

RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

REPORT OF THE PANEL (*Edited Segments*)

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Russia invokes Article XXI(b)(iii) of the GATT 1994 and requests the Panel, for lack of jurisdiction, to limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims. Russia considers that the Panel lacks jurisdiction to evaluate measures in respect of which Article XXI of the GATT 1994 is invoked.

Since 1 January 2016, Ukraine has not been able to use road or rail transit routes across the Ukraine-Russia border for all traffic in transit destined for Kazakhstan.

This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 (or the equivalent provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)).⁵⁸

Ukraine presents its case as an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT 1994 and commitments in Russia's Accession Protocol.

Russia, on the other hand, considers that the dispute involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO, an organization which is not designed or equipped to handle such matters. Russia cautions that involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system.

Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist.⁶¹ Russia asserts that this emergency presented threats to Russia's essential security interests.⁶² Russia argues that, under Article XXI(b)(iii), both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision.

China argues that the Panel has jurisdiction to review Russia's invocation of Article XXI. The United States, in a letter to the Chair of the Panel submitted on the due date for third-party submissions, argues that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute". The reason advanced is that every WTO Member retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as "reflected" in the text of Article XXI. The United States describes this as an "inherent right" that has been repeatedly recognized by GATT contracting parties and WTO Members.

The Panel begins by recalling that Article 3.2 of the DSU recognizes that interpretive issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well established—including in previous WTO disputes—that these rules cover those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) provides: A treaty shall be interpreted in good faith in accordance with the ordinary meaning.

Article XXI(b)(iii) of the GATT 1994 is part of the "Security Exceptions" set forth in Article XXI, which provides:

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

"International relations" is defined generally to mean "world politics", or "global political interaction, primarily among sovereign states".

This conclusion that the Panel has reached based on its textual and contextual interpretation of Article XXI(b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, 1947 is confirmed by the negotiating history of Article XXI of the GATT.

The specific language for the new security exceptions that would apply throughout the whole of the Charter was developed from a proposal submitted by the United States delegation at the 1947, Geneva negotiating session in July 1947.

Ultimately, the delegate for the United States emphasized the importance of the draft security exceptions, which would allow ITO members to take measures for security reasons, but not as disguised restrictions on international trade.

The Panel is also mindful that the negotiations on the ITO Charter and the GATT 1947 occurred very shortly after the end of the Second World War. The discussions of "security" issues throughout the negotiating history should therefore be understood in that context.

Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

The Panel finds as follows: As of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; and each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

However, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Rather, the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the *obligation of good faith* is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith ...") and Article 26 ("[e]very treaty ... must be performed [by the parties] in good faith") of the Vienna Convention. **The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.**

The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous system.

In the case at hand, the emergency in international relations is very close to the "hard core" of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.

The obligation of good faith, referred to in paragraphs 7 and 7 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue.

The Panel finds that Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.

For the reasons set forth in this Report, the Panel concludes as follows: With respect to the Panel's jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that: it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994, the Panel finds that: as of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994; and accordingly, Russia has met the

requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered by Article XXI(b)(iii) of the GATT 1994.

APPENDIX – SUBSEQUENT CONDUCT CONCERNING ARTICLE XXI OF THE GATT 1947

INTRODUCTION

The Panel recalls that in interpreting the terms of a treaty in accordance with the customary rules of interpretation, it is empowered to consider any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

Article 31(3)(b) of the Vienna Convention provides that: "[t]here shall be taken into account, together with the context: ... [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

Additionally, the Panel observes that on several occasions, GATT contracting parties and WTO Members have unilaterally invoked Article XXI in the context of notifying measures to various GATT and WTO bodies.

In 1985, the United States circulated a communication stating that it had imposed a complete import and export embargo on Nicaragua and declared a national emergency due to the extraordinary threat to national security posed by Nicaragua's policies and actions. At a special meeting of the GATT Council requested by Nicaragua in May 1985, Nicaragua argued that this measure "violated both the general principles and certain specific provisions" of the GATT 1947. Nicaragua argued that the US Administration, in declaring a national emergency to deal with a perceived threat by Nicaragua, seemed to have lost any sense of proportion and was trying to override the principles of international trade. Nicaragua said that it was absurd to suggest that it could pose a threat to the national security of the United States, pointing to the relative power and size of the two countries as well as the absence of any "armed conflict between the United States and Nicaragua". Nicaragua also noted that "the United States, in stating to the Security Council that its measures were principally intended to prevent Nicaragua from having the benefit of trading with the United States, had thereby acknowledged that this was not a matter of national security but one of coercion."

The United States stated that it took the measures for "national security" reasons and that the measures fell within the exception contained in Article XXI(b)(iii). The United States emphasized that Article XXI left it to each contracting party to judge what measures it considered necessary for the protection of its essential security interests. According to the United States, it was not for the GATT to approve or disapprove this judgement. The United States also considered that GATT, as a trade organization, had "no competence to judge such matters" and that its effectiveness in addressing trade issues would only be weakened if it became a "forum for debating political and security issues". Nicaragua responded that Article XXI "was not to be applied in an arbitrary fashion" and required "some correspondence between the measures adopted and the situation giving rise to their adoption". Nicaragua also considered that "since this matter involved commercial and trade measures, the GATT, as the institution responsible for the conduct of international trade, should express a view on this issue."

As discussed in paragraphs 7 of the Panel Report, the Panel considers that the **foregoing survey of the pronouncements of the GATT contracting parties and WTO Members does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.**