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SANCTIONS, THE WORLD TRADE ORGANISATION AND THE EURASIAN ECONOMIC UNION: EXAMINING THE LEGAL INTERRELATIONSHIPS

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The legal framework and practices of World Trade Organisation are examined with relevance to the settlement of disputes over the application of unilateral trade-restrictive measures. Changes are described in the interpretation of the nature of the security exemptions provided in art. XXI of General agreement on tariffs and trade and similar provisions of General agreement on trade in services and Agreement on trade-related aspects on intellectual property rights and invoked by states as justification for trade and economic sanctions. Specifically, there is a tendency to reject – in doctrine and case law – the interpretation of the security clause as self-judging, or not subject to judicial review. It is argued that the necessity test and the principle of good faith should preferably underlie adjudications on the legality of invoking the security exemption. Experiences of the EAEU states with the WTO dispute settlement procedures are considered, and recommendations are made on the merits of the observer status for EAEU at the WTO. Finally, approaches are proposed to consolidate the positions of the EAEU member states on interpreting and applying WTO law in regard to restrictive measures.

Keywords: Dispute settlement body; economic sanctions; Eurasian Economic Union; security clause; World Trade Organisation.

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САНКЦИИ, ВСЕМИРНАЯ ТОРГОВАЯ ОРГАНИЗАЦИЯ И ЕВРАЗИЙСКИЙ ЭКОНОМИЧЕСКИЙ СОЮЗ: ПРАВОВЫЕ ВЗАИМОСВЯЗИ

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Раскрываются правовые основы, существующие в рамках Всемирной торговой организации, практика разрешения споров в данной организации в связи с применением односторонних ограничительных мер к торговле. Освещаются изменившиеся подходы к характеру оговорки о безопасности (ст. XXI Генерального соглашения по тарифам и торговле и аналогичные положения Генерального соглашения по торговле услугами, а также Соглашения по торговым аспектам прав интеллектуальной собственности) как к возможному обоснованию введения торговых и экономических санкций: в доктрине и в практике разрешения споров наблюдается устойчивая тенденция отказа от восприятия оговорки об исключениях по соображениям безопасности как не подлежащей судебной оценке. При анализе правомерности применения исключений по соображениям безопасности сделан акцент на целесообразности оценки соблюдения критерия необходимости и принципа добросовестности. Уделяется внимание опыту государств – членов ЕАЭС по взаимодействию и разрешению споров в ВТО, также дается рекомендация о потенциальном статусе наблюдателя для ЕАЭС в данной организации. Сформулированы предложения по консолидации подходов государств – членов ЕАЭС при толковании и применении норм права ВТО по вопросам ограничительных мер.

Ключевые слова: Орган по разрешению споров; экономические санкции; Евразийский экономический союз; оговорка о безопасности; Всемирная торговая организация.

Introduction

According to the WTO Secretariat's ongoing monitoring, 55 measures prohibiting or restricting exports of food, feed, fuels and fertilisers have been introduced by 30 WTO members and observers from February 2022. Of these 55, 15 measures have been phased out, but 40 are still applied by 25 members and observers[1]. From October 2021 to May 2022, 43 members and 1 observer maintained 71 specific trade and trade-related sanctions against the Russian Federation alone, according to the WTO report dated 27 July 2022. There are no similar statistics on Belarus, as it is not a member of the WTO. However, one can safely assume the extent of the sanctions to be significant, knowing that the WTO does not track all the sanction packages, secondary sanctions, or the effects of over-compliance in trade and finance. Economic sanctions have become routine, even though they are by nature inconsistent with the principles of free trade and non-discrimination that lie at the heart of the global trading system.

Essentially, economic sanctions act as discriminatory trade barriers, and their legality within the WTO framework is not an idle question. WTO's 164 member states include partners of Belarus in the Eurasian Economic Union: Kyrgyzstan joined the WTO in1998, Armenia in 2003, Russia in 2013, and Kazakhstan in 2015. The WTO instruments have been incorporated into the legal system of the EAEU, effectively making their provisions binding on Belarus. To the extent possible, Belarus has aligned its WTO accession commitments with those of the other EAEU member states. This research aims to explore the limits for the imposition of sanctions, review the treatment of the security exception clause in WTO case law and examine the potential responses of the EAEU and its member states to the trade restrictions within the framework of the WTO.

This paper is divided into three parts. In the first part, we review the basis for trade restrictions in WTO law, notably, art. XXI of General agreement on tariffs and trade (GATT) and similar articles of General agreement on trade in services (GATS) and Agreement on trade-related aspects on intellectual property rights (TRIPS).

In the second part, we examine how states have invoked the national security exceptions to justify their trade restrictions and exempt themselves from their free trade obligations, and how the resulting disputes have been adjudicated in WTO case law, including the tendency to treat such exceptions as non-self-judging. Finally, we underline the need for coordination among the member states of the EAEU in the invocation of exceptions and participation in the WTO dispute settlement procedures.

We employ general and domain-specific methods of research, including historical and comparative legal analysis, synthesis, and generalisation. We review the relevant case law, paying attention to the norms invoked, and the effectiveness and soundness of the adjudications. The theoretical and historical framework for our analysis is grounded in the works of A. Kern, P. van Bergeijk and C. van Marrewijk [1; 2]. The opinions of WTO officials,

[1]WTO members secure unprecedented package of trade outcomes at MC12 [Electronic resource]. URL: https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm (date of access: 24.08.2022).

including from the appellate body were taken into consideration [3; 4]. With recourse to B. Pirker, D. H. Regan [5; 6], we considered the implications of our analysis for the criteria applied in the "weighing and balancing test" of the trade-restricting measures taken under the security exemption. The paper draws on A. Douhan's fundamental positions on sanction regimes [7], adapted to reflect their specificity in the WTO framework. Our analysis of the practice of sanctions – including in the regional context – and the application of the WTO rules is grounded in the interpretation of the terms from GATT, GATS and TRIPS proposed by D. Boklan, ect [8].

Sanctions within the multilateral trading system

Trade sanctions and retaliation have been known since ancient times. In the Peloponnesian War Pericles, the ruler of Athens, imposed sanctions against Megara [1, p. 9–10]. Throughout history, states have repeatedly resorted to sanctions to secure their foreign policy objectives, despite the heavy cost and the often painful unintended consequences.

Even though sanctions have a long history, their common definition is still missing, and their legality is uncertain. Practice and economic modelling have produced extensive evidence that sanctions are ineffective and can be damaging to the parties that imposed them. The doctrine has questioned their usefulness. For example, as P. van Bergeijk and C. van. Marrewijk concluded as far back as 1994, economic sanctions have only a very limited capacity to serve their intended objectives, furthermore, "intensified use of the sanction instrument, in general, may impair its effectiveness" [2, p. 168]. Likewise, M. Smeets from the WTO Institute of training wrote in 2018: "Economic sanctions generally inflict economic costs to all countries involved in the sanction episodes, including those taking the sanctions, thus shooting themselves in the foot" [3]. However, despite their well-known and widely acknowledged negative effects, states continue to use sanctions on a large scale.

Sanctions conflict *prima facie* with the most favoured nation principle, applied to all 164 member states of the WTO. So can sanctions be reconciled with the obligations of membership in the WTO, and to what extent? What remedies are available to a member state targeted by the sanctions? Let us examine the use of sanctions *de lege lata* and the limits to their legality under the WTO legal framework.

The GATT expressly permits WTO members to impose sanctions in certain situations. It's para c of art. XXI ("Security exceptions") definitively covers sanctions mandated by the UN Security Council resolutions under chapter VII of the UN Charter: "Nothing prevents 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". A similar exemption is also provided in art. XIV bis of GATS and art. 73 of TRIPS.

Under para b of art. XXI of GATT, states have the discretion to apply unilateral sanctions on national security grounds. Specifically, a member state may take "any action which it considers necessary (accent mine) for the protection of its essential security interests". As the WTO Panel in Russia-traffic in transit stated, "essential security interests… may generally be understood to refer to those 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"[2].

Such interests are delineated in subparas i, ii of art. XXI(b) as "relating to fissionable materials or the materials from which they are derived" and "to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".

Subpara iii of art. XXI(b) of GATT relates to the essential security interests "taken in time of war or emergency in international relations". While it allows the member states more discretion, it is also open to interpretation. This provision has rarely been invoked. Furthermore, the jurisprudence concerning its invocation suggests that it is not totally self-judging: the Dispute settlement body (DSB) has jurisdiction to review its application and determine if a balance has been achieved.

A. Mitchell also refers to "hybrid" sanctions, a distinct type of trade restrictions that relate to but exceed the scope of the Security Council's resolutions under chapter VII [9]. As underlined by A. Douhan, the UN Charter rules out the imposition of sanctions without the approval of the UN Security Council. However, states and international organisations have resorted to sanctions on an increasing scale in the absence of the Security Council's authorisation or transgressing the boundaries of such authorisation [7, p. 79].

A. Mitchell considers examples when states invoked art. XXI(c) of GATT to justify a part of their sanctions regime, and relied on art. XXI(b) of GATT to justify the rest. In these cases, it must be established that the sanctions decision addresses an essential security interest and that the trade restrictions were indeed necessary to protect it [9].

Similarly, para 7(iii) of the Ministerial declaration adopted on 29 November 1982 states: "The contracting parties undertake, individually and jointly… to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General agreement".

[2]Article XXI. Security exceptions [Electronic resource]. URL: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (date of access: 24.06.2022).

Clearly, the national security exception provided by art. XXI of GATT cannot be invoked to justify any unilateral economic sanction. The context and rationale for its application are subject to strict legal scrutiny to test the proportionality of the consequences of the trade restrictions. As P. van den Bosche and D. Prevost declare, "the security exceptions of article XXI of the GATT and article XIV of the GATS are formulated in a manner that leaves a lot of discretion to WTO members. Furthermore, unlike the general exceptions under article XX of the GATT 1994 and article XIV of the GATS, these security exceptions are not subject to the requirements of a chapeau to avoid their misuse by WTO members" [4, p. 112]. The jurisprudence of WTO DSB can shed some light on the changing scope of the application of the security clause.

WTO jurisprudence on the invocation of security clause

The WTO DSB is an essential part of the WTO dispute settlement mechanism. However, since the United States blocked the appointments to the appellate body in 2019, the parties to disputes have been effectively precluded from appealing the findings of most panel reports. They have been left to appeal "into a void". Still, "the WTO is a suitable international forum to scrutinise the legality of unilateral sanctions not only because the majority of them entail economic restrictions but also because alternatives are either unavailable or impractical for states" [10, p. 171–172].

Options to revive the WTO mechanism exist, including through an *ad hoc* arbitration mechanism under art. 25 of the Understanding on rules and procedures governing the settlement of disputes annex 2 of the WTO agreement (hereinafter – DSU). Turkey made recourse to this procedure in a recent pharmaceutical case[3]. Disputes have been successfully referred to other WTO institutions. In the well-publicised Huawei dispute in 2019, the USA invoked the national security clause to blacklist Huawei and prohibit all transactions with it for American companies. China reacted immediately by raising the ban at the meeting of the WTO's market access committee. Overall, despite the difficulties, recourse to WTO remains an effective way to resolve trade disputes, even when alternatives to the DSB have to be utilised.

For many years, states have invoked art. XXI of GATT in exceptional circumstances. Nicaragua went to the WTO in 1986 to challenge the legality of the US trade embargo against it. Remarkably, the panel in the Nicaragua case (1986) did not judge the validity or motivation for the invocation of art. XXI of GATT by the United States. Regarding the invocation, the panel noted: "Embargoes such as the one imposed by the United States, independent of whether or not they were justified under article XXI, run counter to basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-developed contracting parties and to reduce uncertainty in trade relations". The panel noted that the GATT protected each contracting party's essential security interests through art. XXI and that the GATT's purpose was therefore not to make contracting parties forego their essential security interests for the sake of these aims. However, the panel considered that the GATT could not achieve its basic aims unless each contracting party, whenever it made use of its rights under art. XXI, carefully weighed its security needs against the need to maintain stable trade relations (para 5.16)[4].

The European communities challenged the legality of the Helms – Burton act under the WTO rules. The DSB established a panel at its meeting was held on 20 November 1996. On 25 April 1997, the chair of the panel informed the DSB that the panel had suspended its work at the request of the European communities. The Panel's mandate expired on 22 April 1998, pursuant to art. 12.12 of the DSU[5].

Recently the Russian Federation successfully invoked art. XXI of GATT as the respondent in a case brought by Ukraine[6]. In 2016, Ukraine challenged the restrictions imposed by Russia on traffic in transit to Kazakhstan and Kyrgyzstan via its territory, claiming that they violated art. V of GATT (freedom of transit). Russia argued that art. XXI(b)(iii) was self-judging in the sense that its invocation was immune from scrutiny by a WTO dispute settlement panel. The third parties disagreed with this interpretation. However, the United States filed a submission that was essentially in agreement with Russia's interpretation.

The panel found it had jurisdiction to review the nature of the measures taken by a party invoking art. XXI of GATT. This finding established a persuasive precedent that limited the parties' discretion to interpret the national security exemptions as totally self-judging. Other economic judicial authorities have taken a similar view, understanding the self-judging nature of a provision as being limited in scope. Even where a tribunal found a security exception clause to be self-judging (e. g. in investment disputes), such a finding did not preclude it in practice or doctrine from testing the validity of its

[3]DS512: Russia – measures concerning traffic in transit [Electronic resource]. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm (date of access: 24.06.2022).

[4]EU wins WTO case against Turkey's discriminatory practice on pharmaceuticals [Electronic resource]. URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4670 (date of access: 24.08.2022).

[5]United States – trade measures affecting Nicaragua: report by the panel [Electronic resource]. URL: https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf (date of access: 24.08.2022).

[6]DS38: United States – the Cuban liberty and democratic solidarity act [Electronic resource]. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm (date of access: 24.08.2022).

invocation. Instead, tribunals have declared themselves to be bound by duty to apply the test of good faith as the proper standard of review to prevent the abuse of such clause [11].

In Russia-traffic in transit the panel concluded that although Russia's actions to restrict traffic in transit would have been inconsistent with its WTO obligations, had they been taken "in normal times", the measures were justified under art. XXI of GATT. Justification of the invocation is in the national domain, provided that the government acts in good faith, and not in deliberate circumvention of its international trade obligations. The obligation of good faith also requires that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i. e. that they are not implausible as measures protective of those interests.

Assessing the balance in this case the panel found *inter alia* that "the bans were imposed specifically to prevent the circumvention of the import bans imposed by the respondent under one of the legal instruments at issue in the dispute, which, itself, was a response taken by the respondent to the sanctions imposed on it by other countries during the relevant period in response to the emergency in international relations" (para 7.143).

The panel determined that the "set of circumstances described in the enumerated subparagraphs" operate as limiting qualifying clauses: "If one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of article XXI(b) operate as limiting qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to members under the chapeau to these circumstances"[7].

The view that the self-judging nature of the security exception is in fact limited has prevailed in the WTO. However, a reliable legal test is still necessary to determine that the restrictive measures do not undermine the purpose of the WTO agreements. The jurisprudence to date gives an indication as to the principles and criteria on which to base such a test, with the good faith principle applied throughout the weighing and balancing process.

Concluding his formal review of the elaboration of balancing test by different judicial authorities on international trade, in light of the institutional context of the WTO and the supremacy of the interest of trade central to the justification for judicial review, B. Pirker observes: "The necessity-based balancing test which prevails in WTO law appears justified, as it provides the necessary weight that is given to other public interests" [5, p. 316]. This necessity-based approach revolves around the understanding of the term "necessary" in art. XXI of GATT, central to the weighing and balancing process performed in the judicial review. Several scholars (e. g. D. H. Regan [6]) have offered interpretations of the term "necessity" in the context of art. XX, but a similar debate has yet to take place with reference to art. XXI of GATT. Because the latter text is also steeped in the language of necessity ("any action which it [the state party] considers necessary"), necessity-based "weighing and balancing" still merits the attention of scholars, given the unmet need for greater formalisation of this process.

D. S. Boklan, V. V. Absaliamov and Yu. S. Kurnosov suggest that terms such as "essential security interests", "exigent circumstances in international relations" and "necessary for protection" are open to interpretation, and should be defined on the basis of general international law and the findings of the appellate body, whereby an earlier interpretation would direct the understanding of similar concepts in another WTO agreement [8]. While this element of the "objective" step is valid, it tends to be limited in practice to the principle of good faith, which, in the argument of these three scholars, should also apply to deliberations at the "subjective" step. In our view, the subjective step must consider the criteria of necessity together with the principle of good faith.

The security exception was also invoked in another dispute brought before WTO in 2018, in which Qatar disputed the alleged failure of Saudi Arabia to provide adequate protection of intellectual property rights held by a Qatar-based entity[8]. The settlement of this dispute exemplifies a different approach, grounded in the regional context.

Saudi Arabia denied Qatari nationals access to civil remedies through its courts, including by preventing domestic law firms from representing Qatari-based entities seeking to enforce their intellectual property rights (unauthorised distribution and streaming of its licensed media content were alleged). Saudi Arabia invoked art. 73 of the WTO TRIPS, which is the equivalent of art. XXI of GATT.

The dispute was recently terminated. On 21 April 2022, Qatar notified the DSB that it had agreed to terminate this dispute and that it would not seek the adoption of the panel report. On 29 December 2021, Saudi Arabia sent a communication to the DSB in which it confirmed the suspension of the appellate proceedings in this dispute, pursuant to the terms of the Al-Ula declaration signed on 5 January 2021. In its communication, Saudi Arabia further confirmed the suspension of any further proceedings to adopt the panel report in this dispute, according to the said declaration. On 31 December 2021, Qatar informed the DSB that Qatar was in receipt of Saudi Arabia's letter of 29 December 2021, requesting a suspension of the appellate proceedings in this dispute and that Qatar agreed to the proposed suspension

[7]DS512: Russia – measures concerning the protection of intellectual property rights [Electronic resource]. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm (date of access: 24.08.2022).

[8]DS567: Saudi Arabia – measures concerning the protection of intellectual property rights [Electronic resource]. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm (date of access: 24.08.2022).

of the appellate proceedings under the terms of Al-Ula declaration. Qatar further confirmed the suspension of its submission to the aforementioned appeal dated 17 August 2020, and of any further proceedings to adopt the panel report, while the mutually agreed suspension remains in place.

Al-Ula declaration seeks to promote cooperation and stability in the region. It has been notified as a treaty at the UN. Para 2 of the declaration reads: "All claims, complaints, measures, protests, objections and disputes shall be terminated at the end of the first year from the date of signature of the present declaration. Such claims, complaints, measures, protests, objections and disputes shall be suspended or frozen with the entities in question (i. e. the courts, agencies, committees, authorities and other domestic, regional and international entities) within one week of the signature of the present declaration"[9]. Al-Ula declaration is an example of lifting restrictive measures, and abandoning all claims on a regional level as a solution for peace and overcoming difficulties.

Strengthening regional coordination: options for EAEU

The WTO is a multilateral trading system, but it is becoming increasingly regionalised [12, p. 3, 9–10]. Sanctions against individual states also have an impact on the regional trade agreements to which they are parties. The differential effects of sanctions on Regional Trade Agreement (RTAs) and RTAs on sanctions have been a subject of debate among economists [13].

The Eurasian Economic Union is a notified regional trade agreement within the WTO. The provisions of the treaty of the union have been widely discussed under the transparency mechanism for RTA in the WTO[10]. The remedies can have implications for the common market of the EAEU. The EAEU is not a party to WTO, like the European Union, and it cannot reserve or request third party rights with the DSB WTO. However, the EUAU has other open options in WTO, independent of its membership.

Applying for observer status is one. In the observer status, international intergovernmental organisations may observe and follow discussions in the WTO on matters of direct interest to them[11]. For example, the European Free Trade Association is an observer for a range of negotiating or review mechanisms in WTO. Therefore, some common institutional measures can be addressed even without full membership.

Similarly, the individual member states can pursue their shared interests by coordinating their actions in different WTO mechanisms, e. g. as third parties in disputes.

The Republic of Belarus has negotiated its accession to the WTO since 1993. Still, it is not a member, and the WTO dispute settlement mechanisms are not available to it. In recent years, the accession talks have intensified. Expected in 2020, the accession could not be finalised because of the COVID epidemic. The epidemic also delayed until 2022 the discussion of the 5th edition of the draft of the Working party report and the final discussion of Belarus' commitments to the WTO. On his visit to Switzerland, the minister of foreign affairs of the Republic of Belarus V. Makei met on 20 April 2021 with the director general of the WTO, Ngozi Okonjo-Iweala. At the meeting, he confirmed Belarus' determination to follow through on its accession negotiations[12]. He also warned against politicising the accession talks with prospective members, as that would be incompatible with the principles of an international system of free trade[13] and could itself become a barrier to trade.

Independent of Belarus' membership in the WTO, the other members of the EAEU have recourse to the DSB. Alternatively, they may raise complaints over an alleged obstacle to trade and request consultations. As a recent example of the EU and the UK demonstrates, a request for consultations can be an effective mechanism[14].

Russia has been an active player in the WTO dispute settlement system. To date, it has taken part in 116 procedures, including in 97 as an interested third party. Russia brought eight complaints against other WTO members (four against the EU, two against the United States and two against Ukraine), and stood as a respondent in eleven (six from the EU, three from Ukraine, one

[9]Al-Ula declaration [Electronic resource]. URL: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805b2870 (date of access: 26.08.2022).

[10]Factual presentation. Treaty on the Eurasian Economic Union (goods and services) [Electronic resource]. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=247772,247762,247773,247690,247198,247057,246747,246770,246600,246477&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (date of access: 27.08.2022) ; Treaty on the Eurasian Economic Union (goods and services). Questions and replies [Electronic resource]. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249843,249646,249465,249424,249422,249423,249239,248933,248931,248912&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (date of access: 27.08.2022).

[11]International intergovernmental organisations granted observer status to WTO bodies [Electronic resource]. URL: https://www.wto.org/english/thewto_e/igo_obs_e.htm/ (date of access: 24.08.2022).

[12]Ministry of Foreign Affairs of the Republic of Belarus [Electronic resource]. URL: https://mfa.gov.by/en/press/news_mfa/a39d2f35e41e9aa6.html (date of access: 12.06.2022).

[13]Belarus slams politicisation of WTO accession talks as unacceptable [Electronic resource]. URL: https://eng.belta.by/politics/view/belarus-slams-politicization-of-wto-accession-talks-as-unacceptable-149792-2022/ (date of access: 07.06.2022).

[14]EU and UK agree on the way forward in the WTO dispute concerning UK's green energy subsidy scheme [Electronic resource]. URL: https://policy.trade.ec.europa.eu/news/eu-and-uk-agree-way-forward-wto-dispute-concerning-uks-green-energy-subsidy-scheme-2022-07-01_en (date of access: 29.08.2022).

from Japan, one from the United States)[15]. In the spring of 2022, Russia announced that it might challenge the trade sanctions against it at the WTO. So far, there have been no indications as to whether it would act on its intention. However, nothing prevents Russia from doing so at a later time. Whatever its decision, it must first request consultations with the WTO concerned. If that does not lead to a settlement, Russia may seek the establishment of a panel by the DSB.

Armenia stood as a respondent in two disputes at the WTO. In both cases, Ukraine was the complainant. At issue were the measures put in place by the Decision of the Collegium based on the findings of the EEC department for internal market defence (Decision of 2 June 2016 No. 48 "On the extension of the anti-dumping duties on certain types of steel pipes originating in Ukraine and imported into the customs territory of the Eurasian Economic Union" and the Finding of 4 October 2017 No. 2017/89/AD1R3 "On the outcomes of the interim review of anti-dumping duties on certain types of steel pipes originating in Ukraine and the need to adjust the levels of such duties in light of new circumstances"). Admittedly, the dispute has not progressed beyond a request for consultations from Ukraine[16]. Similar disputes were brought against Kazakhstan and Kyrgyzstan in 2017 and 2018[17]. Kazakhstan acted as a third party in 35 disputes, including with Russia as a party. These examples can be treated as models for further coordination.

Building on their experience of previous disputes in the WTO over trade measures, including with the invocation of the national security exception, the EAEU members can move towards a more precise definition of their common position on these matters. As V. Slepak observes, the EAEU agreements have no general exemption clauses for national security matters matching those of art. 346, 347 of the EU Treaty on the functioning of the European Union. The states parties still apply distinct approaches to the use of such exemptions across multiple areas of Eurasian integration [14]. However, common practices are beginning to take shape, in light of recent jurisprudence, including decisions of the EAEU Court on exemptions from free trade (these go beyond the scope of this article, and have not been analysed here). It is nevertheless essential to elaborate a shared position on the interpretation of the national security exemption and the limits to its use, to be advocated in the multilateral trading system and WTO structures, such as the DSB orthe review mechanism.

Conclusion

States parties apply restrictive measures, despite the apparent contradiction of this practice with the objective of facilitating trade and not hampering it, central to the WTO as a multilateral trading system. WTO law provides security exceptions. However, these security exceptions – contained in art. XXI of GATT and similar articles of GATS and TRIPS – cannot be used at the unfettered discretion of the invoking party, nor can they be construed as totally self-judging. The use of these provisions is subject to reasonable limits, and there is a strong need to formalise the legal test to determine whether the restrictive measures are still consistent with the purposes of the WTO agreements. Persuasive arguments have been presented at the WTO in favour of the good faith approach. Simultaneously, the weighing and balancing process in the legal test should apply the "necessity" criteria.

It is recommended that the member states of the EAEU elaborate common approaches to postulating their essential interests and other concepts not defined in WTO texts, elaborate a common position and present it before various multilateral fora. As of today, the union is not a party to the WTO agreements and is largely treated in WTO as an autonomous regime within international law. Still, regional consolidation will be a necessary move to overcome fragmentation.

Already, the EAEU members – four out of five of them members of the WTO – are acting in concert as parties to pending disputes or third parties in disputes with other EAEU member states. Continuation of this practice is advised.

The union itself, may, at a minimum, apply for observer status. The advantages and disadvantages of WTO membership for EAEU – possibly on a par with the EU – is a topic for further research. However, the legal interrelationships between RTAs and WTO make the observer status a realistic possibility for EAEU as a notified RTA.

More broadly, the regional context seems important for regional states interested in reciprocal support and the pursuit of coherent approaches in the WTO as a multilateral trading system.

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