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## **1 ARTICLE XXI**

### **1.1 Text of Article XXI**

#### ***Article XXI***

##### *Security Exceptions*

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.

### **1.2 General**

1. The Panel in *China – Raw Materials* examined Article XI:2(a) of the GATT 1994, and contrasted the language used therein (an "essential product to the exporting Member") with the language found in Article XXI(b) of the GATT 1994:

"The Panel does not consider that the terms of Article XI:2, nor the statement made in the context of negotiating the text of Article XI:2 that the importance of a product 'should be judged in relation to the particular country concerned', means that a WTO Member may, on its own, determine whether a product is essential to it. If this were the case, Article XI:2 could have been drafted in a way such as Article XXI(b) of the GATT 1994, which states: 'Nothing in this Agreement shall be construed ... to prevent

any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests' (emphasis added). In the Panel's view, the determination of whether a product is 'essential' to that Member should take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)."<sup>1</sup>

### 1.3 Article XXI(b)

#### 1.3.1 Jurisdiction of a Panel to review the invocation of Article XXI(b)(iii)

2. In *Russia – Traffic in Transit*, Russia argued that the Panel lacked jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994.<sup>2</sup> The Panel noted, first, that Ukraine's claim under Article XXI was within the Panel's terms of reference within the meaning of the DSU:

"Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 (the covered agreements). The covered agreements include, *inter alia*, the Multilateral Agreements on Trade in Goods, including the GATT 1994, more particularly Articles XXII and XXIII, as elaborated and applied by the DSU. Article 1.2 of the DSU provides that the rules and procedures of the DSU shall apply subject to such special or additional rules on dispute settlement contained in the covered agreements as are identified in Appendix 2 to the DSU. Appendix 2 of the DSU does not refer to any special or additional rules of procedure applying to disputes in which Article XXI of the GATT 1994 is invoked.

The Panel recalls that Ukraine requested the DSB to establish a panel pursuant to the provisions of the DSU and Article XXIII of the GATT 1994. On 21 March 2017, the DSB established the Panel in accordance with Article 6 of the DSU, with standard terms of reference as provided in Article 7.1 of the DSU. Article 7.2 of the DSU requires that the Panel address the relevant provisions in any covered agreements cited by the parties to the dispute.

Given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU."<sup>3</sup>

3. The Panel then noted that Russia nevertheless argues that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) because "the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel".<sup>4</sup> In other words, Russia argued that the interpretation of Article XXI was "self-judging", and that therefore "Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations".<sup>5</sup> In addressing this argument, the Panel found it appropriate to interpret Article XXI(b)(iii):

"[T]he Panel's evaluation of Russia's jurisdictional plea requires it, in the first place, to interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements."<sup>6</sup>

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<sup>1</sup> Panel Report, *China – Raw Materials*, para. 7.276.

<sup>2</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.28.

<sup>3</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.54 – 7.56.

<sup>4</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.57.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.57.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.58.

4. The Panel in *Russia – Traffic in Transit* rejected Russia's argument that Article XXI(b)(iii) is self-judging, also echoed by the United States argument that this provision is "non-justiciable".<sup>7</sup> In reaching this conclusion, the Panel made several important findings regarding the nature of Article XXI(b)(iii), with a particular emphasis on the adjectival clause "which it considers" in the chapeau of this provision.

### **1.3.2 Chapeau of Article XXI(b)**

#### **1.3.3 "which it considers"**

5. In considering whether the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision, the Panel in *Russia – Traffic in Transit* stated that the chapeau "can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause 'which it considers'".<sup>8</sup> The Panel began by considering "whether the adjectival clause 'which it considers' in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b)"<sup>9</sup>, and in so doing, found it "apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses".<sup>10</sup>

6. The Panel in *Russia – Traffic in Transit* underlined the objective nature of Article XXI(b) and stated:

"The Panel concludes that the adjectival clause 'which it considers' in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."<sup>11</sup>

#### **1.3.4 "essential security interests"**

7. The Panel in *Russia – Traffic in Transit* found the term "essential security interests" to be a narrower concept than "security interests", and thus "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".<sup>12</sup>

7.127. The Panel in *Russia – Traffic in Transit* pointed out that the specific interests relevant would depend "on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances" and so would be left "to every Member to define what it considers to be its essential security interests".<sup>13</sup> The Panel qualified this finding by stating that a Member is not "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".<sup>14</sup> Furthermore, it would be "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".<sup>15</sup>

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<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.102 -7.103.

<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.63.

<sup>9</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.64.

<sup>10</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>11</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.101.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.130.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.131.

<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.134.

### **1.3.5 Subparagraphs of Article XXI(b)**

#### **1.3.5.1 General**

8. The Panel in *Russia – Traffic in Transit* considered that due to the substantially different nature of the subject matters reflected in the three subparagraphs of Article XXI(b), "it is obvious that these subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet in order to fall within the ambit of Article XXI(b)".<sup>16</sup>

#### **1.3.5.2 Subparagraph (iii)**

##### **1.3.5.2.1 "taken in time of"**

9. The Panel in *Russia – Traffic in Transit*, in considering the phrase "taken in time of" in subparagraph (iii), stated the following:

"The phrase 'taken in time of' in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understands this phrase to require that the action be taken *during* the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination."<sup>17</sup>

##### **1.3.5.2.2 "war or other emergency in international relations"**

10. In considering the circumstances described in subparagraph (iii), the Panel in *Russia – Traffic in Transit* stated that the existence of war as a characteristic example of an emergency in international relations would be clearly capable of objective determination. The Panel further determined that "an 'emergency in international relations' can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination".<sup>18</sup> Furthermore, the Panel considered that use of the word or "indicates that war is one example of the larger category of 'emergency in international relations'".<sup>19</sup>

11. The Panel in *Russia – Traffic in Transit* found that the reference to "war" or "other emergency in international relations" as well as the content of the matters discussed in subparagraphs (i) and (ii) of Article XXI(b) "suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)", and that while such differences "could sometimes be considered urgent or serious in a political sense, they will not be 'emergencies in international relations' within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests".<sup>20</sup>

12. In determining that an emergency in international affairs is an objective state of affairs, the Panel in *Russia – Traffic in Transit* stated the following:

"An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.

Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was 'taken in time of' an

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<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>17</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.70.

<sup>18</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.71.

<sup>19</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72.

<sup>20</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.75.

'emergency in international relations' under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination."<sup>21</sup>

13. In determining the existence of an emergency in international relations, the Panel in *Russia – Traffic in Transit* noted that "it is not relevant to this determination which actor or actors bear international responsibility".<sup>22</sup>

14. Turning to the facts surrounding the case at hand, the Panel in *Russia – Traffic in Transit* found that there was evidence showing that the existence of an emergency in international relations within the meaning of Article XXI(b) of the GATT 1994 between Russia and Ukraine:

"There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation."<sup>23</sup>

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<sup>21</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.76 – 7.77.

<sup>22</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.121.

<sup>23</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.122.