, the NPT does not set an analogous positive obligation for the NNWS not to proliferate horizontally, that is, not to transfer nuclear explosive devices or "assist, encourage or induce" their acquisition. It is most likely that the drafters deemed this excessive since they prohibited the NNWS from manufacturing and obtaining nuclear weapons in the first place. NPT Article I also forbids said "assistance, encouragement or inducement" by the NWS only in respect of the NNWS and stays silent on such cooperation among the NWS themselves. Even the only semblance of an official NPT commentary does not approach these issues.<sup>12</sup> This constitutes a practical gap that, firstly, principally affords an opportunity for the NNWS to aid, directly or indirectly, other States in obtaining nuclear weapons (e.g. by trading precursor materials) and, secondly, allows further cooperation among the NWS towards elevating their existing nuclear military capabilities. Though somewhat balanced by the safeguards requirement of Article III, this is still quite unusual, especially considering that the NPT's 'brotherly' treaties (e.g. in respect of chemical, biological weapons) prohibit all their respective members from "assisting, encouraging and inducing" the acquisition of the respective weapons of mass destruction by virtually any actor whatsoever.<sup>13</sup>

Thus, a consistent textual interpretation of the NPT cannot foster any equal requirement to limit trade in sensitive technology or materials. Yet in practice, States demonstrate equal readiness to do so. For example, the European Union as the largest conglomerate of the NNWS maintains a common export control policy for nuclear-sensitive goods<sup>14</sup> despite the fact that France is its only remaining NWS. This 'good will' also manifests itself in the existence of voluntary international export control regimes and arrangements that offer

<sup>8</sup> Black-Branch J. L., Fleck D. *Nuclear Non-Proliferation in International Law. Volume II, Verification and Compliance*. Hague : Asser Press, 2016. P. 267–268; Sidel V., Levy B. *Proliferation of Nuclear Weapons: Opportunities for Control and Abolition II* American Journal of Public Health. 2007. Vol. 97. № 9. P. 1589.

<sup>9</sup> *Australia's Uranium: Greenhouse Friendly Fuel for an Energy Hungry World: Report of the House of Representatives Standing Committee on Industry and Resources*. 2006. § 7.6. URL: [https://www.aph.gov.au/parliamentary\\_business/committees/House\\_of\\_Representatives\\_Committees?url=isi/uranium/report/chapter7.htm](https://www.aph.gov.au/parliamentary_business/committees/House_of_Representatives_Committees?url=isi/uranium/report/chapter7.htm) (accessed: 03.05.2022).

<sup>10</sup> Cirincione J. *Repairing the Regime: Stopping the Spread of Weapons of Mass Destruction*. New York : Routledge, 2000. Appendix I.

<sup>11</sup> In the sense of the NPT, the NWS include those States that detonated their first warhead before 1 January 1967: the United States (made its first detonation in 1945), the Soviet Union (1949), Great Britain (1952), France (1960) and China (1964).

<sup>12</sup> *Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*. NPT/CONF.2010/50 (Vol. I). P. 2–19. URL: <https://www.un.org/en/conf/npt/2010/> (accessed: 03.05.2022).

<sup>13</sup> *United Nations Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972. Article I*. URL: <https://front.un-arm.org/wp-content/uploads/2020/12/BWC-text-English-1.pdf>; *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992 Article I(1)*. URL: <https://www.opcw.org/chemical-weapons-convention/articles/article-i> (accessed: 03.05.2022).

<sup>14</sup> For the latest version see *Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items (Recast)* (hereinafter — Regulation (EU) 2021/821). URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02021R0821-20220505> (accessed: 16.11.2022).

guidance and an opportunity to harmonise national regulatory practices. Still, national export control regimes remain the principal instrument that States engage to directly ensure both their compliance with the NNPR and their own nuclear security. However, as will be discussed below, it would be quite naïve to presume that the common good of global nuclear security is the only motivation that influences export control policies of States.

## 1.2. Substance and approaches towards export control

National export control regimes are used to control a country's outbound export of certain sensitive goods and technology. Most often, this takes the form of licensing policy for certain goods destined for certain recipients, destinations or end users. The licensed goods could be of an exclusive military nature (military-use, or single-use) or could also have a wide variety of civilian uses (dual-use). Trade in dual-use goods can encapsulate a wide variety of items, materials and technologies that are usually innocuous, like specific metal alloys or high-technology goods.<sup>15</sup>

Though States originally adopted export control regulations to align international trade with their interest to restrict enemy military capabilities, the notion has gradually widened to embrace other policy considerations deemed crucial by a given State. For instance, the evolution of the US export control laws reflects a growing consideration of the economy as a strategic interest.<sup>16</sup> This "blurring" of permissible boundaries only intensifies within broad sanctions regimes, which leads to heightened security concerns among banks and companies and widens the impact of restrictions to permeate all areas of business.<sup>17</sup> The US is not shy to admit the expansive discretion it exercises, citing not only its commitment to protect national security interests by controlling exports, but also to promote its foreign policy and economic objectives, and even "continued US strategic technology leadership".<sup>18</sup> It is apparent that the US sees export controls as a valid instrument to advance the country strategically as a dominant power. The EU's export control regime appears similar, but more rhetorically restrained. It focuses on national security, human rights and continued development of security-sensitive sophisticated technologies, but does add national foreign policy and sanctions to the list of concerns<sup>19</sup>.

## 1.3. Main concerns going forward

It would be equally naïve to presume that stern control and limitation of trade in sensitive goods is an inherent virtue. Licensing regimes effectively constitute a form of 'quantitative restrictions' on trade.<sup>20</sup> Such measures are viewed as the least desirable since they impose absolute limits on the quantities of trade ('absolute restrictions'), while other possible measures, such as tariffs, do not produce such a cardinal restrictive effect.<sup>21</sup> The key defects of quantitative restrictions were summarised by the WTO panel in *Turkey — Textiles*: such restrictions "usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent".<sup>22</sup>

This immediately raises more associated concerns. First, exporting States have to maintain firm control over goods and technologies that could be diverted to serve military aims. Since dual-use goods have virtually uncountable civilian applications, their trade comprises a significant percentage of normal, legitimate international trade. Particularly, the US Commerce Control List (hereinafter — CCL) contains thousands of important high-tech items, such as machine tools, laboratory and medical equipment, computer processors.<sup>23</sup>

<sup>15</sup> Joyner D. H. *Op. cit.* P. 126, 130.

<sup>16</sup> Whang C. *Op. cit.* P. 3–4.

<sup>17</sup> Breen E. *Corporations and US Economic Sanctions: the Dangers of Overcompliance // Research Handbook on Unilateral and Extraterritorial Sanctions* / ed. by Beaucillon *Research Handbook on Unilateral and Extraterritorial Sanctions*. Cheltenham : Edward Elgar Publishing, 2021. P. 257.

<sup>18</sup> "The US Department of Commerce's Bureau of Industry and Security (BIS) administers US laws, regulations and policies governing the export and reexport of [items under] the Export Administration Regulations (EAR). The primary goal of BIS is to advance national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system, and promoting continued US strategic technology leadership." See *International Trade Administration of the US Department of Commerce. U.S. Export Controls*. URL: <https://www.trade.gov/us-export-controls> (accessed: 03.05.2022).

<sup>19</sup> See Preamble to the original version of the *Regulation (EU) 2021/821*.

<sup>20</sup> Restrictions that entail "a limiting effect on the quantity or amount of a product being imported or exported". See Appellate Body Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295, § 320.

<sup>21</sup> Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363, § 9.63.

<sup>22</sup> *Ibid.*, § 9.63–9.65.

<sup>23</sup> The latest version of the CCL is contained in *US Code of Federal Regulations (CFR), Title 15, Part 774 — The Commerce Control List*. URL: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-774> (accessed: 16.01.2023).

Obviously, such regulations can and do significantly restrict international trade in many civilian-usable, highly commercially viable goods that are not of primary military application.<sup>24</sup> As will be demonstrated, screwing the cap too tightly could cause serious trade distortion, with dire consequences for the targeted State's civil economy and the associated risks of further political escalation.

Second, the lack of transparency noted by the panel in *Turkey — Textiles* makes such measures especially sensitive to abuse. The classical notion of national security concerns appears to deal with actual, pressing and objective threats to the existence, sovereignty and territorial integrity of a State.<sup>25</sup> Meanwhile, the arguably subjective foreign policy concerns could be rationalised to encompass virtually any political aspirations. As said above, it is more and more complicated to differentiate between the two. There is always a risk that the restrictions will be used too broadly.

Third, any such measures should thus be checked for potential conflict with international trade commitments of the exporting State. These may include the goal of trade liberalisation, the most-favoured-nation principle, prohibition of quantitative trade restrictions and other key principles and provisions of international trade law.

To summarise, States have historically accepted export restrictions as a legitimate means to protect their national security from military threats. Looking ahead, this understanding has been reflected in certain exceptions presented in the founding agreements of the WTO system. However, some States have come to extend their understanding of national security to cover some broader strategic interests (e.g. economic interests) and may thus approach their export restrictions more liberally. In particular, these measures can be incorporated into broad and more legally ambiguous sanctions regimes, which only results in their further blurring. At the same time, such restrictions are problematic (may be non-transparent, adversary to existing commitments, sensitive to abuse, etc.) and thus call for a great measure of care and restraint. Still, practice does sometimes demonstrate notably low regard towards the pervasive negative consequences of export control overreach. As will be shown further, the broad and possibly politicised export restrictions against Iran and Russia seem to have culminated in, or at least significantly contributed to, a precarious local failure in the NNPR.

## 2. Behavioural dimension: compliance (re)duced?

### 2.1. The US trade sanctions against Iran

#### 2.1.1. General context and defining characteristics

Since the early 2000s, Iran<sup>26</sup> has faced accusations that it sought to construct facilities that would enable it to produce nuclear weapons, although the State's officials insisted that their actions were aimed solely at realising the NPT-guaranteed right for peaceful nuclear development.<sup>27</sup> Since then, the US sanctions on Iran have had the stated primary goal of curbing its nuclear policy. Beyond a trade component, this comprehensive sanctions regime includes blocking of Iranian property and assets, financial and banking sanctions, travel bans and other general and targeted tools.<sup>28</sup> Though the US reduced its relevant sanctions regime (which the EU also lifted, as required by the deal) after the JCPOA went into effect in 2016, the Trump administration withdrew from the agreement in May 2018 and re-imposed the former limitations.

The US conditions its export restrictions on the need to block all items Iran could potentially seek for its nuclear weapons programme. The execution may seem consistent at first glance. For instance, the US Export Administration Regulations (hereinafter — 'EAR') restrict export to Iran of carbon fibre, which is used for building centrifuges required to enrich uranium.<sup>29</sup> Despite the many civilian uses of carbon fibre, like production of sports gear (golf clubs, bicycle frames, etc.), it is understandable that the US would seek to

<sup>24</sup> Joyner D. H. *Op. cit.* P. 130.

<sup>25</sup> Manifested primarily in the risks associated with the military proliferation of hostile States. See Whang C. *Op. cit.* P. 3–4.

<sup>26</sup> An NPT party since 1970. For information on the parties see *United Nations Office of Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons*. URL: <https://treaties.unoda.org/t/npt> (accessed: 03.05.2022).

<sup>27</sup> *Iran Nuclear Crisis: Can Talks Succeed?* // BBC News. 25 November 2014. URL: <https://www.bbc.com/news/world-middle-east-11709428> (accessed: 10.05.2022).

<sup>28</sup> Katzman K. *Iran Sanctions (updated February 2, 2022)*. Congressional Research Service Report. RS20871. P. 1. URL: <https://sgp.fas.org/crs/mideast/RS20871.pdf> (accessed: 23.11.2022).

<sup>29</sup> *Bureau of Industry and Security of the US Department of Commerce. Guidance on Actions Exporters Can Take to Prevent Illicit Diversion of Items to Support Iran's Nuclear Weapons or Ballistic Missile Programs* (hereinafter — 'US BIS guidelines for exporters'). URL: <https://www.bis.doc.gov/index.php/licensing/23-compliance-a-training/53-iran-web-guidance> (accessed: 10.05.2023).

limit export of a material mostly used in the aerospace and nuclear sectors, especially when Iran showed an increased interest in obtaining it.<sup>30</sup>

However, the US prohibits unlicensed export of *practically all EAR items* to Iran.<sup>31</sup> This includes EAR99 — a ‘catchall’ classification for all items that are not on the CCL, mostly low-technology consumer goods. These usually do not require a licence for export, subject to the exporter’s own due diligence.<sup>32</sup> For example, the US blocks export to Iran of epoxy resin and related hardening/accelerator agents since they could be used in constructing uranium centrifuges and missile structures.<sup>33</sup> However, these basic materials, known to virtually any consumer, are important for construction and countless other industries, not to mention arts and crafts or home repair. Meanwhile, these and other EAR99 goods constitute the *majority* of items subject to export control.<sup>34</sup>

Though the official US guidance demands exporters to obtain a licence for the regulated goods destined for Iran,<sup>35</sup> in practice the EAR maintains a “general policy of denial” for all such licensing applications, regardless of the item’s character and with very limited exceptions.<sup>36</sup> Though the stated goal of the above measures is to ensure nuclear non-proliferation, they amount to an *almost complete embargo* on exports to Iran, similar to some other countries targeted in the EAR, like Syria and Cuba. Furthermore, it appears that to stretch the reach further, the US even tried to pressure other States to join its sanctions under the threat that it might impose increased tariffs on their own exports, and foreign companies to cut their ties with Iran.<sup>37</sup>

### 2.1.2. Adverse humanitarian impact and its implications for the NNPR

Meanwhile, the slim humanitarian exceptions (e.g. food, some healthcare items) offered in the EAR have done little to offset the categorical harmful effects. ‘Over-compliance’ by many US and European companies, manifested in their reluctance to maintain any trade for fear of attracting secondary sanctions, resulted in Iran’s factual inability to import the most essential humanitarian goods. Human Rights Watch characterised the US sanctions as “overbroad and burdensome”, causing “unnecessary suffering to Iranian citizens” and “impair[ing] their right of health”, and the humanitarian exception as “nearly meaningless”.<sup>38</sup> They have also caused catastrophic damage to Iran’s economy in general, with a trade deficit reaching billions and rapid inflation that has made the still-available imports much more expensive.<sup>39</sup> UN Special Rapporteur A. Douhan reviewed these issues in the recent report on her visit to Iran. The report called the States to remove all unilateral sanctions, including all restrictions on trade and any coercion that results in over-compliance.<sup>40</sup>

It can thus be said that the scale and administration of US export restrictions against Iran, as well as the manner of the US withdrawal, warrant at least some doubt as regards consistency with the goals of nuclear non-proliferation and existence of other possible US motives. There are more suggestive moments, like the dubious exception for information technology equipment (e.g. cell phones, personal computers, other high-tech equipment generally deemed sensitive) “for supporting democracy in Iran”.<sup>41</sup> But the most convincing piece of evidence came from the White House itself, when in 2019 the then-US Secretary of State

<sup>30</sup> *Blocking Iran with a Global Game of Nuclear ‘Keep Away’* // NPR. 7 February 2013. URL: <https://www.npr.org/2013/02/07/171368189/to-enrich-uranium-buy-the-right-stuff-and-dont-get-caught> (accessed: 10.05.2022).

<sup>31</sup> See *US BIS guidelines for exporters*. *Blocking Iran with a Global Game of Nuclear ‘Keep Away’* // NPR. 7 February 2013. URL: <https://www.npr.org/2013/02/07/171368189/to-enrich-uranium-buy-the-right-stuff-and-dont-get-caught> (accessed: 10.05.2022).

<sup>32</sup> *International Trade Administration of the US Department of Commerce, Export Control Classification # (ECCN) and (EAR99)*. URL: <https://www.trade.gov/eccn-and-export-administration-regulation-ear99> (accessed: 10.05.2022).

<sup>33</sup> See *US BIS guidelines for exporters*.

<sup>34</sup> *International Trade Administration of the US Department of Commerce, Export Control Classification # (ECCN) and (EAR99)*. URL: <https://www.trade.gov/eccn-and-export-administration-regulation-ear99> (accessed: 10.05.2022).

<sup>35</sup> See *US BIS guidelines for exporters*.

<sup>36</sup> The exceptions include transactions for humanitarian reasons or for the safety of civil aviation and safe operation of US-origin aircraft — licences for such will be considered on a case-by-case basis. See *US Code of Federal Regulations (CFR), Title 15, Part 746 — Embargoes and Other Special Controls, § 746.7(b)*. URL: [https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-746/section-746.7#p-746.7\(b\)](https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-746/section-746.7#p-746.7(b)) (accessed: 16.01.2023).

<sup>37</sup> Terry P. C. R. *Op. cit.* P. 5.

<sup>38</sup> *Iran Sanctions Threatening Health* // Human Rights Watch. 29 October 2019. URL: <https://www.hrw.org/news/2019/10/29/iran-sanctions-threatening-health> (accessed: 10.05.2022).

<sup>39</sup> Motamedi M. *Iran’s Economy Reveals Power and Limits of US Sanctions* // Al Jazeera. 2 February 2022. URL: <https://www.aljazeera.com/economy/2022/2/2/irans-economy-reveals-power-and-limits-of-us-sanctions> (accessed: 10.05.2022); Ng A. *These 6 Charts Show How Sanctions are Crushing Iran’s Economy* // CNBC. 22 March 2021. URL: <https://www.cnbc.com/2021/03/23/these-6-charts-show-how-sanctions-are-crushing-irans-economy.html> (accessed: 10.05.2022).

<sup>40</sup> *United Nations Human Rights Council, Visit to the Islamic Republic of Iran: Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Alena Douhan. A/HRC/51/33/Add.1. 17 August 2022*. URL: [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/regularsession/session51/2022-0907/A\\_HRC\\_51\\_33\\_A\\_dd1\\_Ad-vanceUneditedVersion.docx](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/regularsession/session51/2022-0907/A_HRC_51_33_A_dd1_Ad-vanceUneditedVersion.docx) (accessed: 24.11.2022).

<sup>41</sup> Katzman, K. *Op. cit.* P. 9.

Mike Pompeo boasted of how the US sanctions were so hard-hitting that the Iranian people would surely rise up and make a difference.<sup>42</sup>

However, it is now obvious that the US significantly misjudged (or disregarded) the potential effects of their policy on Iran's nuclear stance. The US considered that, if the sanctions are reinstated, it could pressure Iran into a new deal that would account for US interests beyond Iran's nuclear programme.<sup>43</sup> Contrary to the US expectations, Iran showed economic resilience and responded by gradually decreasing its compliance with the JCPOA.<sup>44</sup>

The situation is particularly poignant against the historical background, as it was not so long ago that Iran's immediate neighbour, Iraq, found itself in a similar place. The sanctions regime against it was criticised for having caused tremendous humanitarian harm, while the larger political goals of the US and the UK (argued to go as far as regime change) left little room for removing or even significantly reducing the sanctions, regardless of whether or not they achieved the stated WMD disarmament objectives. In the end, Saddam Hussein's rule only strengthened, the UNSCOM weapons inspection regime failed, and the international community was unsuccessful in preventing an armed conflict from breaking out.<sup>45</sup>

## 2.2. The February 2022 US trade sanctions against Russia

### 2.2.1. General context and defining characteristics

In February 2022, the US imposed trade sanctions against Russia and Belarus in connection with the hostilities in Ukraine, yet again with broad export restrictions at the forefront. Although these sanctions were imposed as a single package, we will focus on Russia. The main stated goal has been to cripple the country's ability to import electronic components and technologies to restrict its capacity to produce, maintain and repair military materiel.<sup>46</sup> Much of the modern military industry depends on high technology, including Russia's nuclear capabilities (e.g. the ability to produce and maintain nuclear weapons and means of their delivery, the general ability to procure items necessary for developing its nuclear programme). The US does not conceal that the larger strategic objective is to "technologically isolate Russia",<sup>47</sup> which is clearly a step too far. Meanwhile, at least 37 countries (mostly European) decided to support these restrictions and adopted substantially similar measures.<sup>48</sup>

Normally, the US EAR cover (i) all items in the US or moving through it, (ii) all US-origin items "wherever located" and irrespective of their rule of origin, and (iii) foreign-produced commodities, software and technology that incorporate US-origin commodities, or are bundled/commingled with EAR-controlled US-origin software.<sup>49</sup> In this case, however, the US further expanded its already tremendous reach through the so-called 'foreign direct product' rule (hereinafter — FDPR), a mechanism that has been piloted against China's major telecommunications producer Huawei.<sup>50</sup> The FDPR enables the US to exercise control even

<sup>42</sup> "Things are much worse for the Iranian people [with the US sanctions], and we are convinced that will lead the Iranian people to rise up and change the behaviour of the regime." See *Iran Sanctions Threatening Health* // Human Rights Watch. 29 October 2019. URL: <https://www.hrw.org/news/2019/10/29/iran-sanctions-threatening-health> (accessed: 10.05.2022).

<sup>43</sup> This included numerous major (and, arguably, impracticable) demands for Iran, like abandoning its ballistic missile programme, removing its armed forces from Syria, cutting the alleged support of any terrorist groups, releasing any imprisoned citizens of the US and its allies, and many separate demands aimed at curbing Iran's foreign policy in general. See Kerr P. K., Humud C. E., Clayton T. *Iran Nuclear Agreement and U.S. Exit (updated July 20, 2018)*. Congressional Research Service Report. R43333. P. 22–25. URL: <https://crsreports.congress.gov/product/pdf/R/R43333> (accessed: 23.11.2022).

<sup>44</sup> Motamedi M. *Iran's Economy Reveals Power and Limits of US Sanctions* // Al Jazeera. 2 February 2022. URL: <https://www.aljazeera.com/economy/2022/2/2/irans-economy-reveals-power-and-limits-of-us-sanctions> (accessed: 10.05.2022).

<sup>45</sup> Dodge T. *The Failure of Sanctions and the Evolution of International Policy towards Iraq, 1990-2003*. Contemporary Arab Affairs. 2010. Vol. 3. № 1. P. 83–91.

<sup>46</sup> "[The Russian FDPR is] the most comprehensive application of [US export control over domestic and foreign items] produced using US equipment, software, and blueprints, targeting a single nation" that "primarily target Russia's defense, aerospace, and maritime sectors and will cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut its strategic ambitions to exert influence". See *US Department of Commerce. Commerce Implements Sweeping Restrictions on Exports to Russia in Response to Further Invasion of Ukraine. 24 February 2022*. URL: <https://www.commerce.gov/news/press-releases/2022/02/commerce-implements-sweeping-restrictions-exports-russia-response> (accessed: 10.05.2022).

<sup>47</sup> *Ibid.*

<sup>48</sup> For the full list of States see *US Code of Federal Regulations (CFR), Title 15, Part 746, Supplement No. 3*. URL: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-746/appendixSupplement%20No.%203%20to%20Part%20746> (accessed: 16.01.2023).

<sup>49</sup> For the categories of items subject to the EAR see *US Code of Federal Regulations (CFR), Title 15, Part 734 — Scope of the Export Administration Regulations, § 734.3*. URL: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-734/section-734.3> (accessed: 16.01.2023).

<sup>50</sup> Klaess W. *Lost at Sea: Lack of BIS Guidance on New Russia/Belarus FDP Rule Creates Compliance Chaos* // Lexology. 23 April 2022. URL: <https://www.lexology.com/library/detail.aspx?g=fec01f25-f992-4797-90eb-0e079815ab21> (accessed: 10.05.2022).

over foreign exports, given that there is a margin, direct or indirect, of US industry involvement in the manufacture of a product — like using a US-origin programme or machine.<sup>51</sup> Thus, to access US-made tools and equipment used to produce semiconductors, foreign manufacturers would need to agree to no longer sell to the sanctioned entity (e.g. Huawei) and would risk attracting secondary sanctions otherwise,<sup>52</sup> which the US is known to approach in a notably aggressive and expansive manner.<sup>53</sup> With these advancements, the US has arguably turned the traditional domestic regulatory element in its export licensing largely superficial.

When it came to Russia and Belarus, however, the US imposed not one, but two FDPRs simultaneously: firstly, a general rule (excludes EAE99), and secondly, a Military End User (MEU) rule that prohibits all controlled exports “ultimately destined” to military end users (includes EAR99). All licensing applications under both rules, as well as applications for items specifically covered by the “Nuclear non-proliferation” EAR category, are now subject to a “general policy of denial”.<sup>54</sup> Thus, the US not only limited all foreign exports generally reachable through its FDPR, but also virtually banned all exports that could in any way be used to support the Russian military.

What is more, FDPR measures are notoriously difficult to follow. The vague requirements, lack of guidance on their implementation and of clear criteria to obtain a licence have made it infamously difficult for exporters to determine which goods are subject to restrictions, especially given that the exporter is often not the producer of the goods and cannot be expected to be exhaustively familiar with their production process.<sup>55</sup> Oftentimes, it appears more viable to simply abandon the sanctioned market than to risk facing secondary sanctions, which would cast off even the trade that could well be legitimate. Due to the notably erratic nature of US foreign policy, exporters may find it safer to cease trade with a country that has fallen into US disfavour and could be subject to new or increased sanctions in the long term, even if their prospect is not yet fully clear.<sup>56</sup> This is a recipe for over-compliance.

### 2.2.2. Adverse impact on the Russian industry and its implications for the NNPR

Although the US presents the above trade sanctions as not affecting consumer electronics, this is clearly not the case in practice. For instance, the MEU FDPR blocks exports to some fundamental research and educational institutions in the field of technology and nuclear energy.<sup>57</sup> It was reasonable to expect a “rippling effect” on such critical industrial sectors as civil transport and aviation, peaceful nuclear energy, artificial intelligence and consumer electronics. One example is the infamously profound effect of the discussed measures on the Russian civil automotive industry, whereby the leading automobile concerns had to strip their cars of electronics, return to obsolete model lines, or temporarily suspend production.<sup>58</sup> Despite some steps having been made towards import substitution, foreign manufacturers reportedly occupied 80 % of the Russian electronics market, while domestic manufacturers depended heavily on basic foreign technology.<sup>59</sup> Meanwhile, most key consumer electronics manufacturers have already completely cut off direct sales to

<sup>51</sup> Through the FDPR, the US controls exports of items produced in other countries if these were produced (i) with EAR-controlled technology and software, or (ii) by plants or their essential equipment that are the direct product of such technology and software. For the description of FDPRs see *US Code of Federal Regulations (CFR), Title 15, Part 734 — Scope of the Export Administration Regulations, §734.9*. URL: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-734/section-734.9> (accessed: 16.01.2023). The scope of the FDPR is practically immeasurable. For example, the FDPR gives the producers freedom to decide which of their equipment is essential: see *Bureau of Industry and Security of the US Department of Commerce. Foreign-Produced Direct Product (FDP) Rule as it Relates to the Entity List § 736.2(b)(3)(vi) and footnote 1 to Supplement No. 4 to part 744*. P. 2. URL: <https://bis.doc.gov/index.php/documents/about-bis/2681-2020-fdpdp2-faq-120820-ea/file> (accessed: 10.05.2022). However, a rational producer would likely be hard pressed to find any component that is ‘inessential’ to the production process it is used in.

<sup>52</sup> Bown C. P. *How the United States Marched the Semiconductor Industry into its Trade War with China*. East Asian Economic Review. 2020. Vol. 24. № 4. P. 379.

<sup>53</sup> Terry P. C. R. *Op. cit.* P. 3–5.

<sup>54</sup> See *US Code of Federal Regulations (CFR), Title 15, Part 746 — Embargoes and Other Special Controls, § 746.8(b)*. URL: [https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-746#p-746.8\(b\)](https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-746#p-746.8(b)) (accessed: 16.01.2023).

<sup>55</sup> Klaess W. *Op. cit.*

<sup>56</sup> Breen E. *Op. cit.* P. 264.

<sup>57</sup> For the list of sanctioned entities see *US Code of Federal Regulations (CFR), Title 15, Part 744, Supplement No. 4*. URL: <https://www.ecfr.gov/current/title15/subtitleB/chapterVII/subchapterC/part744/appendixSupplement%20No.%204%20to%20Part%20744> (accessed: 16.01.2023).

<sup>58</sup> *Russian Carmaker Avtovaz may Suspend Some Assembly Lines on Monday due to Components Shortage* // Reuters. 25 February 2022. URL: <https://www.reuters.com/business/autos-transportation/russian-carmaker-avtovaz-may-suspend-some-assembly-lines-monday-due-components-2022-02-25/> (accessed: 17.01.2023); *Sanctions for Ukraine and our Truck Production* // TopWar. 21 March 2022. URL: <https://en.topwar.ru/193696-sankcii-za-ukrainu-i-nashe-proizvodstvo-gruzovikov.html> (accessed: 17.01.2023).

<sup>59</sup> *Overview of the Russian Electronics Industry* // ExpoElectronica. 30 January 2020. URL: <https://expoelectronica.ru/en/news/2020/january/30/overview-market> (accessed: 17.01.2023)



Russia and third-party exporters that dealt with Russia. Even some major Chinese manufacturers were reported to be starting to withdraw.<sup>60</sup> Although the US presents its restrictions as not concerning consumer electronics, this is clearly not the case in practice.

All the above, again, seems to have backfired on the JCPOA. Russia is a crucial party to the nuclear deal, responsible for much of the key work with Iran's nuclear facilities. During the recent talks to revive the accord, Russian Foreign Minister Sergey Lavrov demanded formal guarantees that US sanctions “[do] not in any way damage [Russia's] right to free and full trade, economic and investment cooperation and military-technical cooperation” with the Islamic Republic of Iran. Western sources allege that Russia thus seeks to use Iran as a ‘relief’ trade channel.<sup>61</sup> In response, the US refused to negotiate any exemptions to its sanctions and threatened that it would seek a deal that excludes Russia if it did not back off.<sup>62</sup> Uncertainty regarding Russia's participation as a ‘guarantor’ for Iran could have significantly affected the latter's readiness to step into a new agreement. After months of back-and-forth negotiations, the new deal seems to have hit a dead end. The negotiations were undercut by a sudden conflict between Iran, IAEA and the European JCPOA parties, further complicated by a new wave of secondary sanctions on trade with Iran.<sup>63</sup>

### 3. Legal dimension: a balancing act

Nuclear export controls are an exercise in managing the tension between trade (sufficient access to goods and technologies) and security (concerns over their possible diversion).<sup>64</sup> They should provide a measured response to foreign threats, yet their procedure must be transparent and predictable enough so as not to hinder trade in a manner incompatible with international law. If the balance is tipped, it is crucial that targeted States have avenues to challenge this abuse. The primary source of the relevant rules is the General Agreement on Tariffs and Trade (hereinafter — ‘GATT’).

#### 3.1. GATT Articles I and XI

The GATT is the core agreement of the WTO. It sets out the basic rules for trade in goods, including the fundamental most-favoured-nation rule of Article I.1. It prohibits discrimination among like products originating in or destined for different countries, including as regards “all rules and formalities in connection with importation and exportation [of goods].” Any preferential treatment must be extended to all WTO Members. Article XI.1 reinforces this basic principle: it provides for the general elimination of quantitative restrictions including those “made effective through <...> export licences”. Not all such restrictions are ruled out: some do not produce an independent “limiting or restrictive effect” by their design or operation.<sup>65</sup> In our case, however, this limiting or restrictive effect is fundamentally apparent and may verge on a virtual trade ban. Here, the licensing mechanism itself is the means of administering trade, meaning a direct and purposeful restrictive effect. In such cases as were discussed above, the restrictions may also offer a licensing opportunity as a thin exception rather than an actual possibility subject to a defined and transparent procedure. Licensing systems that give the licensing authorities discretion to grant or deny

<sup>60</sup> *Russian Sanctions Prompt Tech to Stop Sales, Curb Services* // TechTarget. 4 March 2022. URL: <https://www.techtarget.com/searchcio/news/252514218/Russian-sanctions-prompt-tech-to-stop-sales-curb-services> (accessed: 17.01.2023); Strumpf D. *Chinese Tech Giants Quietly Retreat from Doing Business with Russia* // The Wall Street Journal. 6 May 2022. URL: <https://www.wsj.com/articles/chinese-tech-giants-quietly-stop-doing-business-with-russia-11651845795> (accessed: 10.05.2022); Klaess W *Op. cit.*

<sup>61</sup> Norman L. *JCPOA Threatened by Russian Demands over Ukraine Sanctions* // The Wall Street Journal. 6 March 2022. URL: [https://web.archive.org/web/20220313045711/https://www.wsj.com/articles/iran-nuclear-deal-threatened-by-russian-demands-over-ukraine-sanctions-11646487044?mod=article\\_inline](https://web.archive.org/web/20220313045711/https://www.wsj.com/articles/iran-nuclear-deal-threatened-by-russian-demands-over-ukraine-sanctions-11646487044?mod=article_inline) (accessed: 10.05.2022); Karnitschnig M. *Russia Eyes Iran as Sanctions-Busting Backdoor for Oil Sales* // Politico. 23 August 2022. URL: <https://www.politico.eu/article/russia-eyes-iran-as-sanctions-busting-backdoor-for-oil-sales/> (accessed: 17.01.2023).

<sup>62</sup> Norman L. *U.S. Won't Negotiate Ukraine-Related Sanctions with Russia to Save Iran Nuclear Deal* // The Wall Street Journal. 13 March 2022. URL: [https://web.archive.org/web/20220313105316/https://www.wsj.com/articles/u-s-wont-negotiate-ukraine-related-sanctions-with-russia-to-save-iran-nuclear-deal-11647167692?mod=hp\\_lead\\_pos1](https://web.archive.org/web/20220313105316/https://www.wsj.com/articles/u-s-wont-negotiate-ukraine-related-sanctions-with-russia-to-save-iran-nuclear-deal-11647167692?mod=hp_lead_pos1) (accessed: 10.05.2022).

<sup>63</sup> Irish J., Murphy F. *Europeans Doubt Iran's Intentions in Nuclear Talks* // Reuters. 10 September 2022. URL: <https://www.reuters.com/world/france-britain-germany-say-irans-stance-iaea-probe-jeopardises-nuclear-talks-2022-09-10/> (accessed: 17.01.2023); *US Imposes New Sanctions over Iran Sanctions Evasion, Targets Chinese Firms* // Arab News. 17 November 2022. URL: <https://www.arabnews.com/node/2201636/middle-east> (accessed: 17.01.2023).

<sup>64</sup> Berndorfer T. *Op. cit.* P. 84–85; Joyner D. H. *Op. cit.* P. 126.

<sup>65</sup> Such as automatic licensing procedures that operate for purely statistical or monitoring purposes, or those setting certain prerequisites for applicants (e.g. provide proof of eligibility for a legitimate quota). See Panel Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R, DSR 2012:VII, p. 3501 (hereinafter — PR, *China — Raw Materials*), § 7.915, 7.918.

licences based on some unspecified criteria ('discretionary licensing mechanisms') have been consistently found to produce a restrictive or limiting effect by their very nature.<sup>66</sup> As Professor Joyner put it, national export control regimes "entail political judgments at every turn and *requir[e] the exercise of a very broad and largely unrestricted unilateral discretion* (emphasis added)." Hence, they are inherently adverse to GATT Article XI<sup>67</sup> and may only be admissible if consistent with the specifically provided exceptions.

### 3.2. The 'national security exception' of GATT Article XXI

To allow States some 'breathing room' to adequately protect their sovereign interests, the GATT drafters introduced several 'escape clauses', including the 'national security exception' of Article XXI. The article reads as follows:

"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" (emphasis added).

Paragraph (c) of the article relates to UN sanctions and thus falls outside of this work. Each other element of Article XXI may present a separate opportunity to vindicate or justify unilateral restrictive measures.

#### 3.2.1. Article XXI(a): acceptability of non-disclosure

It would not be unreasonable to assume that a dispute under Article XXI would require the respondent to disclose information it may consider sensitive to its 'essential security interests'. The respondent may be tempted to invoke Article XXI(a) to deny the panel access to any required information and thus stall further proceedings. Though in the existing practice respondents have rather opted to deny the jurisdiction of the panel altogether, the 1949 dispute between Czechoslovakia and the US (hereinafter — *US — Export Restrictions (Czechoslovakia)*) offers a close case.<sup>68</sup> The US denied licences on certain goods of "strategic significance" destined for Czechoslovakia, including electrodes, x-ray tubes, tungsten wire, and mining drills.<sup>69</sup> While the US agreed to provide Czechoslovakia some information on how it administered its export controls, it refused to elaborate which commodities it considered "strategic".<sup>70</sup> Regrettably, the case was resolved through a vote<sup>71</sup> and offers no further insight on the acceptable limits of Article XXI(a). Still, in our opinion, a virtual denial to cooperate would violate the object and purpose of the GATT and the WTO Dispute Settlement Understanding (hereinafter — 'DSU'), as well as the principle of good faith. Thus, the panel is unlikely to accept such invocation of Article XXI(a), especially considering the pro-judicial stance of the panels discussed below.

<sup>66</sup> PR, *China — Raw Materials*, § 7.921, 7.957; Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799, § 5.130; Panel Report, *Turkey — Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151, § 7.128, 7.134.

<sup>67</sup> Joyner D. H. *Op. cit.* P. 130–131.

<sup>68</sup> *Ibid.* P. 132.

<sup>69</sup> *GATT Contracting Parties, Third Session, Reply by the Vice-chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda. GATT/CP.3/38. 2 June 1949. P. 10.* URL: <https://docs.wto.org/gattdocs/q/GG/GATTCP3/38.PDF>.

<sup>70</sup> *Ibid.* P. 9.

<sup>71</sup> Before the DSU's entry into force in 1995 as part of the WTO's 'single undertaking' package, disputes were usually resolved by a GATT panel, the decision of which was adopted if it reached a positive consensus, i.e. if all contracting parties voted in favour. However, this particular dispute had to be resolved by a vote (which Czechoslovakia overwhelmingly lost). Decisionmaking by vote was atypical for GATT, which itself speaks volumes about the dispute's politicisation and the high stakes involved. See McKenzie F. *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance II 1947–1959*. Journal of Cold War Studies. 2008. Vol. 10. № 3. P. 90–91.

### 3.2.2. Article XXI(b): substance and the necessity to review the underlying conditions

Article XXI(b) presents an exhaustive list of circumstances where the WTO Member could take legitimate “actions” that it “considers necessary” to protect its “essential security interests”<sup>72</sup>. The panel in *Russia — Traffic in Transit* was the first to substantially interpret the provision. The panel’s reasoning is quite convoluted; fortunately, the further panels have digested it in a far more structured manner. The subparagraphs of Article XXI(b) exhaustively enunciate the meaningful threats (“traffic” or “emergency”) that give rise to, or relate to, the essential security interests of the Members.<sup>73</sup> As such, these threats could attract legitimate ‘actions’ to protect said interests. This triad provides the foundation for the analytical framework of Article XXI(b).

The vague wording of Article XXI(b) has been used to argue both for and against the jurisdiction of the WTO panels, and thus the applicant’s ability to make a case.<sup>74</sup> After years of debates, the panel in *Russia — Traffic in Transit* finally settled that Article XXI(b) shall be subject to independent judicial review with objectively identifiable standards, as demonstrated by the provision’s object and purpose, logical structure and the *travaux préparatoires*. Otherwise, the article would have offered an unfettered possibility to ‘launder’ WTO-incompliant measures.<sup>75</sup> Consequently, the words “which it considers” qualify the word “necessary” (meaning that the WTO Member is free to decide on the measure’s necessity), but not the criteria in subparagraphs (i)-(iii), which the panel must separately and objectively assess.<sup>76</sup> Other WTO panels further affirmed this reading in two more recent cases.<sup>77</sup>

To make a proper assessment of Article XXI(b), the panel will first have to find if there is, indeed, an ‘action’ under the relevant subparagraph. Only then could the panel contrast this action with the requirements of the article’s chapeau.

### 3.2.3. ‘Action’ under Articles XXI(b)(i) and XXI(b)(ii)

The terms “relating to [the relevant materials or traffic]” used in Articles XXI(b)(i) and XXI(b)(ii) will require the respondent to demonstrate a “close and genuine relationship of ends and means” between said measure and its “objective”.<sup>78</sup>

Article XXI(b)(i) (“[measures] relating to fissionable materials or the materials from which they are derived”) should give a basis to legitimise at least some national nuclear-related export control measures. Namely, export control measures covering single-use nuclear materials would fall squarely under Article XXI(b)(i).

The US invoked Article XXI(b)(i) in *US — Export Restrictions (Czechoslovakia)*, where it suggested that Czechoslovakia could use the drills it requested to mine uranium ore instead of coal. The US representative

<sup>72</sup> Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WT/DS552/R, 9 December 2022. (hereinafter — PR, *US — Steel and Aluminium Products (Norway)*), § 7.101.

<sup>73</sup> PR, *US — Steel and Aluminium Products (Norway)*, § 7.100: “The terms “relating to” indicate a connection to the “materials” and “traffic” in subparagraphs (i) and (ii), respectively, while the terms “taken in time of” indicate a temporal relationship to the circumstances in subparagraph (iii). The Panel understands these opening terms in each subparagraph to qualify and describe the “action” referred to in Article XXI(b)”; Panel Report, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019, DSR 2019:VIII, p. 4301 (hereinafter — PR, *Russia — Traffic in Transit*), § 7.74: “While the enumerated subparagraphs of Article XXI(b) establish alternative requirements, the matters addressed by those subparagraphs give rise to similar or convergent concerns... Those interests... are all defence and military interests, as well as maintenance of law and public order interests.”

<sup>74</sup> See PR, *Russia — Traffic in Transit*, § 7.63: “The text of the chapeau of Article XXI(b) [allows for] more than one interpretation of the adjectival clause “which it considers”. The adjectival clause can be read to qualify only the word “necessary”, i.e. the necessity of the measures for the protection of “its essential security interests”; or to qualify also the determination of these “essential security interests”; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.”. The US, for instance, has argued that the grammar of Article XXI(b) forms a “single relative clause” where all parts are attached to the WTO Member’s consideration; thus, the Members alone decide if their measures are admissible (i.e. the security exceptions are “self-judging” and “non-justiciable”). See PR, *Russia — Traffic in Transit*, § 6.15, 6.19.

<sup>75</sup> See *Ibid.* § 7.65, 7.89–7.93, 7.100. In fact, the US itself advocated for this view initially as the provision’s original drafter: see E/PC/T/A/PV/33 (24 July 1947). P. 19–21. URL: <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF>.

<sup>76</sup> PR, *Russia — Traffic in Transit*, § 7.82, 7.83: “[F]or action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision. [This follows from] textual and contextual interpretation of [Article XXI], in the light of the object and purpose of the GATT 1994 and WTO Agreement and confirmed by the negotiating history of Article XXI.” See also § 7.100, 7.103: “[the Panel’s interpretation] rejects the United States’ argument that Russia’s invocation of Article XXI(b)(iii) is “nonjusticiable”.

<sup>77</sup> Panel Report, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated to WTO Members on 16 June 2020, dispute terminated while appeal pending (hereinafter — ‘PR, *Saudi Arabia — IPRs*) and, most recently, in *US — Steel and Aluminium Products (Norway)*.

<sup>78</sup> This comes from the other panels’ interpretation of the terms “relating to” in Article XX(g). See PR, *Russia — Traffic in Transit*, § 7.69.

appealed to US media reports on the alleged discovery of a uranium mine in Czechoslovakia, as well as to expert analysis of the intended use of the discussed drills.<sup>79</sup> The Czechoslovak representative jested that the US factories had to be so polluted that the drills themselves had become “fissionable material”.<sup>80</sup> To be fair, this remark was well-placed. One can note that subparagraph (i) (“relating to fissionable [or precursor] materials”) lacks the words “the traffic in” that expand, for example, the reach of subparagraph (ii) to any related trade (if it supplies the military sector). A good faith textual interpretation would suggest that the drafters envisioned subparagraph (i) to only cover *actual fissionable or precursor material*, like uranium ore itself.<sup>81</sup> It is puzzling that the US chose to substantially rely on subparagraph (i) rather than subparagraph (ii), which would have probably been more appropriate. One thing is clear: the respondent’s ‘action’ would have to target fissionable or precursor material directly to fall under subparagraph (i).

Article XXI(b)(ii) (“[measures] relating to [(i)] the traffic in arms, ammunition and implements of war and [(ii)] to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”) would also be expected to cover at least some dual-use items and technologies. Meanwhile, as has been established, such items constitute a significant percentage of normal, legitimate, and sometimes crucial (food, medical goods) trade. The US example shows that States could use the possibility of *some* items being diverted as a pretext for setting *comprehensive* export bans.

In *US — Export Restrictions (Czechoslovakia)*, the UK and the US stressed that it was an undeniable prerogative of any State to restrict exports that in their view “could be of direct use in increasing military potential” of another State.<sup>82</sup> The Czechoslovak representative rightfully responded that the GATT did not refer anywhere to any ‘military potential’, which notion is so broad and elastic that it could encapsulate practically anything — even the birth of a child could be presented as the appearance of a future conscript.<sup>83</sup> Furthermore, traffic that “[is] carried on [to supply] a military establishment” is much different from traffic that “could be of direct [military] use.” This interpretative aspect, however, is not quite clear-cut. The negotiation materials show that the intention of the drafters was to create an exception for the measures that they deemed crucial in the run-up to World War II — in particular, limiting exports of metal that a Member believed would be used to produce enemy armaments.<sup>84</sup> This sets quite a low argumentative standard, which the dire conditions of that particular time probably did require. It would have been difficult, for example, to trace the end use of metal ore beyond its melting, while there was no doubt that the military industry would have been preferentially saturated with such materials by the warring powers. In the modern times, however, the end use of the restricted goods would be far more ambiguous.

In our opinion, to make a *bona fide* case under Article XXI(b)(ii), the respondent must be expected to demonstrate that the precluded exports constitute “arms, ammunition and implements of war”, or, if the goods are dual-use, that they are destined for military end users (and thus have the purpose of supplying a military establishment). When deciding on the argumentative standard, the panels should take into account the foreign policy environment (akin to subparagraph (iii), which is discussed further) and the nature of the restricted goods. For instance, where some prolonged traffic is involved, there is no reason not to expect the respondent to present results of some trade investigation or inquiry. Moreover, to rule out politically ambiguous and overly broad restrictions, the respondent must be expected to demonstrate that ceasing trade destined for a military establishment indeed constitutes the primary purpose of its ‘action’. As an option, the panel could turn to the language and structuring of the relevant measure: for example, insertion of non-proliferatory restrictions in the ‘foreign policy’ sections of export regulations would strongly indicate their inconsistency with Article XXI(b)(iii), since it is clear that national security is not their primary orientation.<sup>85</sup>

<sup>79</sup> GATT/CP.3/38. P. 3, 11–12.

<sup>80</sup> GATT Contracting Parties, Third Session, Reply of the Head of the Czechoslovak Delegation, Mr. Zdenek AUGENTHALER, to the speech of the Vice-Chairman of the USA Delegation, Mr. John W. Evans, under Item 14 of the Agenda. GATT/CP.3/39. 8 June 1949. P. 2. URL: [https://www.wto.org/gatt\\_docs/English/SULPDF/90320198.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90320198.pdf).

<sup>81</sup> Joyner D. H. *Op. cit.* P. 133.

<sup>82</sup> GATT Contracting Parties, Third Session, Summary Record of the Twentieth Meeting. GATT/CP.3/SR.20. 14 June 1949. P. 3–5. URL: <https://docs.wto.org/gattdocs/q/GG/GATTCP3/SR20.PDF>; GATT Contracting Parties, Third Session, Statement by the Head of the Czechoslovak Delegation Mr. Zdenek AUGENTHALER to Item. 14 of Agenda (CP.3/2/Rev.2). GATT/CP.3/33. 30 May 1949. P. 4–5. URL: <https://docs.wto.org/gattdocs/q/GG/GATTCP3/33.PDF>.

<sup>83</sup> GATT/CP.3/33. P. 5–6, 8.

<sup>84</sup> GATT, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. Verbatim Report. Thirty-Sixth Meeting of Commission “A” Held on Tuesday, August 12, 1947, at 10.50 a.m. at the Palais des Nations, Geneva. E/PC/T/A/PV/36. 12 August 1947. P. 17–19. URL: <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-36.PDF>.

<sup>85</sup> Joyner D. H. *Op. cit.* P. 137–138.

### 3.2.4. 'Action' under Article XXI(b)(iii)

Finally, export restrictions may prove legitimate if they were taken to protect essential security interests “taken in time of war or other emergency in international relations.” Article XXI(b)(iii) does not limit the scope of actions a Member can take, but rather addresses their context. Thus, this particular option calls for special scrutiny.

To make use of this option, the respondent must be expected to demonstrate separately that the relevant measure (i) was taken in time of (temporal requirement) (ii) war or other emergency in international relations (substantive requirement).<sup>86</sup> However, it is not fully clear to what extent the respondent must be affected by this situation, or what kinds of situations would constitute “other emergency” in the sense of the article.

In *Sweden — Import Restrictions on Certain Footwear*, Sweden tried to justify a global import quota for certain footwear. It suggested that the surged competition from (*virtually any*) foreign shoemakers could undermine Sweden’s minimum domestic capacity to supply troops with *special* footwear, which is “essential <...> in case of war or other emergency in international relations”.<sup>87</sup> The denial of epoxy resin to Iran immediately comes to mind. Though Sweden alluded to the wording used in subparagraph (iii), it did not attempt to actually show that there was any “emergency in international relations” to begin with. Instead of building a concrete argument grounded in WTO law, Sweden appealed to the “spirit” of Article XXI.<sup>88</sup>

In *Russia — Traffic in Transit*, the panel clarified: “emergency in international relations <...> appear[s] to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.” The existence of an emergency in international relations “is an objective state of affairs <...> subject to objective determination.” The panel accorded a fairly high standard of tension to such emergencies. The panel’s reading accounts for the references to “war”, the pressing security interests expected to arise from war and the subject matter of other subparagraphs and *excludes political or economic conflicts* that would be deemed more ordinary.<sup>89</sup> While such could sometimes be considered urgent or pressing, they would not constitute ‘emergencies’ under Article XXI(b)(iii) unless they give rise to the same kind of security interests. The panel in *US — Steel and Aluminium Products (Norway)* further clarified that the emergency under Article XXI(b)(iii) “must be, if not equally grave or severe, at least comparable in its gravity or severity to a “war” in terms of its impact on international relations.”<sup>90</sup> This well attests to the historical approach noted by the panel in *Russia — Traffic in Transit*:

A significant majority of occasions on which Article XXI(b)(iii) was invoked concerned [(i)] *situations of armed conflict* and [(ii)] *acute international crisis*, where heightened tensions *could lead to armed conflict*, rather than protectionism under the guise of a security issue (emphasis added)<sup>91</sup>.

Though the panel did not attach any legal effect to this particular observation, in our opinion, it demonstrates the overall understanding shared by the majority of the Members regarding the applicable standard. The existing practice of WTO panels so far appears to conform to this trend, though it does not yet provide any guiding “lowest standard” for such emergencies. Of particular note is the decision of the panel in *US — Origin Marking (Hong Kong, China)*, which further clarified that the relevant term “refers to a state of affairs, of the utmost gravity, in effect a situation *representing a breakdown or near-breakdown in the relations* between states or other participants in international relations” (emphasis added).<sup>92</sup> Thus, the panel will focus on the gravity of the impact of the claimed state of affairs rather than on its circumstances.<sup>93</sup> The practice so far appears consistent in demanding that there is at least a severance of international relations between the parties (e.g. in diplomacy, trade, and other crucial policy areas), or, again, a situation close or amounting to an armed conflict.<sup>94</sup>

<sup>86</sup> See the analytical framework laid down in PR, *Saudi Arabia — IPRs*, § 7.242.

<sup>87</sup> GATT, *Sweden — Import Restrictions on Certain Footwear*. L/4250. 17 November 1975. § 4. URL: [https://www.wto.org/gatt\\_docs/English/SULPDF/90920073.pdf](https://www.wto.org/gatt_docs/English/SULPDF/90920073.pdf).

<sup>88</sup> GATT Council of Representatives, *Draft Report on Work since the Thirtieth Session. Addendum. C/W/264/Add.1*. 7 November 1975. P. 3–4. URL: [https://www.wto.org/gatt\\_docs/English/SULPDF/92170660.pdf](https://www.wto.org/gatt_docs/English/SULPDF/92170660.pdf).

<sup>89</sup> PR, *Russia — Traffic in Transit*, § 7.75–7.77.

<sup>90</sup> Meanwhile, “[t]he term ‘grave’... may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.” See PR, *US — Steel and Aluminium Products (Norway)*, § 7.127.

<sup>91</sup> PR, *Russia — Traffic in Transit*, § 7.81.

<sup>92</sup> Panel Report, *United States — Origin Marking Requirement*, WT/DS597/R and Add.1, circulated to WTO Members 21 December 2022, appealed 26 January 2023 (hereinafter — PR, *US — Origin Marking (Hong Kong, China)*). § 7.306–7.315.

<sup>93</sup> *Ibid.* § 7.308.

<sup>94</sup> In *Russia — Traffic in Transit*, the panel recognised an emergency in international relations between Russia and Ukraine, citing (i) the concern of the international community; (ii) the recognition of the situation by the UN General Assembly as “involving armed conflict”; and (iii) the imposition of sanctions in response to this situation. In *Saudi Arabia — IPRs*, the panel recognised as such

In spite of the above panel's acknowledgement that an 'emergency' can exist between just the parties to the dispute as well as among a wider group of WTO Members, it based its decision on considering the former,<sup>95</sup> which was also the focus of the other relevant panels. It can thus be concluded that an argued emergency in international relations is only relevant to the dispute as long as it at least concerns the relations between the applicant and the respondent, not some third parties, which represents the only possible good faith catalyst for a measure under Article XXI(b)(iii). Thus, in a hypothetical dispute between Russia and the US, the latter may appeal to giving the Pentagon the so-called "wartime procurement powers" to expedite military aid to Ukraine.<sup>96</sup> However, the panel must not be satisfied merely with this statement, but make a thorough and objective assessment of whether there is an actual "breakdown or near breakdown" in the normal bilateral relations between Russia and the US, in particular in their ability to cooperate on most substantive policy issues.

### 3.2.5. The chapeau of Article XXI(b): the requirement of good faith invocation

Returning to the issue of interpretation, the panels did not pronounce as clearly whether the words "which it considers" imply that the Members could elevate any concern (e.g. the "US strategic technology leadership") to an essential security interest. As the panel in *Russia — Traffic in Transit* established, the Members may personally regard any security interests as 'essential'; however, these will only be treated as such within the meaning of Article XXI if the Member invokes the Article XXI exceptions in good faith. This demands that the Members should not use subparagraphs (i)-(iii) as the means to circumvent their trade commitments (e.g. by arbitrarily "re-labelling" trade interests protected under the GATT as the untouchable 'essential security interests').<sup>97</sup>

For the panel to verify the good faith invocation of Article XXI, the respondent will first have to sufficiently articulate its pleaded essential security interests. There is yet no concrete standard of articulation or analytical algorithm for subparagraphs (i)-(ii) in this respect. Here, the panels will likely have given more bearing to the approximate definition of essential security interests laid down in *Russia — Traffic in Transit*. Such "may generally be understood [as] *interests relating to the quintessential functions of the state*, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally (emphasis added).<sup>98</sup>" In contrast, subparagraph (iii) will require a more complex assessment. The level of required articulation here will vary depending on the seriousness of the invoked emergency in international relations: the farther this situation is removed from an armed conflict, the more clearly the respondent will have to enunciate its essential security interests.<sup>99</sup>

The above step will enable the panel to assess whether there is any link between the relevant actions and the protection of the respondent's essential security interests (their "veracity").<sup>100</sup> To establish the "minimum requirement of plausibility" with regard to subparagraph (iii), the panel will have to examine "whether the measures are so remote from, or unrelated to, the <...> emergency that it is implausible that [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency".<sup>101</sup> This assessment will likely apply to subparagraphs (i)-(ii), though most of this requirement

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Saudi Arabia's severance of all (e.g. diplomatic, consular, economic) relations with Qatar since (i) it represents an "exceptional and serious crisis" due to its cardinal nature, and (ii) directly concerned the security interests of the parties, as was apparent from the repeated mutual allegations of supporting terrorism and extremism. The panel agreed that such severance represents "the ultimate State expression of the existence of an emergency in international relations." In *US — Steel and Aluminium Products (Norway)*, the Panel "[was] not persuaded that the situation [of global excess capacity in steel and aluminium production] rises to the gravity or severity of tensions on the international plane so as to constitute an 'emergency in international relations'..." The panel in *US — Origin Marking (Hong Kong, China)* did not find an emergency in international relations between Hong Kong, China and the US since most of their international relations, including trade and diplomatic relations, continued as usual. See PR, *Russia — Traffic in Transit*, § 7.122; PR, *Saudi Arabia — IPRs*, § 7.257–7.263; PR, *US — Steel and Aluminium Products (Norway)*, § 7.134–7.136; PR, *US — Origin Marking (Hong Kong, China)*, § 7.353–7.359.

<sup>95</sup> *Ibid.* § 7.306–7.359.

<sup>96</sup> Gledhill J. *Beware Arms Makers Exploiting Ukraine War to Profit, Avoid Oversight // Responsible Statecraft*. 19 December 2022. URL: <https://responsiblestatecraft.org/2022/12/19/how-arms-makers-are-exploiting-the-ukraine-war-to-weaken-oversight/> (accessed: 16.01.2023).

<sup>97</sup> PR, *Russia — Traffic in Transit*, § 7.132–7.133.

<sup>98</sup> *Ibid.*, § 7.130–7.134.

<sup>99</sup> *Ibid.*, § 7.135: "What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. <...> The less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity..."

<sup>100</sup> See *Ibid.*, § 7.134; PR, *Saudi Arabia — IPRs*, § 7.281.

<sup>101</sup> PR, *Russia — Traffic in Transit*, § 7.138–7.139.

appears “sewn into” the above-discussed assessment of the ‘action’ through the terms “related to”. Thus, the task of the panel will be to establish that the respondent’s pleaded connection between (i) the measure and its object (‘action’) and (ii) the relevant essential security interest is comprehensive and convincing.

In summary, to justify the measures it presents under Article XXI(b), the respondent (e.g. the US) would have to demonstrate (i) the existence of an ‘action’ under one of the three conditions in Article XXI(b) that (ii) bears a genuine connection with the stated security interest born from the subject matter of the pleaded subparagraph. If a claim is brought against restrictions such as those discussed in the above sections, the respondent must be expected to establish these elements, lest its measures must be deemed WTO non-compliant and subject to correction or removal under DSU Article 19. The panel will almost certainly accept security from nuclear threats (or other connected interests) as a valid essential security interest. It seems likely that the panel will find restrictions on fissionable materials or dual-use items corresponding to this interest. However, this will not be the case if the measure is distant or broad enough to resemble a disguised restriction. It should also not be the case if the respondent fails to establish that the impeded traffic is destined for a military end user, or if the pleaded emergency is too distant and not personally acute or pressing to the respondent.

### 3.3. Non-WTO States: is there any opportunity for redress?

The above sections discussed the relevant substantive provisions of WTO law that the respondent can use to argue for its restrictive measures, and the argumentative standards that will be applicable and could screen out excessive or abusive measures. This will be useful for States that are Members to the WTO and thus entitled to benefit from its dispute settlement system. For instance, Russia could file a complaint under Article XXIII:1(a) to assert that the broad US trade restrictions violate GATT Articles I and XI. If the panel finds a *prima facie* violation, the US would have to justify its measures under Article XXI. However, many other States fall prey to wide export restrictions, but are not WTO Members: e.g. Iran, Libya, Syria, Iraq, and North Korea. The case of Iran particularly demonstrates that the ability to defend against excessive restrictive measures could be a valuable balancing mechanism to keep a sanctioned State within the nuclear non-proliferation regime.

Indeed, Iran cannot formally take advantage of the WTO dispute settlement system, but this does not mean that it cannot at all make use of this system. DSU Article 3:8 elaborates on GATT Article XXIII:1:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. *This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members* (emphasis added).

In other words, any contracting party may raise a violation complaint (GATT Article XXIII:1(a) if it finds that any other contracting party has infringed a covered agreement, even if the actual interested entity is not a WTO Member. *Australia — Tobacco Plain Packaging* presents one similar case, where Ukraine (later withdrew), Honduras, the Dominican Republic, Cuba and Indonesia effectively represented the interests of Philip Morris, a major tobacco producer, which allegedly financed the endeavour.<sup>102</sup>

Though the possibility of this ever manifesting is very slim, a non-WTO Member (e.g. Iran) could make use of this loophole by persuading some benevolent WTO Member State (e.g. Russia) to file a complaint on its behalf. However, they will have to establish some related violation of a covered agreement as regards an actual WTO Member State, or at least some minimal basis that could be argued as such. For instance, the applicant could argue that there is an obstruction of the transit of goods through a WTO Member’s territory, or even violation of the ‘spirit’ or purpose of the WTO (similar to Sweden’s defence in the above-discussed footwear case). Though theoretically possible, it should be acknowledged that the absence (at least at first glance) of a clear violation of a WTO agreement leaves very thin chances of success.

Although it is outside the scope of this paper, let us note an option outside the WTO: it is also possible to turn to the International Court of Justice. This venue, in particular, appears highly relevant for Iran. NPT Article II compels the NNWS “not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices”. It is possible to argue that the obligation “not to manufacture” would require the State not only to produce or acquire a sufficient quantity of fissionable material, but to actually produce a

<sup>102</sup> Martin A. *Philip Morris Leads Plain Packs Battle in Global Trade Arena* // Bloomberg. 22 August 2013. URL: <https://web.archive.org/web/20170309024318/https://www.bloomberg.com/news/articles/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena> (accessed: 24.05.2022).

nuclear explosive device. The basis of US trade restrictions would thus appear dubious.<sup>103</sup> Still, this avenue warrants its separate discussion. Meanwhile, it will also be pertinent in the near future to watch the development of the ICJ dispute opened by Iran regarding the alleged violations of the 1955 Treaty of Amity, which also deals with the effects of US-imposed sanctions, including on bilateral trade between the parties.<sup>104</sup>

### Conclusion: fairness and fairness only

Although the global nuclear non-proliferation regime involves a variety of multilateral mechanisms to ensure compliance, States themselves play a significant role in sustaining the regime through domestic export control regulation. However, this could also have a contrary effect if their approach is not restrained, as is the case with the failure of the JCPOA. Unrestrained or abusive application of export controls usually entails significant negative collateral consequences for the population and industry of the targeted State, opening the question of possible human rights violations. States tend to adapt to economic damage and may in fact react by adopting a negative compliance stance, or consider withdrawing from the relevant non-proliferation regime altogether (e.g. Iran, Iraq).

The above situation is unique, but by no means exceptional. These days it is quite evident that a State's allegiance has much bearing on the ability of other States to influence its behaviour and decisions, which might explain why some States have frequently resorted to economic measures as a 'blunt instrument' to promote political change abroad. Expectedly, this cannot facilitate any genuine drive towards negotiations, and, as voiced by the Russian Ministry of Foreign Affairs and outlined in the recent Russian Foreign Policy Concept,<sup>105</sup> does not bode well for the principles of sovereignty and non-intervention. This can be seen as a symptom of the larger, fundamental conflict between the said principle and various other international values, perceptions and legal commitments (human rights, democracy, etc.). The modern UN architecture has so far proved unable to agree on how to cut this Gordian knot. In this sense, the WTO system unexpectedly reveals itself as a potent alternative mechanism for upholding peace and security through trade, including by way of dispute settlement.

Of course, a reasoned appeal can be made to *forum conveniens*. It is true that the WTO system was never meant to address issues of national security, and thus to complement or compete with the UN Security Council, the International Court of Justice, or any other competent international organs. It is also only natural for WTO panels to adhere closely to their specialised jurisdiction, not to mention tie themselves by judicial economy considerations. It is quite simply not for the multilateral trading system to bear that cross. But this system is indeed a relevant forum for debating trade policies that may have bearing on international security and may in fact well offer a robust balancing mechanism by allowing aggrieved States to challenge abusive export control measures.

Met with a complaint, the respondent will have to resort to the security exception of GATT Article XXI. A diligent reading of the article suggests significant argumentative standards for the invoking party. The respondent will have to prove that its export restrictions directly serve the essential security interest of ensuring nuclear security (or other legitimate essential security interest) through one of the three available exceptions. Though WTO dispute settlement is generally accessible only to WTO Members, other States that are often the target of broad export restrictions could sometimes also make use of this system. However, this possibility yet is more theory than practice.

High standards for the allowable derogations from the WTO law and the uncertain prospects of defence may generally act to dissuade States from using trade pressure to promote their foreign policy interests. Furthermore, a reasoned refusal of the WTO panel to accept such derogation may act to level the positions of the parties and put them back on the negotiating track. The now-expected (and frankly unexclusive) caveat is that the respondent States may consciously tolerate the consequences of a negative panel decision, or abuse the currently paralysed WTO Appellate Body, as may be the case with *US — Steel and Aluminium Products (Norway)* and *US — Origin Marking (Hong Kong, China)*.<sup>106</sup> Meanwhile, *Saudi Arabia —*

<sup>103</sup> Joyner D. H. *Op. cit.* P. 13–19.

<sup>104</sup> See *Website of the International Court of Justice. Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*. URL: <https://www.icj-cij.org/case/164> (accessed: 28.02.2023).

<sup>105</sup> *Ministry of Foreign Affairs of the Russian Federation, Comment by the Russian Ministry of Foreign Affairs regarding the United States' sanctions against Russia. 17 July 2014*. URL: [https://www.mid.ru/foreign\\_policy/news/1624621/?lang=en](https://www.mid.ru/foreign_policy/news/1624621/?lang=en) (accessed: 21.04.2023); *Permanent Mission of the Russian Federation to the European Union, The Concept of the Foreign Policy of the Russian Federation, approved by Decree of the President of the Russian Federation No. 229, March 31, 2023 (unofficial translation)*. § 8, 23, 26. URL: <https://russiaeu.ru/en/news/concept-foreign-policy-russian-federation> (accessed: 21.04.2023).

<sup>106</sup> The US has filed for appeals in both cases on 26 January 2023. Hence, pursuant to Article 16(4) of the DSU, the respective panel reports could not be adopted unless the appeal is completed.



*IPRs*, which parties eventually settled their differences outside of the proceedings, may already offer a valuable positive example, even if the actual underpinnings behind this outcome may go far beyond that single dispute.<sup>107</sup> The real significance of the WTO system on the front of non-proliferation and international security may yet be unclear, but the potential is certainly there.

## МЕЖДУ ПРАВОМ И ПОЛИТИКОЙ: НЕРАСПРОСТРАНЕНИЕ ЯДЕРНОГО ОРУЖИЯ И СОБЛЮДЕНИЕ МЕЖДУНАРОДНО-ПРАВОВЫХ ОБЯЗАТЕЛЬСТВ ПОД ВЛИЯНИЕМ ДРУГОГО ГОСУДАРСТВА В КОНТЕКСТЕ МЕЖДУНАРОДНОЙ ТОРГОВЛИ

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### Аннотация

Экономические санкции США против Ирана и России, включая широкомасштабные экспортные ограничения, изначально преподносились как обслуживающие цели, связанные с нераспространением вооружений. Однако складывается впечатление, что именно санкции подорвали переговоры по возобновлению Совместного всеобъемлющего плана действий — соглашения, призванного удержать Иран от приобретения ядерного статуса. В настоящей статье эта ситуация рассматривается в качестве наглядного примера того, как неограниченный экспортный контроль может вступать в противоречие с интересами международной безопасности, в частности в рамках международного режима нераспространения ядерного оружия. Опираясь на этот показательный случай, автор статьи ставит перед собой задачу сформулировать общие выводы о возможных побочных эффектах обширных экспортных ограничений, их необходимых границах в рамках права ВТО и значимости системы ВТО для ядерного нераспространения. В статье определено место мер экспортного контроля в контексте данного режима и рассмотрены причинно-следственные связи, характерные для описанной выше ситуации. По мнению автора, здесь присутствует влияние внешнеполитического элемента, в конечном счете противоречащее заявленным целям ядерного нераспространения. Далее представлен анализ содержания статьи XXI Генерального соглашения по тарифам и торговле, которую государство-санкционер с наибольшей вероятностью задействует, чтобы оправдать торговые ограничения в рамках рассмотрения спора в ВТО. Автор приходит к выводу: добросовестная интерпретация статьи и сложившаяся практика указывают на то, что предлагаемые в статье XXI исключения ограничены определенными стандартами и должны толковаться таким образом, чтобы максимально отсеять меры, негласно преследующие иные, например внешнеполитические, интересы. Между тем государства, не являющиеся членами ВТО, могут попытаться возбудить спор через дружественных им членов ВТО, если удастся установить нарушение права ВТО в отношении ее участников, хотя шансы такого исхода, разумеется, невелики. В качестве итогового вывода в статье констатируется ценная роль системы ВТО в обеспечении и поддержании международной безопасности и ядерного нераспространения.

### Ключевые слова

режим нераспространения ядерного оружия; Договор о нераспространении ядерного оружия; Совместный всеобъемлющий план действий; меры экспортного контроля; всеобъемлющие санкции; статья XXI ГАТТ

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### References / Список источников

Beaucillon C. (ed.) (2021) *Research Handbook on Unilateral and Extraterritorial Sanctions*, Cheltenham: Edward Elgar Publishing.

Berndorfer T. (2009) *Nuclear Commerce: Its Control Regime and the Non-Proliferation Treaty*, Hamburg: Diplomica Verlag.

Black-Branch J. L., Fleck D. (2016) *Nuclear Non-Proliferation in International Law. Volume II, Verification and Compliance*, Hague: Asser Press.

<sup>107</sup> Siddell I, Dackiv B, Safar-Aly, S. *Lifting of Restrictions with Qatar — What You Need to Know* // Baker McKenzie. 18 January 2021. URL: <https://me-insights.bakermckenzie.com/2021/01/18/lifting-of-restrictions-with-qatar-what-you-need-to-know/> (accessed: 17.04.2023).

<sup>108</sup> Мнения, представленные в данной статье, выражают сугубо личную позицию автора и никоим образом не отражают позицию любого другого лица или организации.

- Bown C. P. (2020) How the United States Marched the Semiconductor Industry into its Trade War with China. *East Asian Economic Review*, vol. 24, no. 4, pp. 349–388.
- Cirincione J. (2000) *Repairing the Regime: Stopping the Spread of Weapons of Mass Destruction*, New York: Routledge.
- Dodge T. (2010) The Failure of Sanctions and the Evolution of International Policy Towards Iraq, 1990–2003. *Contemporary Arab Affairs*, vol. 3, no. 1, pp. 83–91.
- Jiangyu W., Hewett D. (2021) U.S.–China Trade Relations in the Biden Era: Trade War, Industrial Policy, and Rule-Based International Order. *Proceedings of the ASIL Annual Meeting*, vol. 115, pp. 315–320.
- Joyner D. H. (2009) *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford: Oxford University Press.
- McKenzie F. (2008) GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance. 1947–1959. *Journal of Cold War Studies*, vol. 10, no. 3, pp. 78–109.
- Menkes M. J. (2019) The Legality of US Investment Sanctions against Iran before the ICJ: A Watershed Moment for the Essential Security and Necessity Exceptions. *Canadian Yearbook of International Law/Annuaire canadien de droit international*, vol. 56, pp. 328–364.
- Reinsch W. A. (2022) China as Best Customer and Biggest Threat — Trade Policy in the Biden Era. *Schwerpunkt Außenwirtschaft 2021/2022*, pp. 179–185.
- Sidel V., Levy, B. (2007) Proliferation of Nuclear Weapons: Opportunities for Control and Abolition. *American Journal of Public Health*, vol. 97, no. 9, pp. 1589–1594.
- Terry P. C. R. (2020) Enforcing US Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law? *Washington International Law Journal*, vol. 30, no. 1, pp. 1–27.
- Whang C. (2021) Trade and Emerging Technologies: A Comparative Analysis of the United States and the European Union Dual-Use Export Control Regulations. *Security and Human Rights*, vol. 31, no. 1/4, pp. 1–24.