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THE CAPACITY OF THE WTO TO ASSIST UKRAINE IN ITS WAR AGAINST RUSSIA: AN ASSESSMENT OF SANCTIONS AND OTHER TOOLS

by

1732674

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DECLARATION

I, student 1732674, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements of the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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THE CAPACITY OF THE WTO TO ASSIST UKRAINE IN ITS WAR AGAINST RUSSIA: AN ASSESSMENT OF SANCTIONS AND OTHER TOOLS

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ABSTRACT

In this piece I assess the sanctions currently being implemented against Russia and their lawfulness in terms of the security exemption. In doing so I determine there is no valid legal challenge that Russia could bring against the sanctions. I assess the level of efficacy the sanctions have had in achieving their goal while identifying their weaknesses. Having identified the weaknesses and where the sanctions have failed due to these weaknesses, I move onto assessing two proposals which are alternatives to the current sanctions. Firstly, the much talked about expulsion of Russia from the WTO and thereafter my own hypothetical proposal. Having assessed that neither of these options are highly viable, I look at what can be done to assist Ukraine under the WTO, which will show that when looking at the core of the WTO it is not built to act as a sanctioning organisation, but rather one of trade liberalisation and these liberalisation tools can be repurposed to assist Ukraine. The WTO is therefore best positioned to passively allow sanctions while actively pursuing liberalisation.

I INTRODUCTION

In February 2022 Russia lead a full-scale invasion of a sovereign neighbouring State, namely Ukraine. Russia has refused to acknowledge its actions against Ukraine as an invasion nor the conflict that ensued as a war. However, the global community has almost unanimously used these terms when referring to what has and is still occurring in Ukraine. The conflict has had impacts not only within Ukraine but around the whole world, this has caused oil prices to spike and affected the supply of essential foods such as grain, of which Ukraine is one of the world's largest suppliers.[1]

[1] Peter Hoskins 'Ukraine war: Global wheat prices jump after India export ban' Available at *https://www.bbc.com/news/business-61461093* accessed on 22 December 2022.

The global community has reacted to Russia's invasion of Ukraine by implementing trade sanctions which have been justified under Article XXI. Sanctions which are implemented in terms of the security exemption come with the weakness of lacking multilateral application. This means each WTO Member must choose whether to implement sanctions and the exact nature and level of sanction is determined and justified on an individual basis. This has led to countries such as China choosing not to implement sanctions and, in some cases, acting as a trading proxy for Russia to subvert the sanctions in place by other countries.

The other weakness is that justification for the sanctions in terms of the Article XXI security exemption is open to a challenge by Russia at the WTO which Russia has already indicated they intend to do.

Russia is a member of the World Trade Organization ('WTO') and has been since 22 August 2012.[2] The implication of this fact is that Russia is obliged to be treated no less favourably than any other member of the WTO. This is in terms of what is known as the MFN principle. This severely limits other WTO members from imposing trade sanctions in the form of Tariffs. Article XI of the GATT eliminates the ability to impose Quantitative Restrictions, those are trade sanctions which do not fall under '…duties, taxes or other charges…'.[3] The fact that Russia is to be accorded most favoured nation treatment in relation to tariffs, and that all other trade sanctions are prohibited under the GATT leaves few options for WTO members to lawfully impose trade sanctions on Russia. On an individual basis members have the option of relying on the general and security exemptions contained in the GATT contained in Article XX and XXI respectively.[4] On an institutional level expulsion of Russia from the WTO is possible, this would require the WTO to break with their tradition of decision taking by consensus and invoke the requirement to take matters to a vote, with the end goal of amending Article X of the WTO agreement.[5]

How does this reconcile with the fact that many WTO members have already imposed trade sanctions as well as a quantitative restriction against Russia? If these measures are not reconcilable with the exemptions under the GATT Articles, would the effective expulsion of Russia retroactively justify the measures currently being undertaken?

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[2] World Trade Organization 'Accessions Russian Federation' Available at *https://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm* accessed on 12 July 2022.
[3] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) Article XI.
[4] Ibid Article XX and Article XXI.
[5] James Bacchus 'Boot Russia From the WTO' (28 February 2022) Available at *https://www.wsj.com/articles/boot-russia-from-the-wto-world-trade-organization-putin-international-economic-sanctions-tariffs-legal-authority-11646092051* accessed on 12 July 2022.

This piece seeks to firstly answer whether the sanctions currently in place are justified on a legal basis and thereafter whether they are sufficient to assist Ukraine from a practical perspective. After assessing the legality of the sanctions, it is important to engage with an assessment of whether they are practically sufficient in their current form and how they fall short in order to direct the legal assessment and suggestions of where the WTO could strengthen its approach.

II ARE THE CURRENT SANCTIONS AGAINST RUSSIA LEGAL?

Many WTO Members have implemented sanctions against Russia. The United States Senate and House voted to revoke Russia's permanent normal trade relations.[6] This allows the United States to suspend the most-favoured nation ('MFN') treatment guaranteed to WTO members in GATT Article I.[7] The United States has also implemented a ban of certain products which originate from Russia, this has been done so under the International Emergency Economic Powers Act ('IEEPA').[8] The suspension of MFN treatment is in direct violation of GATT Article I, which requires that any advantage accorded to a member is immediately offered to all other members in relation to like products.[9] Therefore, should the United States increase tariffs on goods originating from Russia and not do so for all like goods not originating in Russia, all other members would be accorded a benefit which is not being immediately offered to Russia and therefore violates Article I.

The outright ban on certain goods originating from Russia constitutes a quantitative restriction which is defined and generally prohibited in GATT Article XI. The Article allows for specific exemptions in Article XI:2(a)-(c), however none are of relevance to the matter at hand.

Other Members have imposed broadly similar sanctions and at the time of writing there are other Members, most notably the EU are in discussions to revoke Russia's MFN status, without going into detail of every member's specific sanction package, it is to be noted that the GATT Articles I and XI are the Articles which prohibit the sanctions against Russia.[10]

Therefore, should any member treat another less favourably or impose bans or quotas on products originating from another members country they will *prima facie* be in violation of

[6] Cathleen D. Cimino-Isaacs 'Russia's Trade Status, Tariffs, and WTO Issues' available at https://crsreports.congress.gov/product/pdf/IF/IF12071, accessed on 16 July 2022.
[7] Op cite note 3 GATT Article I.
[8] Op cite note 6.
[9] Op cite note 3 GATT Article I.
[10] Ibid Article I and Article XI.

WTO law in terms of Articles I and XI. Therefore, there must be a valid exemption justifying the measures for them to be legal. Most discussion surrounding the justification of the sanctions has been in relation to GATT Article XXI the security exceptions which will be analysed below. I will also make an argument that Article XX the general exemptions should not be overlooked as an alternative means of justification.[11]

(a) GATT Article XXI

GATT Article XXI is the article which contains the security exemptions. The specific provision of relevance in relation to the sanctions imposed against Russia is Article XXI(b)(iii).[12] This provision provides that nothing in the GATT shall prevent a member from taking any action which the member considers necessary for the protection of their essential security interests, which is 'taken in time of war or other emergency in international relations'.[13]

The wording of this provision raised many questions, some of which were answered in the recent panel *Russia – Traffic in Transit*.[14] The first major question which was raised was whether the section was self-judging. In other words, was it up to the absolute discretion of the invoking member when and if they can invoke the section? This question is brought about by the open language used in Article XXI.[15] Despite the section not explicitly declaring itself 'self-judging' the open and broad nature of the wording does not preclude such an interpretation.[16] When looking at the drafting history it can be seen that the drafters had concern for the ramifications of a self-judging exemption which would permit '…anything under the sun.'.[17] If this were the case it would constitute a nullifying loophole of the GATT.[18]

This explains why the argument that the provision is self-judging was brought forward by Russia in *Russia – Traffic in Transit*, and it also explains why the panel rejected the argument. Russia's argument was that the section was self-judging and that the panel had no jurisdiction to review actions taken in terms of GATT Article XXI.[19] The panel held that it had

[11] Ibid Article XX.
[12] Ibid Article XXI(b)(iii).
[13] Ibid.
[14] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019.
[15] Stuart Davis 'Inherent Limits to the World Trade Organization's Article XXI Self-Judging Security Exception' (2019) 34 Maryland Journal Of International Law 364 at 369.
[16] Ibid.
[17] United Nations, Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp't, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. E/PC/T/A/PV/33 (1947) at 20.
[18] Op cite note 15 at 369.
[19] Pramila Crivelli 'Separating the Political from the Economic: The Russia–Traffic in Transit Panel Report' (2021) 20 *World Trade Review* 582-605 at 585.

inherent jurisdiction to determine which matters fell within their substantive jurisdiction, in other words the panel has jurisdiction to determine its own jurisdiction.[20] This holding is of great significance in relation to the future of Article XXI. It means that any future invocation of Article XXI is subject to review by a panel. Which in the case of the Russian sanctions opens up the use of Article XXI to being challenged by Russia. The panel did acknowledge that certain aspects of the section, such as a member's right to determine their own 'essential security interests' grants them wide discretion, but this discretion does not go far enough to constitute 'self-judging'. The reason for this is that both the subsections and the chapeau qualify when Article XXI may be invoked.[21] This wide discretion to determine security interests does allow Members a level of leniency in invoking the Article, an assessment of the qualifications to this discretion will follow.

(b) Qualifications to the wide discretion afforded by Article

Russia – Traffic in Transit ended a longstanding uncertainty about what exactly qualifies the invocation of Article XXI. It must be noted that panel decisions under the WTO and international law in general do constitute binding precent and therefore a different panel could take a different approach. However, it should be noted that binding precedent is not the only way a system of precedent can operate and when examining panel practices, one sees that generally the legal reasoning of prior adopted panel reports is followed by future panels, unless there exists a good reason for departing from the prior panel's decision.[22] Therefore, the interpretation of Article XXI in *Russia – Traffic in Transit* holds value and strongly indicates the direction future panels will follow. This is further emphasised by the more recent panel report of *Saudi Arabia — IPRs* which followed and applied the same framework developed in *Russia – Traffic in Transit*.[23]

The panel acknowledged the almost unlimited discretion that members were allowed in determining what their essential security interests are, however the two limiting factors are the 3 subsections as well as the requirement of good faith.[24] It is these two qualifications to the discretion accorded to members, that ensures members are unable to abuse their power by

[20] Op cite note 14 para 7.53.
[21] Ibid.
[22] Adrian T. L. Chua 'Precedent and Principles of WTO Panel Jurisprudence' (1998) 16 *Berkeley Journal of International Law* 171 at 179.
[23] Saudi Arabia — *Measures concerning the Protection of Intellectual Property Rights* (WTO/DS567).
[24] Op cite note 19 at 588.

declaring an essential security interest any time they wish to avoid an obligation under the GATT.

(c) Good faith

The panel cited the Vienna Convention Article 31(1) which obligates reference to good faith when interpretating treaties.[25] Therefore, when a member determines its essential security interests, they are to be tested against the standard of good faith. This extends not only to the essential security interest itself, but also to the measure which is being implemented to protect said interest.[26] What this requires is that members not use exceptions contained in Article XXI as a way to circumvent their obligations, simply put, they may not elevate anything to the level of 'essential security interest' in bad faith simply to achieve an agenda. It is required that a member sufficiently articulates their essential security interests to allow for an analysis confirming their veracity.[27]

When applying the good faith requirement to the measure itself, what is required is that the measure meets the minimum requirement of plausibility in relation to the essential security interests articulated. The panel therefore must test whether the measures taken are so remote or unrelated to the essential security interest, that said measure is implausible at protecting the interest.[28]As can be seen this is not a high burden to prove, quite simply as long as members articulate reasonable and genuine security interests and then follow with measures which are plausibly connected with the protection of said interests, a panel will find that the member has acted in good faith.

(d) The subsections

The panel held that the subsections (i)-(iii) limit and qualify the discretion accorded to the members in determining their essential security interests, by requiring a factual assessment of whether one of the conditions outlined in the three subsections is present.[29] The assessment of the subparagraphs is an objective one. In other words if the facts of the case do not show that one of the conditions outlined in the three subsections is present, then Article XXI may not be

[25] Op cite note 14 para 7.281
[26] Tatiana Lacerda Prazeres 'Trade and National Security: Rising Risks for the WTO' (2020) 19 *World Trade Review* 137–148 at 140.
[27] Op cite note 14 para 7.132-7.134.
[28] Ibid para 7.138- 7.139.
[29] Ibid para 7.139.

invoked. The panel also confirmed that the wording 'emergency in international relations' contained in subsection (iii) does not extend to an economic emergency and is effectively confined to situations of armed conflict, heightened tensions or general instability which is engulfing the state.[30]

III ARTICLE XXI AND THE 4-STEP FRAMEWORK

Having analysed Article XXI, the question therefore is whether or not it may be relied upon by Members to justify the sanctions against Russia. To answer this I will apply the 4 step analytical framework developed in *Russia – Traffic in Transit* and applied in *Saudi Arabia — IPRs*.[31]

(a) Step one

The first step in the analysis is to answer the objective question of whether one of conditions required in subsections (i)-(iii) is present? In the case of the sanctions against Russia the most oblivious subsection to be relied upon would be Article XXI(b)(iii), which requires an analysis of whether the measures taken were 'taken in time of war or other emergency in international relations;'.[32] The fact that Russia refuses to refer to their actions as either an invasion or a war causes an issue for the first part of the subsection. However, this need not be dealt with further because 'emergency in international relations' has been interpreted by the panel in *Russia – Traffic in Transit* as being a '…a situation of armed conflict…'.[33] Therefore, the objective fact that there is an armed conflict occurring between Russia and Ukraine would satisfy subsection (iii) without the need to delve into the definition of a war.

(b) Step two

Step two relates to the first words of subsection (iii) 'taken in time of'. This requires that the measure be taken while the condition described in subsection (iii) is still present.[34] This is met by the sanctions against Russia, because the armed conflict is still occurring at all relevant

[30] Op cite note 14 para 7.75-7.76.
[31] Op cite note 23.
[32] Op cite note 3 Article XXI(b)(iii).
[33] Op cite note 14 para 7.111.
[34] Op cite note 23 para 7.247.

times when the sanctions were imposed and therefore so was the emergency in international relations.

(c) Step three

Step three looks at whether the member invoking Article XXI has sufficiently articulated the essential security interests which relate to the measures being taken by the member.[35] This requirement is simply to allow for the panel to analyse the essential security interests in relation to the measure which has been implemented.[36] Therefore, all that is required here is that the member articulate a good faith essential security interest. In the case of the sanctions against Russia it will be up to each individual member to articulate their various security interests. This step does not entail an analysis and simply the articulation of the essential security interests is sufficient. The nature of the essential security interests were identified in *Russia – Traffic in Transit* as: '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'.[37] In the case of the Russia Ukraine conflict, I can think of two plausible options which cover almost all WTO Members around the globe. The first is the threat of a nuclear war, this threat is a valid concern if the conflict continues.[38] A nuclear threat would affect the 'protection of its territory and its population' of any member in the world. Even if it were argued that a nuclear war is unlikely, the question is not one of statistical probability but rather whether the member raises it in good faith, if the answer is yes, then it is within any Members discretion to raise this threat as a threat to their essential security interests. The next option which covers all WTO Members who are also NATO Members, is the risk of the spill over of the conflict involving NATO members who are geographically close to the conflict zone, which would then potentially result in the invocation of article 5 which could force the involvement of every NATO Member and effectively start a 3rd World War.[39] Therefore, due to the global risks of this conflict almost every WTO member could raise legitimate essential security interest in relation to the conflict.

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[35] Ibid.
[36] Ibid para 7.249.
[37] Op cite note 14 para 7.130.
[38] W.J. Hennigan 'This Is Not a Bluff.' Putin Raises Specter of Nuclear Weapons Following Battlefield Losses' available at *https://time.com/6215610/putin-nuclear-weapons-threat/* accessed on 12 December 2022.
[39] Matt Spetalnick 'Explainer: NATO's Articles 4 and 5: Could Ukraine war trigger its defence obligations?' available at *https://www.reuters.com/world/europe/how-natos-defense-obligations-could-be-triggered-by-ukraine-conflict-2022-11-15/* accessed on 14 December 2022.

(d) Step four

Step four, the final step constitutes an analysis in which the articulated essential security interest is weighed up against the measure, to determine whether there is a plausible connection between the security intertest and the measure. The measures in question are quantitative restrictions in the form of import bans of Russian products as well as the suspension of Russia's MFN status.[40] For this step to be met it must be shown that the measure being the sanctions against Russia are linked to protecting the essential security interest which is the de-escalation of the armed conflict. The burden of proof is that there is a plausible link.[41] I argue there is a plausible link between the sanctions and their goal. It is estimated that Russia is spending approximately $500 million a day on their conflict with Ukraine.[42] The estimate on this figure various greatly but the conclusion remains the same, the conflict is costing Russia a lot of money, by hurting the Russian economy through sanctions it makes the continuation of that conflict far less palatable. Put differently, if the sanctions hurt the Russian economy enough then there will not be money available to fund the war. Therefore, the plausible link is present.

(e) 'Taken in time of'

As discussed above one of the requirements for instituting a measured based on GATT Article XXI is that the measure is 'taken in time of' the condition. In the case of the sanctions on Russia the condition would be the war and as long as the war is ongoing Members may institute new sanctions. The wording however makes it questionable if a justified measure is taken in a time when the conditions are occurring, then will the measure cease to be justified under Article XXI as soon as the conditions cease to occur. Article XXI does not explicitly state that measures cease to be justified when the condition ends. I argue that it must be understood that as soon as the condition ends the sanctions must end with it.

This is supported by the actions of the US in relation to the Nicaragua trade embargo which the US lifted as soon as it deemed the conditions which necessitated the measure ceased to exist.[43] The US actions however do not constitute a definitive answer as to whether this is a requirement of Article XXI.

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[40] Op cite note 6.
[41] Op cite note 19 at 602.
[42] Aleksey Maltsev 'What's the cost of war for Russia, and what could be done with this money?' available at *https://genevasolutions.news/ukraine-stories/what-s-the-cost-of-war-for-russia-and-what-could-be-done-with-this-money* accessed on 15 December 2022.
[43] Analytical Index of The GATT 'Article XXI Security Exceptions' available at *https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf* accessed on 22 November 2022 at 604.

One must interpret Article XXI in terms of the general requirement in the Marrakesh Agreement of non-discrimination which is stated in both the MFN provision and the objectives of the WTO '…the elimination of discriminatory treatment in international trade relations.'[44] With this in mind it would be discriminatory treatment to continue with a sanction when the initial justification of the sanction ceases to exist. Therefore, as soon as the war ends all sanctions would need to immediately end as well. What the war 'ending' means however might be contentious. If the fighting ends but Russia still holds Ukrainian territory it is debatable whether the war has ended.

This interpretation of Article XXI is also most beneficial towards influencing Russian behaviour. If Russia knew that despite ending the war the sanctions would continue then there would be no incentive to change their behaviour, however if Russia was assured that that their MFN status would be regained the moment the war ends, then this would incentivise Russia to end the war.

IV ARTICLE XX

As shown above the measures which have been implemented against Russia are legally justified under GATT Article XXI. However, this conclusion does not necessarily guarantee the same outcome before a panel and there is no harm in having an alternative option to justify the sanctions, this is provided for by GATT Article XX:(a).[45] GATT Article XX:(a) allows a member to implement measures which would otherwise be in breach of WTO law when they are 'necessary to protect public morals;'.[46] The measure must also comply with the chapeau which requires that 'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…'.[47]

The potential to use Article XX:(a) in circumstances relating to foreign policy was opened up by the panel in *EC — Seal Products*.[48] The Panel accepted the argument by the EU that due to the fact that the way in which the Seals were being killed was repugnant to most

[44] Op cite note 86 at 1-2.
[45] Ton Notermans 'Are EU Trade Sanctions on Russia WTO Compatible?' available at *https://ssrn.com/abstract=4141568 or* http://dx.doi.org/10.2139/ssrn.4141568 accessed on 27 July 2022 6.
[46] Op cite note 3 Article XX:(a).
[47] Ibid.
[48] AB Report, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products,* WT/OS400/ AB/R,WT/0S401/ AB/R, adopted June 18, 2014.

EU citizens, the ban on imports was necessary to protect public morals. Therefore, in the same was if it were shown that Russia's actions are repugnant to the citizens of any Member then said Member can justify an import ban on Russian products on the basis of it being necessary to protect public morals.[49] The challenge in using Article XX:(a) is that a strong link needs to be shown between the measure and the threat it seeks to protect against.[50] Where in *EC — Seal Products* there was a direct link between the product being banned and the threat to public morals, this is less so in the case of bans of Russian products. It can be argued that there is an indirect link in that the consumption of Russian products aids the Russian economy funding the repugnant behaviour which offends the public morals.[51]

Tuna — Dolphin panel[52] required that the restrictions be related to the nature of the product. Which could limit which products this could be used for against Russia.

V HAVE THE SANCTIONS WORKED?

This section will analyse the sanctions, their goals and whether they have achieved these goals and if not, then why and what can be done to achieve the goals? This analysis will direct the legal analysis that follows in the next section.

Given that the sanctions are highly likely to be legally justifiable under WTO law and that many members have implemented economic sanctions against Russia, why is the conflict still ongoing? The statistics show that two 3rds of the world's population live in countries which have failed to sanction or oppose Russia.[53] Despite the fact that the portion of the global population sanctioning Russia is in the minority making up only 16% of the global population, the portion supporting the Western position against Russia makes up 70% of the global GDP. 61% of the global GDP belongs to countries actively condemning Russia.[54] This represents a significant portion of the global economy. Despite this Russia continues the conflict, so have the sanctions been effective?

The answer to whether or not the sanctions have been effective is very much linked to what the goal of the sanctions are. If the goal of the sanctions were to outright stop the conflict,

[49] Op cite note 45 at 6-7.
[50] Ibid at 7.
[51] Ibid.
[52] Panel Report, *United States-Restrictions on imports of Tuna,* 0S21/R-39S/155 (Sept. 3, 1991) (not adopted).
[53] Ambassador Mark Green 'Countries That Have Sanctioned Russia' available at https://www.wilsoncenter.org/blog-post/countries-have-sanctioned-russia accessed on 26 July 2022.
[54] Ibid.

then it is clear that they have failed to achieve this. However, if the goal was to slow the conflict or restrict Russia's military capability then the answer is more nuanced. There is another issue of the timeframe over which the sanctions are analysed. The short versus the long-term goals of sanctions.

The UK government laid out their sanction goals as '…sanctions for the purposes of encouraging Russia to cease actions which destabilise Ukraine, or undermine or threaten the territorial integrity, sovereignty or independence of Ukraine.'[55] According to Spisak the purpose of sanctions is usually to cause a change in behaviour.[56] This change in behaviour can either be one which is sought in the short or the long term. Spisak contrasts the sanctions that have been imposed on Iran against those that have been imposed on Russia. The Iran sanctions were aimed at applying a longer term pressure, this is unlike the Russia sanctions which had the more immediate goal of '…stopping Putin's military offensive in Ukraine and de-escalating aggression.'[57] It is clear that these immediate goals have failed. History has shown that sanctions efficacy has been mixed, the evidence shows that they are most effective when they are able to impose a high cost on the targeted economy. This is best achieved when the sanctions are imposed by multiple countries at once and have a specific security goal.[58] These are all features which seem to be present in the Russian sanctions. The most likely reason for the failures lies in all of the weakness of sanctions being present in the situation of Russia. Sanctions are more effective against democracies than they are against autocrats and they work better against smaller countries with smaller economics. Russia is a large authoritarian country with a powerful economy.[59] The short term impact of the sanctions on the Russia economy is undeniable, the Rouble dropped in value by 45% and the Central Bank of Russian doubled its interest rate to 20%. These impacts were however short lived, the Rouble strengthened to its pre-conflict level in April and has maintained this level at the time of writing and the Central Bank has begun cutting the interest rate.[60] The question is are these short term impacts impeding Russia from funding the war? It would appear not and this is linked to the fact that Russia is still receiving $1billion a day in revenue from oil and gas exports. This is due to the

[55] The Russia (Sanctions) (EU Exit) Regulations 2019 no. 855 section 4.
[56] Anton Spisak 'Sanctioning Russia: Where Does the West Go Next?' available at https://institute.global/sites/default/files/articles/Sanctioning-Russia-Where-Does-the-West-Go-Next-.pdf accessed on the 2 August 2022.
[57] Ibid at 7.
[58] Ibid.
[59] Ibid at 7.
[60] Gerard DiPippo 'Strangling the Bear? The Sanctions on Russia after Four Months' available at *https://www.csis.org/analysis/strangling-bear-sanctions-russia-after-four-months accessed* on the 3 August 2022.

fact that European economics such as Germany have failed to cut their reliance on Russian oil and gas and China who is allied with Russia has in fact increased its imports of Russian oil and gas.[61]

As research shows the greatest chance for sanctions to achieve their goal is for multiple countries to be involved. In other words multilateral sanctions are more effective than unilateral ones. This statement is compounded even further when you are dealing with a world power such as Russia. The fact that Russia has an ally in China (the words 2nd largest economy) has greatly reduced the chances of these sanctions succeeding.[62] Trade between Russia and China has increased by 50% since the first sanctions in 2014 were placed on Russia when Crimea was annexed.[63] There is therefore a direct link between a decrease in trade with the West due to sanctions and an increase in trade with China. If it is possible for Russia to continue trading with the world by using China as their middle man, the sanctions will likely fail to have their intended impact, despite this hurdle it waits to be seen whether the current sanctions will achieve their goals in the long term, however the initial hope of an immediate impact seems to have failed. According to Borrell who is the acting High Representative of the European Union for Foreign Affairs and Security Policy, the sanctions are working.[64] Borrell never anticipated the immediate impact that the initial sanctions packages may have hoped for but instead explains that strategic patience is needed for the sanctions to have their full desired effect.[65]

Finally it is most effective when sanctions have a high immediate cost which does not allow governments to adjust their policies to evade sanctions.[66] Russia has had varying degrees of sanctions placed on it since 2014, so this immediate high impact was not possible to achieve with these new sanctions because Russia has already been navigating and learning how to operate under less severe sanctions since 2014.

(a) The consequences of the sanctions

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[61] Reuters 'Factbox: China-Russia trade has surged as countries grow closer' available at *https://www.reuters.com/markets/europe/china-russia-trade-has-surged-countries-grow-closer-2022-03-01/* accessed on 3 August 2022.
[62] IMF 'GDP' available at *https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD* accessed on 3 August 2022.
[63] Op cite note 61.
[64] Josep Borrell 'The sanctions against Russia are working' available at *https://www.eeas.europa.eu/eeas/sanctions-against-russia-are-working_en* accessed on the 3 August 2022.
[65] Ibid.
[66] Dursun Peksen 'When Do Economic Sanctions Work Best?' available at *https://www.cnas.org/publications/commentary/when-do-economic-sanctions-work-best* accessed on 3 August 2022.

Sanctions are an alternative to using methods such as armed conflict to influence State behaviour. In the same way as going to war has consequences so do sanctions. In the case of the Russia Ukraine conflict the West has taken the view that the cost of the sanctions is far less than the cost of a war. But what are the costs of the sanctions?[67] The main cost which is being felt by the countries imposing sanctions on Russia being, in the energy sector.[68] The decision to reduce reliance on Russian gas and oil, with the long term goal to completely stop dealing with Russia for supply of these resources has already caused fuel prices to increase dramatically due to the global deficit in oil and gas, this has created a knock on effect causing inflation and increases in the prices of food in the countries imposing sanctions as well as those not imposing sanctions.[69] South Africa has seen fuel prices increase despite not being a participant in any sanctions against Russia. These increases in fuel prices have impacted all aspects of the South African economy causing inflation. This is only one example of how an uninvolved country has been negatively impacted by the sanctions.[70]

One argument made is that the fact the Rouble exchange rate has risen is a sign that the sanctions are not working, this according to Borrell is a dubious interpretation.[71] In actuality this raise in value of the Rouble is an indication of a massive imbalance between a collapse in imports due to the sanctions and the high level of oil and gas exports. This surplus in trade is actually not a sign of a healthy economy especially one like Russia's which relies on imports of high-value products and the export of raw materials. This is forcing Russia to substitute imports with domestic products which has been challenging in relation to tech products.[72]

As seen above there is no yes or no answer to the question of 'have the sanctions worked', this really does depend on the goal they are framed under. However, if the goal is to end the conflict in the short term then they have unquestionably failed to do so. When innocent lives are on the line I would argue that this therefore constitutes a failure and necessitates looking towards solutions which will increase the efficacy of the sanctions under the WTO, or make use of the WTO's other trade tools as an alternative means to achieve the goal that the sanctions have failed to achieve.

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[67] Boris Begović 'Book review: The Economic Weapon: The Rise of Sanctions as a Tool of Modern War by Nicholas Mulder' (2022) *New Haven and London:Yale University Press* 613-624 at 613.
[68] Ibid.
[69] Ibid at 613.
[70] Associated Press 'Ukraine War Blamed for Fuel Hikes in South Africa, Continent' available at *https://www.usnews.com/news/business/articles/2022-06-01/ukraine-war-blamed-for-fuel-hikes-in-south-africa-continent* accessed on 10 Feb 2023.
[71] Op cite note 67 at 613.
[72] Ibid.

VI ALTERNATIVES TO SANCTIONS IN THEIR CURRENT FORM

I now turn to discuss expulsion and thereafter a method of unifying sanctions against Russia.

a) Expulsion of Russia from the WTO

The first measure under the WTO which has been very publicly discussed is the expulsion of Russia from the WTO.[73] No member has ever been expelled from the WTO and until this war it was not much of a topic of interest or discussion. There is also nothing in the WTO agreement which directly envisages the expulsion of a member. However there is a hidden mechanism which makes it possible to theoretically expel a member.[74] This is in terms of the clause in amended Article X of the Marrakesh Agreement. In terms of Article X:1 any member may initiate a proposal to amend the Marrakesh Agreement. The next step is that the Ministerial Conference should by consensus decide whether or not to present the proposal to the members for their acceptance. If the Ministerial Conference cannot make a decision by consensus then they can take a decision by a two thirds majority vote.[75] Article X:4 stipulates that if the Marrakesh Agreement is amended by a two thirds majority and said amendment does not change the rights and obligations of each member, then the amendment is effective on all members. Article X:3 however provides that when an amendment decided by a two thirds majority does affect the rights and obligations of the members, then it will only be effective against the members subject to the amendment. In terms of this paragraph the Ministerial Conference with a two thirds majority of the members may decide that any member who has not accepted an amendment within a specified time period has the right to withdraw from the WTO or remain a member with the Ministerial Conference's consent.[76]

With the above in mind a tactic to expel Russia is available. If the EU or United States submit any proposed amendment which would be unacceptable to Russia and it is accepted by a two thirds majority of the Ministerial Conference, then this proposal would be submitted to

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[73] Terence P Stewart 'A former Appellate Body Chair argues WTO Members have the ability to remove the Russian Federation from WTO Membership; other proposals to strip MN benefits from Russia and services restrictions' Available at *https://currentthoughtsontrade.com/2022/03/02/a-former-appellate-body-chair-argues-wto-members-have-the-ability-to-remove-the-russian-federation-from-wto-membership-other-proposals-to-strip-mfn-benefits-from-russia-and-services-restrictions/* accessed on 14 July 2022.
[74] Qingjiang Kong & Shuai Guo 'WTO Reform: Will There Be a Third Option other than a U.S. Withdrawal and a China Expulsion' (2019) 14 *Asian Journal of WTO and International Health Law and Policy* 359 at 381.
[75] Ibid.
[76] Ibid.

the members who could pass it again by a two thirds majority. It would be assumed that Russia would not vote in favour of an amendment contrary to their interests. If the Ministerial Conference then decides by a three fours majority vote that the amendment is of the nature affecting the rights and obligations of the members, then any member which does not accept the amendment is either forced to withdraw from the WTO or remain with the consent of the Ministerial Conference. Therefore, any other member will be in a position to block the WTO membership of whichever member did not accept the amendment.

This method could be used to expel Russia directly with the procedure described above or it could be used to amend the Marrakesh Agreement to include an expulsion condition, such as the invasion of another WTO member.[77] Obviously Russia would not agree to a provision which they would be *de facto* in breach of.

As can be seen, without a direct clause dealing with expulsion, should a member wish to expel Russia they must take a very roundabout, indirect and uncertain path which could at any point be halted by failing to obtain the requisite majority at a vote. With the fact that 141 members of the UN voted to condemn Russia's invasion of Ukraine, should the same members vote in favour of expelling Russia the two thirds and three quarters majorities would easily be met.[78] Therefore, the only thing in the way of the expulsion of Russia is the reluctance to decide matters by way of a vote at the WTO.

The expulsion of Russia from the WTO would have a definite symbolic effect, however the unlikelihood of the expulsion does not mean Russia cannot be effectively sanctioned. As was detailed above, the use of the security exemption allows each member to individually treat Russia as if they were expelled from the WTO and if every member made use of this exemption then an expulsion would have no greater impact other than being symbolic. However there are many members who currently are not making use of the security exemption to sanction Russia and the expulsion may encourage greater buy in for unified sanctions. The expulsion or even the risk of expulsion could act as a sanction on its own, in the sense that it brings with it long term risks for Russia. If the invasion ends it would mean as detailed above that the sanctions being brought under the security exemption would come to an end and Russia would continue business as usual at least from a trade perspective. However, if Russia were expelled from the WTO it would allow any member to continue with the unequal treatment indefinitely. Russia's

[77] Timothy Meyer and Todd N. Tucker 'There are two ways to kick Russia out of the world trade system. One is more likely to work.' Available at *https://www.washingtonpost.com/politics/2022/03/11/russia-wto-penalize-ukraine-conflict/* accessed on 5 August 2022.
[78] Ibid.

expulsion would therefore have permanent detrimental effects on their trade which is something they have an incentive to avoid. If Russia were expelled eventually they would want to rejoint he WTO, they would be doing so from the same position as a State who had never been a member before, this would entail reapplying for membership.[79]

Firstly, this process takes years to complete which would mean that even if the war was ended shortly after the expulsion the negative repercussions of an expulsion would endure for years to come or potentially forever if Russia was never allowed to re-join the WTO.[80] Unlike with sanctions under the security exemption which are possible to reverse immediately after the war ends.

Secondly, using the example of China, their late joining of the WTO resulted in additional commitments made, Russia might be subject to the same sort of treatment in the case of them trying to re-join post expulsion. If the expulsion process described above did begin it may influence Russia's behaviour due to its potential long term repercussions, this is however merely hypothetical, in fact Russia has gestured at the possibility of voluntarily leaving the WTO as a response to their perceived unfair treatment in the form of the sanctions.[81] They went as far as drafting a domestic law which would facilitate their withdrawal. Despite this no further action was taken indicating this may have been an empty threat and that Russia in fact does value their membership to the WTO.

The truth is however that expulsion is more powerful as a threat which may contain long term consequences than a tool to advance sanctions in the short term. It is unlikely that any country who has chosen not to introduce sanctions under Article XXI would suddenly do so due to the expulsion of Russia, in other words if Russia was expelled the level of sanctions against them would most likely remain unchanged. Therefore, if it were to change Russia's behaviour it would only be able to do so if treated as a threat posed to Russia that unless the conflict is ended they will be expelled, once the expulsion has taken place it would be a sunk cost to Russia and hold no further influence.[82]

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[79] Yuliia Kucheriava 'Russia's Invasion of Ukraine: A WTO Perspective' (2022) 17 *Global Trade and Customs Journal* 10 at 427.

[80] Ibid.

[81] IISD 'Russia Plans to Exit World Trade Organization and Other Global Bodies' available at *https://www.iisd.org/articles/news/russia-plans-exit-world-trade-organization* accessed on 22 November 2022

[82] There have been discussions about making use of a suspension instead of an expulsion. I would argue that a suspension is far less effective than the treat of expulsion for the fact that a suspension would remove any long-term consequences like those attached to an expulsion and still fail to have any short-term impact on in levels of sanctions which members can apply (in the context of members already being free to sanction under Article XXI).

(b) How to unify the response to Russia[83]

The sanctions are not having their desired effect as established above, the greatest weakness of these sanctions and the probable reason for them not being able to influence Russia, is the fact that they have not been unified. Most notably China has not been a participant. The worlds 2nd largest economy being willing to largely fill the trade gap that the sanctions have created, has largely nullified the sanctions effect on Russia. The only way to avoid this would be to force every country to maintain a certain level of sanctions, thereby making it impossible for the sanctioned Member to get assistance from any other Member.

An immediate argument against this might be that the WTO is not the right place to entertain this sort of mission, it is an organisation aimed at trade liberalisation and a provision requiring Members to do the opposite would be against the mission of the WTO.[84] To this I would argue that the WTO has many agreements which allow for trade restrictive or protectionist behaviour when they are aimed at the goal of overall trade liberalisation, a prime example would be the SPS Agreement allowing members to ban imports where there is a risk to health or plant life. This trade restrictive behaviour protects the goal of liberalisation.[85]

Additionally the War in Ukraine is estimated to have reduced global trade by 1.7% therefore it is certainly hindering the goal of the WTO, it also appears that the number one weapon that nations have used to try stop the war are trade sanctions. So the fact that the war is impacting WTO goals and the measures being used fall within the ambit of the WTO is a compelling reason why the WTO should be involved in resolving these issues.

One way which the WTO could regulate this is by negotiating an Agreement with the purpose of regulating mandatory sanctions. This Agreement would introduce provisions which would require all members to maintain a specified sanction level in the form of minimum tariffs and mandatory barriers to trade for certain products (for example anything which could be used in a military context). A proposed direction this could take is to have various provisions which trigger predetermined sanction levels upon the occurrence of specific events. For example the unprovoked declaration of war on a Member or non-Member by a Member would invoke a specific level of mandatory sanctions on that State.

This agreement would need to be binding on Members and be worded in a way that it forces Members to apply the sanctions to non-members as well, this is essential for the

[83] This suggestion is made under the assumption that Russia is still a WTO member.
[84] World Trade Organization 'WTO in Brief' available at https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm accessed on 24 November 2022.
[85] Agreement on the Application of Sanitary and Phytosanitary Measures 1867 U.N.T.S. 493.

agreement to be effective. This is because with such a wording even if a Member such as Russia left the organization the rest of the WTO Members would still be obliged to maintain the sanctions.

The only way this kind of agreement would be passed is by way of a vote. Quite simply because Russia (and most likely some other Members) would not approve it by way of consensus. This is of course assuming Russia has not already been expelled.

To keep in line with the goals of the WTO this kind of agreement would need to only be invoked for the most universally agreed wrongs. If the agreement proposed was passed it would be able to close the loophole of Russia trading through countries like China who are allied to them and the sanctions would have their full impact. This would have a truly massive impact on the economy of Russia and also impact their ability to fund the war. It is most likely the only way the WTO could perfect the sanctions and be used as a tool to force Russia to end the war.

Another possible method of obtaining the same outcome would be through the use of Article X of the Marrakesh Agreement to amend the GATT. The agreement described above would be the best long term solution to regulating all instances of repugnant behaviour by rogue States. However, in the short term an amendment specifically targeting Russia could be introduced into the GATT by way of an amendment.

In terms of Article X any Member may initiate a proposal to amend the GATT by submitting said proposal to the Ministerial Conference. If the Ministerial Conference cannot agree by consensus to submit the proposal to the Members then they will decided on a two-thirds majority vote. [86]

Because this amendment would be one requiring a mandatory action by members it would in terms of Article X:3 be an amendment which alters the rights and obligations of the Members. Therefore, to be effective there must be a two-thirds acceptance by the Members.[87] Once this is achieved then the Ministerial Conference may by three-fourths majority, decide that members who have not accepted the amendment within a specified period of time, are free to withdraw from the WTO or remain with the consent of the Ministerial Conference.[88]

[86] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 Article X.
[87] Op cite note 74 at 381
[88] Op cite note 86 Article X:3.

Therefore, an amendment to the GATT which requires members to introduce mandatory sanctions is certainly possible from a hypothetical standpoint, however, at what cost? Assume the two-thirds majority was achieved and a date for acceptance was set by the Ministerial Conference but China and potentially other members may decide not to comply and instead withdraw from the WTO. This could potentially destroy the WTO and achieve nothing towards ending the war. Therefore, this is a high risk tactic. However the most likely outcome would be Members refusing to vote which would stall the whole process, the reluctance to vote will be dealt with below.

c) The WTO reluctance to vote

A significant problem of using the WTO as a tool to influence State behaviour is the WTO reluctance to take matters to a vote, this reluctance has caused some notable problems within the WTO. Namely the inability to appoint Appellate Body members due to the US blocking appointments, this issue could be resolved by way of a vote.[89]

To determine the plausibility of expelling Russia from the WTO or the more ambitious idea of using the WTO as a tool for facilitating unified sanctions, a discussion of why voting has not taken place and how to facilitate voting in the WTO is relevant. Without the WTO resorting to a vote neither options would be viable.

In terms of the Marrakesh agreement when Members cannot obtain consensus they are able to vote. So this begs the question why have members never resorted to a vote to resolve even the simplest of matters? The decision making procedure of the WTO is contained in Articles IX, X and XII of the Marrakesh Agreement.[90] In terms of Article IX:1 the normal procedure for decision making is consensus, in other words for a decision to be made no member must object to the decision, this method of decision making is akin to the veto powers found in the UN.[91] Unlike the UN however every WTO member is imbued with these veto powers in relation to every decision. This makes decision making a difficult, process in the case that a decision negatively affects even a single Member consensus cannot be obtained. Article IX:1 foresaw circumstances where consensus might not be possible and it therefore makes provision for a voting process which may be undertaken when consensus cannot be

[89] Van den Bossche, Peter 'Is there a future for the WTO Appellate Body and WTO Dispute Settlement?' (2022) WTI Working Paper No. 01/2022 available at *https://www.wti.org/research/publications/1344/is-there-a-future-for-the-wto-appellate-body-and-wto-dispute-settlement/* accessed on 25 November 2022.
[90] Alex Ansong 'Single Undertaking, Different Speeds: Pliable Models for Decision-making in the WTO' *Journal of International Economic Law* (2018) 21 *Journal 1of International Economic Law* 395–410.
[91] Ibid at 396.

reached so as to not cause deadlocks. The WTO membership has however refused to make use of voting and decisions are *defacto* made by consensus exclusively. This lack of willingness to make use of the voting process envisioned in the Marrakesh agreement is responsible for the breakdown of the Appellate Body, this issue would be resolved by a vote.

It is clear that to be able to use the WTO as a tool to influence State behaviour consensus will not work, the State, in our case Russia would simply veto any initiative proposed. The expulsion process proposed in terms of Article X would require voting and so would any other radical measure.

It would appear that the reason for members failing to use voting as a decision making tool is linked to various political considerations.[92] One of which is that members seem to view voting as a floodgate which should remain closed. In other words should a vote be taken on one matter the same would happen in a multitude of others and this would eventually erode the principle of decision making by consensus.[93] Keeping with the status quo of taking decisions by consensus allows for every Member to retain a level of power, if any single Member is unhappy about anything at the WTO it is not passed. If the floodgate were to be opened and everything was voted on this would substantially change the nature of the WTO.

It seems that voting in and of itself is far-fetched, to then add to the mix the fact that the vote would be in relation to such a controversial topic, this makes it highly unlikely that an amendment would be passed. The fact that a radical solution is unlikely to succeed under the WTO does not mean that there are not any other methods of supporting the sanctions within the organization.

VII DIPLOMATIC REACTIONS

Condemnation at the WTO is not only actioned through sanctions, due to the diplomatic nature of the WTO diplomatic expressions of dissatisfaction are another way of expressing that a Member is acting in a way which is unacceptable to the international community. This has been actualised via the WTO by the EU in their decision to suspend all pending litigation with Russia at the DSB.[94]

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[92] Matthew Yeo 'Tensions Between Consensus and Voting in WTO Decision-Making – Part I: Appointing Appellate Body Members' available at *https://www.steptoeglobaltradeblog.com/2021/08/tensions-between-consensus-and-voting-in-wto-decision-making-part-i-appointing-appellate-body-members/* accessed on 25 November 2022.
[93] Ibid.
[94] Op cite note 79 at 422.

Another diplomatic expression against Russia at the WTO has been Members refusing to participate in 3rd party session where both Russia and Ukraine are present and Russian representatives make oral statements.

This reaction has been justified by Members in terms of Article 10.2 of the DSU which grants Members the right to an opportunity to be heard by the panel. Members have argued that due to the invasion by Russia of Ukraine, Ukraine has been prejudiced in exercising this right which therefore obstructs the DSU from functioning.

Finally, Members have condemned Belarus's involvement in the invasion calling it a 'premeditated, illegal and unprovoked invasion of Ukraine'.[95] Belarus had submitted an application to join/acceded to the WTO and due to the invasion, fourteen WTO members and the EU have made the decision to cease participation in any accession proceedings which suspends the process. This refusal to further consider Belarus's accession has been justified on the basis of Belarus's connection with the invasion 'incompatible with the values and principles of the WTO and of a just rules-based order'.[96]

These diplomatic responses may not have an economic impact, but they do have a coercive effect from a reputational perspective. These statements against Belarus and Russia isolate Russia from the international community and put them squarely on the wrong side of history. Whether or not these statements will influence Russia in any way remains to be seen. The position taken on Belarus however would indicate that they will not be able accede to the WTO which does have real world implications for them and Russia.

VIII TRADE LIBERALISATION, THE OTHER SIDE OF TRADE SANCTIONS

This paper has thus far focused on the WTO being used to facilitate the use of sanctions as a tool to influence Russia into ending the war. Despite the WTO not standing in the way of sanctions it has been shown that as an organisation it is not geared towards facilitating sanctions. This is because the core purpose of the WTO is and always has been trade liberalisation.

Despite this not being a means to end the war, trade liberalisation can mitigate some of its negative impacts on Ukraine. This approach will not only assist the Ukrainian economy but

[95] Joint Statement by Ambassadors accredited to Indonesia on Russia's Invasion of Ukraine available at *https://www.eeas.europa.eu/delegations/indonesia/joint-statement-russia's-invasion-ukraine_en?s=168* accessed on 24 November 2022.
[96] Op cite note 79 at 424.

also mitigate the negative impacts of the war in general such as food shortages which are as a direct result of the war.[97] By assisting the Ukrainian economy their food exports can re-start which will hopefully bring down global food prices which will aid in reversing the food crisis this war has exacerbated.[98]

To this end as well as with the goal of showing solidarity to Ukraine, Members have been proposing measures to facilitate market access for Ukrainian goods. These proposals include the elimination of customs duties and measures expediting the movement, clearance, and release of goods. According to Kucheriava WTO agreements do not provide for the temporary waiver of import tariffs however, there is a growing body of evidence which suggests that this sort of waiver is something Members can implement on their own initiative.[99] This could be done through Article 9.[100]

The war in Ukraine has prompted both the EU and the UK to take this a step further by both States temporarily waiving all outstanding import duties due from Ukraine. Furthermore, the EU has also suspended all their anti-dumping and anti-subsidy duties which were in place on Ukrainian steel. Both the US and Canada have also implemented these relief measures for Ukraine.[101]

Trade liberalisation is not only concerned with tariffs, the WTO also aims to achieve the goal of trade liberalisation through improving freedom of transit of goods, as the fees surrounding imports and exports as well as formalities. The Trade Facilitation Agreement ('TFA') has the goal of improving these issues. These areas are where the WTO through the TFA is in a perfect position to facilitate Members assisting Ukraine in resolving the food crisis created by the war. The war has disrupted trade and the most concerning area is in relation to agriculture. This has not only impacted Ukraine but also the entire world. Russia and Ukraine combined supply 25% of the world's wheat, 15% of its barley and 45% of its sunflower oil.[102]Russian blockage of

[97] WTO 'The Crisis in Ukraine Implications of the war for global trade and development' available at *https://www.wto.org/english/res_e/booksp_e/imparctukraine422_e.pdf* accessed on 22 November 2022.
[98] UN Women 'Ukraine and the food and fuel crisis: 4 things to know' available at *https://www.unwomen.org/en/news-stories/feature-story/2022/09/ukraine-and-the-food-and-fuel-crisis-4-things-to-know* accessed on 22 November 2022.
[99] Op cite note 79 at 425.
[100] Op cite note 86 Article IX.
[101] European Commission 'Ukraine: Commission waives customs duties and VAT on the import of life- saving goods for Ukrainians available at *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4235* accessed on 20 Jan 2022.
[102] Op cite note 97 at 2.

Ukraine's Black Sea ports has resulted in 90% of Ukraine's grain and oilseed exports being disrupted.[103]

This sharp decrease in exports from Ukraine and Russia of these products is believed to have resulted in an estimated global food price increase of 8-22 percent.[104] Thus far in this paper the approach being discussed has been to levy sanctions on Russia to end the war, these very sanctions are a part of the reason for the reduced exports from Russia and therefore the exacerbation of the global food crisis. It is therefore important that while sanctions are maintained that the WTO looks at ways to mitigate the externalities they cause.

This is where the WTO through the use of the TFA came into play. The EU, in line with the TFA best practices came up with an action plan to assist Ukraine in exporting its agricultural products. The action plan suggested the establishment of EU-Ukraine solidarity lanes which planned to link Ukrainian agricultural exports to EU transportation making use of both the Baltic Sea Ports and Bulgarian Ports.[105] The action plan mobilised private market participants to designated areas creating a 'one-stop shop' linking Ukrainian producers to EU transporters. This initiative was implemented and resulted in the export of 15 million tonnes of grain, oilseeds, and related products as well as 60% of Ukraine's grain.[106]

What is concerning is that this is a two-way street and the measures just discussed above which are being used to aid Ukraine are being used by China to aid Russia in much the same way. China has cut its MFN tariffs on coal which were previously between 3-6% to zero, this disproportionately benefits Russian exports which were not able to be exported elsewhere due to the sanctions. This point brings the argument full circle that if any sort of trade sanction is to be fully effective the WTO needs to be a role player by implementing mandatory sanctions which would prevent other members assisting the dissident through trade liberalising measures.

IX CONCLUSION

All evidence points to the fact that trade sanctions can affect State behaviour, this has been emphatically shown from their past uses. However, for this to be so there are multiple factors which are at play and if even one of these factors is not present then trade sanctions may fail to

[103] European Commission 'An Action Plan For EU-Ukraine Solidarity Lanes to Facilitate Ukraine's Agricultural Export And Bilateral Trade With The EU' Brussels, 12.5.2022 COM(2022) 217 final.
[104] Op cite note 79 at 20.
[105] Ibid.
[106] European Union 'EU-Ukraine Solidarity Lanes – Lifeline for Ukrainian economy, key for global food security' (2022) available at *https://euneighbourseast.eu/wp-content/uploads/2022/11/eu-ukraine_solidarity_lanes_factsheet.pdf* accessed on 22 November 2022.

have any meaningful effect. This has been the case in the sanctions against Russia. The two factors which have diminished the effectiveness of the sanctions are the strength and size of the Russian economy and the lack of consistent/multilateral application of the sanctions by Members most notably China.

As the WTO currently stands it does not hinder the application of sanctions against Russia, however it also does not facilitate the sanctions, essentially the WTO through its security exemption allows the sanctions but does not involve itself any further than that. For the sanctions to be effective the sanctions would need to be applied multilaterally and to achieve this WTO would need to play a more active role, this would require breaking with the tradition of decision making by consensus and would constitute a major departure with how things are done at the WTO. It is unlikely that the WTO would be able to facilitate such an ambitious change and even if it did undertake to do so, it would take too long to have any meaningful impact at least insofar as Russia and Ukraine are concerned.

The WTO is therefore not as it currently stands able to assist in facilitating effective sanctions against Russia. This means that the WTO is not able to assist in ending the war, but this does not mean that the WTO is unable to assist in mitigating the effects of the war. The WTO is built on the idea of trade liberalisation, and this has shown to be an effective way of mitigating the food crisis caused by the war and supporting Ukraine economically in general which allows them to continue to defend their sovereignty.

The WTO certainly has a role to play but as it currently stands it is not the role of influencing state behaviour by way for sanctions.

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