

## HUMAN RIGHTS IMPLICATIONS OF THE RUSSIAN FEDERATION MEMBERSHIP IN THE WTO AFTER THE INVASION OF UKRAINE

**Kateryna Rashevskya**

Postgraduate Student at the Department of International Law, Educational and Scientific Institute of the International Relations of Taras Shevchenko National University of Kyiv, Ukraine

e-mail: c.rashevskya@gmail.com, orcid.org/0000-0001-9090-1934

### Summary

This paper aims to investigate the human rights implications of the challenges facing the WTO in connection with the international armed conflict between Russia and Ukraine and suggest possible ways to overcome them, as well as outline the range of arguments that can be used by states resorting to economic countermeasures, during the trade dispute settlement procedure. The author has reviewed the three key aspects related to the continuation of Russia's membership in the WTO, namely: (1) legal justification of restrictive trade measures (within sectoral and individual sanctions) through the use of security exceptions; (2) suspension or termination of Russia's participation in the WTO due to amendments to the Marrakesh Agreement; (3) adoption of WTO initiatives in the field of human rights protection in the context of political isolation of the Russian Federation. The research is critical in nature. It is conducted in the pragmatic paradigm through economic analysis of law (EAL). A combination of quantitative and qualitative approaches was used in the data analysis while case studies allow a detailed analysis of existing practice of the WTO DSB. The findings presented in the article should make an important contribution to the harmonization of international trade law and international human rights law and advance the progressive development of WTO law by potentially overcoming the existing legal gaps.

**Keywords:** international trade, security exception, Marrakesh Agreement, Russia's invasion, Developed Countries Coordinating Group, R2A.

DOI <https://doi.org/10.23856/5135>

### 1. Introduction

The WTO has traditionally tried to stay away from world politics. However, the refusal of the United States, the European Union, Canada, the United Kingdom, and Japan to grant most-favored-nation treatment (hereinafter MFN) to the Russian Federation in connection with the armed aggression against Ukraine is tantamount to suspending the benefits of membership of the aggressor state in the organization. The revocation of the MFN trade status, in combination with other economic sanctions, also hinders the application of the principle of national treatment and is a *de facto* trade isolation of Russia.

The major objective of this study is to investigate the human rights implications of the challenges facing the WTO in connection with the international armed conflict between Russia and Ukraine and suggest possible ways to overcome them, as well as outline the range of arguments that can be used by states resorting to economic countermeasures, during the trade dispute settlement procedure. The paper seeks to remedy the mentioned problems by analyzing agreements, which are an integral part of WTO law, and a critical assessment of

articles on this subject, written by M. Russel (*Russel, 2021*), I. Bogdanova (*Bogdanova, 2021*) and P. Ungphakorn (*Ungphakorn, 2022*).

The methodological approach taken in this study is a mixed methodology based on economic analysis of law (EAL). The article follows a case-study design aimed at adapting the existing practice of the WTO and its bodies to international trade relations in the context of Russia's aggression against Ukraine.

### ***Russia's objection to the possibility of imposing trade restrictions in the context of its invasion of Ukraine***

The issue of suspension of membership or exclusion of the Russian Federation from the WTO was called for by Ukraine in its letter to the General Council on March 2, 2022 (*Agence France-Presse, 2022*). Fearing such a turn of events, the Representative of Russia to the organization D. Lukashev on March 7, 2022, sent a letter to the Chairman of the General Council of the WTO, in which he explained why the exclusion of Russia from the organization is impossible.

*Firstly*, Russia denies a threat to Ukraine's national security, and therefore, in its view, Articles XXI GATT, XIVbis GATS, and 73bis TRIPS cannot be applied in trade relations between Russia and Ukraine.

*Secondly*, regarding Article XIII of the Marrakesh Agreement, Russia insists that Ukraine can no longer disagree with the application of the WTO's founding treaty and its annexes, as both states are full members, and Article XIII, paragraph 1, can only be used at the stage of accession to the organization.

*Thirdly*, Russia insists that exceptions to national security in the GATT, GATS, and TRIPS can be invoked only in the context of a waiver of obligations under the agreement and only by the state where there are threats to national security.

*Finally*, Russia asserts that the Marrakesh Agreement does not provide a mechanism for suspending membership or exclusion from the WTO (*Baschuk, 2022*).

These objections can be refuted mainly regarding the main treaties of the WTO legal system and existing practices, in particular the decisions of the Dispute Settlement Body (hereinafter DSB).

## **2. The scope of security exceptions for Ukraine and other countries**

As for the lack of the right in Ukraine to invoke security exceptions (Article XXI GATT), it should be noted that, ironically, Russia was the first country to win a trade dispute, citing this condition of lawful derogation from the WTO obligations. Thus, in the case of *Russia – Measures Concerning Traffic in Transit*, Ukraine challenged several Russian bans and restrictions on transit traffic by road and rail through Russia (to Central Asia). The panel found that the situation between Ukraine and Russia since 2014 has been an «emergency in international relations» (*DSB, 2017*), that threatens Russia's essential security interests and is very close to armed conflict. The group of experts confirmed that the restrictions imposed by the Russian Federation on WTO law complied with the considerations of its security interests (*ibid*, paras 7.136-7.137). There is no doubt that Russia's military invasion of Ukraine on February 24, 2022, is just another act of Russian aggression in the framework of the international armed conflict, which has been going on since the end of February 2014. Therefore, Ukraine, restricting trade measures, can reasonably refer to security exceptions, as Russia did in 2019. Ukraine does not need to invoke Article XIII of the Marrakesh Agreement at the same time as referring to the provisions of Article XXI of the GATT, XIVbis GATS, and 73bis TRIPS. Indeed, in the course

of the completion of Russia's accession to the WTO, Ukraine hoped that this would have a positive effect on stopping the practice of the neighboring state using the so-called trade wars for political pressure, as the main principle of WTO law is non-discrimination (combination of MFN and national regime). Therefore, Ukraine did not take the opportunity to declare the non-application of specific multilateral trade agreements in relations with Russia at the time of its accession.

In the context of the third objection, it should be noted that the states that refused to provide the most-favored-nation treatment in trade relations with Russia did so not so much because of the threat to their national security (although for some EU members: Poland, the Baltic States, Czech Republic, Romania – it does exist), and through the use of the doctrine of R2A (responsibility to act), the central tenets of which were highlighted in the reports of the Special Rapporteurs of the Human Rights Council – Oliver de Schutter and Alfred de Zayas. The latter insists that the doctrine of R2A «reflects the ontology of the rule of law. Responsibility to act means taking preventive and corrective measures to ensure the primacy of human rights, health and the environment, and the right to development» (*de Zayas, 2016*).

Although the main features of the doctrine were formulated only in the 2000s, the United States, Canada, and the EU have long linked trade and human rights, especially in relations with Russia. Thus, in 1974 the US Congress adopted the Jackson-Vanik Amendment to the US Trade Act. Introduced in response to restrictions on freedom of movement by the USSR, Article 2432, paragraph 1 (a), provided that goods from any non-market economy would not be subject to normal trade relations. In addition, the country itself would not participate in any US government program which provides for the direct or indirect granting of loans, credit, or investment guarantees, and the President of the United States will not enter into commercial agreements with such a country if it denies its citizens the right to free emigration; imposes excessive fees on the procedures necessary for emigration, regardless of the reasons and purposes of this tax. In 2012, Congress passed the Serhiy Magnitsky Law, and in 2016, the Magnitsky Global Law providing economic tools to combat large-scale and systematic human rights violations, for the most part, committed by Russia. Canada's Sergei Magnitsky Law, the UK's Global Anti-Corruption Sanctions Regulations and Global Human Rights Regulations, and Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses largely echo the provisions of the aforementioned US laws (*Russel, 2021*).

Sanctions imposed to stop and/or prevent large-scale human rights violations are, in essence, an economic blockade of both the perpetrators and the organizations belonging to them and entire sectors of the economy of the offending State. In the case of a ban on imports and exports of goods, *prima facie*, it can be said that such countermeasures are inconsistent with Articles I: 1 (MFN principle) and XI: 1 (prohibition of quantitative restrictions) of the GATT 1994 (*DSB, 1999*).

In the armed conflict that began in connection with the aggression of the Russian Federation in late February 2014 against Ukraine, the states that impose sanctions do not participate. It does not allow them to refer to the exception for national security reasons in the context of direct military confrontation (*DSB, 2017: para. 7.101*). At the same time, countries that have refused to provide MFN treatment in trade relations with Russia may justify such actions by «the emergency in international relations» and the global crisis of international order due to Russia's disregard for fundamental principles of international law (sovereign equality, prohibition of the use of force, respect for human rights) (*DSB, 2020*). To this end, such states should demonstrate:

1. The state of emergency in international relations and/or the general instability that engulfs or surrounds them (for example, invoking the UN General Assembly Resolution ES-11/1 «Aggression against Ukraine», approved by 86% of the WTO Member States).

2. This emergency affects the interests of national security, in particular, the maintenance of the rule of law and public order (*DSB, 2020*). In the case of the Russian Federation committing an act of aggression against Ukraine, which is accompanied by mass war crimes and crimes against humanity (*Prosecutor General Office, 2022*), there should be no doubt about this legitimate interest. In this context, one should also agree with Irina Bogdanova, who insists that the uncontrolled and significant flow of refugees should also be considered those that can create an emergency in international relations and is essential from the point of view of national security (*Bogdanova, 2021: 169*). As of the end of March 2022, the number of Ukrainian refugees exceeded 4 million (*European pravda, 2022*).

### **3. UN Charter and WTO law: working together to protect human rights**

States that impose sanctions on trade with Russia may refer to Article XXI (c) of the GATT 1994, which allows for any action to fulfill obligations under the Charter of the United Nations to preserve peace throughout the world and international security (*Marrakesh Agreement, 1994*).

On March 4, 2022, the WTO Developed Countries Coordinating Group (no information on membership in this group: probably the United States, the EU, and Russia, as indicated by the addressee) informed the General Council of Russia's expulsion. The move was justified by the latter's «gross violation of international law, the UN Charter, and the fundamental principles of international peace and security» (*Ungphakorn, 2022*), suggesting that in potential trade disputes over sanctions in the DSB, respondent states will refer to Article XXI (c) GATT 1994. It should be noted that the exclusion of Russia from the Developed Countries Coordinating Group makes it impossible for the aggressor state to participate in the backstage life of the WTO, namely: in making decisions on the appointment of heads of bodies, development of new trade rules in the so-called green room.

### **4. Legal mechanisms for excluding Russia from the WTO**

In the context of the reference to the lack of provisions in the Marrakesh Agreement that would regulate the exclusion of the state from the WTO, we should agree with Russia on this legal loophole in the founding treaty. At the same time, this does not mean that such a mechanism cannot be introduced based on existing amendments.

Article X of the Marrakesh Agreement allows two-thirds of WTO members to approve their rights and duties changes. Initially, such amendments are valid only for the states that adopt them. However, by three-quarters of the votes, WTO members may set a time limit within which dissenting States must (1) agree to change, (2) leave the WTO, or (3) obtain the permission of other members to remain (*Marrakesh Agreement, 1994*). Denying the latter option will, *de facto*, have the same effect as exclusion. This procedure can be used to amend the exclusion mechanism and establish special conditions for suspension or expulsion from the WTO in the event of a gross violation of international law, the UN Charter, and the fundamental principles of international peace and security.

Interestingly, without receiving the desired response to its objections, on March 21, 2022, Russia took more decisive steps: the State Duma registered a bill denouncing the protocol on Russia's accession to the WTO in order to «protect national interests, the need for protectionist policies, as measures in response to sanctions pressure and as self-defense» (WTO, 2022). As of mid-April 2022, the draft law is under consideration by the Economic Policy Committee. It should be emphasized that Russia made a similar move in 2018 and, given the decision of the DSB in a trade dispute with Ukraine in 2019, such blackmail had positive consequences for Russia.

The question of Russia's exclusion from the WTO lies beyond the legal environment, and the answer to it directly correlates with the political will of all member states. In this context, it should be mentioned that Russia became a member of the WTO only on August 22, 2012, nineteen years after the first application to join the GATT in 1993. Only Algeria has been trying to become a member of the WTO for longer than Russia. In 2014, Russia, despite joining the WTO on reasonably favorable terms (particularly in the case of agricultural subsidies and state-owned companies) (Report, 2011), began to use unjustified, sometimes protectionist, trade measures for political purposes against countries -neighbors, the US, and the EU (USTR, 2014: 4).

Today, Russia's aggressive actions against Ukraine's territorial integrity, political independence, and sovereignty, accompanied by a ban on agricultural exports and unilateral changes in trade contracts, not only have a negative impact on global food security and environmental protection but also block WTO activities, including its initiatives in the field of human rights promotion. Thus, the WTO Ministerial Conference, which was threatened twice in connection with the pandemic and scheduled for the day before the new act of aggression – on June 13, 2022, is again at risk. Necessary arrangements in agriculture, fisheries subsidies, e-commerce, and investment promotion for sustainable development are to be reached during the above-mentioned WTO summit.

In addition, due to the Russian aggression, world trade in 2022 will increase by only 3% compared to the forecast of 4.7%. The victims of such a reduction will be the poorest countries, where human rights are already low (WTO, 2022).

## 5. Conclusions

As the only universal organization in global trade, the WTO has long begun to address the impact of international trade on the promotion and protection of human rights. Hence, several initiatives in gender equality, environmental protection, sustainable development, combating hunger, and reducing the gap in access to education and health services. Since its signing, the GATT has had Article XXI, which, based on national security considerations through evolutionary interpretation, may protect human rights, especially in armed conflicts.

Russia's aggression against Ukraine has created new challenges, both for international trade in general and for the effective functioning of the WTO in particular. Since the UN Charter stipulates that measures may be taken against the aggressor state, consisting of complete or partial severance of economic relations, a number of the most influential actors have decided to prevent by such a way mass other international crimes that Russia has already committed in Bucha, Chernihiv, Okhtyrka, Mariupol. In addition to trade restrictions, some countries are refusing to cooperate politically. It, *inter alia*, jeopardizes the holding of the WTO Ministerial Conference and, therefore, delays the signing of important international agreements in

sustainable development. Moreover, Russia is trying to manipulate its membership in the Organization to influence decision-making in other member states and distort trade, which has dangerous consequences for ensuring food security, reducing environmental pollution, and eradicating poverty.

In these circumstances, the normal functioning of the WTO is impossible without the formation of new formats of cooperation with Russia: it may be the suspension of membership or expulsion from the Organization, which requires amendments to the Marrakesh Agreement. It is also possible that, following the example of the multiparty interim appeal arbitration arrangement (MPIA) in dispute settlement, individual states will, through bilateral or multilateral agreements, *de facto* remove Russia from participating in the WTO.

Responding to this challenge as soon as possible minimizes the negative impact on human rights, especially in the least developed countries. In the context of the international armed conflict between Russia and Ukraine, this will prevent atrocities and save lives.

### References

1. Presse, A. F. P.- A. F. (2022, March 3). *Ukraine urges WTO to shun Russia participation*. Retrieved from: <https://www.barrons.com/news/ukraine-urges-wto-to-shun-russia-participation-01646311510?tesla=y> (accessed April 10, 2022).
2. Baschuk B. (2022, March 7). *Russia responds to Ukraine's call to suspend it from the WTO*. Twitter. Retrieved from: <https://twitter.com/bbaschuk/status/1500880199495335938> (accessed April 15, 2022).
3. WTO (2019) *Russia — Measures Concerning Traffic in Transit, Panel Report, paras 7.76 and 7.114-7.123*. Retrieved from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512-7.pdf&Open=True> (accessed April 12, 2022).
4. OHCHR (2016) *Statement of Mr. Alfred-Maurice de Zayas Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council 33rd Session*. Retrieved from: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20480&LangID=E> (accessed April 8, 2022).
5. Russell M. (2021) *Global human rights sanctions*. European Parliamentary Research Service. Retrieved from: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS\\_BRI\(2021\)698791\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS_BRI(2021)698791_EN.pdf) (accessed April 10, 2022).
6. WTO (1999) *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Panel Report, para. 5.129*. Retrieved from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/90R.pdf&Open=True> (accessed April 12, 2022).
7. WTO (2020) *Saudi Arabia — Protection of IPRs, Panel Report, paras 7.257–7.270*. Retrieved from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567RA1.pdf&Open=True> (accessed April 12, 2022).
8. General Assembly (02 March 2022) *Resolution ES-11/1, Aggression against Ukraine, A/RES/ES-11/1*. Retrieved from <https://digitallibrary.un.org/record/3959039?ln=ru> (accessed April 12, 2022).
9. Kryminal'na vidpovidal'nist' za #russianwarcrimes! Кримінальна відповідальність за #RussianWarCrimes! Retrieved from: <https://warcrimes.gov.ua/all-crimes.html> (accessed April 13, 2022).
10. Bogdanova, I. (2021) *Targeted economic sanctions and WTO law: Examining the Adequacy of the National Security Exception*. Retrieved from: <https://www.researchgate.net/>

- publication/351712719\_Targeted\_Economic\_Sanctions\_and\_WTO\_Law\_Examining\_the\_Adequacy\_of\_the\_National\_Security\_Exception* (accessed April 10, 2022).
11. *European Pravda* (2022, March 30) *Viina Rosii zrobyla bizhentsiamy 4 miliony ukrainsiv–OON [Russia's war has made 4 million Ukrainians refugees–the UN]*. Retrieved from <https://www.euointegration.com.ua/news/2022/03/30/7136903/> (accessed April 14, 2022).
12. *WTO (1994) Marrakesh Agreement Establishing the World Trade Organization*. Retrieved from: [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm) (accessed April 13, 2022).
13. *Ungphakorn P. (2022) Has the Russian invasion of Ukraine inadvertently revealed one of the WTO's best kept secrets? Twitter*. Retrieved from: <https://twitter.com/CoppetainPU/status/1500100588901654536?s=20&t=n9K-qFwiibtQEXIElybH9Q> (accessed April 10, 2022).
14. *WTO (1994) General Agreement on Tariffs and Trade*. Retrieved from: [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (accessed April 10, 2022).
15. *The Federal Assembly of Russia (2022) Zakonoproekt №91393-8 «O denonsatsii Rossiyskoy Federatsiyey Protokola o prisoedinenii Rossiyskoy Federatsii k Marrakeshskomu soglasheniyu ob uchrezhdenii Vsemirnoy trgovoy organizatsii i priznanii utrativshim silu Federalnogo zakona № 126-FZ ot 21 iyulya 2012 g. «O ratifikatsii Protokola o prisoedinenii Rossiyskoy Federatsii k Marrakeshskomu soglasheniyu ob uchrezhdenii Vsemirnoy trgovoy organizatsii 15 aprelya 1994 g.»*. Retrieved from: <https://sozd.duma.gov.ru/bill/91393-8> (accessed April 14, 2022).
16. *WTO (2011) Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization. WT/ACC/RUS/70 WT/MIN(11)/2*. Retrieved from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN11/2.pdf&Open=True> (accessed April 15, 2022).
17. *United States Trade Representative (2014) Report on Russia's Implementation of the WTO Agreement*. Retrieved from: [https://ustr.gov/sites/default/files/Russia\\_0.pdf](https://ustr.gov/sites/default/files/Russia_0.pdf) (accessed April 13, 2022).
18. *WTO (2022) Russia-Ukraine conflict puts fragile global trade recovery at risk*. Retrieved from: [https://www.wto.org/english/news\\_e/pres22\\_e/pr902\\_e.htm](https://www.wto.org/english/news_e/pres22_e/pr902_e.htm) (accessed April 15, 2022).