ELP WTO Alert: The "National Security" Exception under the GATT 1994 is Justiciable

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Introduction

In a telling development, a WTO Dispute Settlement Body panel, on 5 April 2019, issued its report in *Russia - Measures Concerning Traffic in Transit* ("***Russia – Traffic in Transit***"), wherein it upheld, for the first time, the "national security" exception invoked by a Member State under Article XXI(b)(iii) of the GATT 1994. Ukraine, which brought the complaint against Russia, specifically challenged certain Russian measures concerning transit by road and rail through the territory of Russia. Russia, in response, specifically invoked the "national security" exception under Article XXI (b)(iii) of GATT 1994 to justify its measures and argued that the panel had no jurisdiction to review the challenged measures.

Article XXI of the GATT 1994 broadly provides that a Member State may adopt measures that are derogatory to its obligations under the GATT 1994 if it considers that the measures are necessary to protect its essential security interests. This is also called "national security" exception.

Background

Ukraine challenged certain measures adopted by Russia which allegedly imposed bans and restrictions on traffic in transit by road and rail, from Ukraine, across Russia and destined for Kazakhstan and the Kyrgyz Republic. Ukraine also alleged that these bans and restrictions *de facto* extended to Ukrainian traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Ukraine claimed that these measures were inconsistent with Russia's obligations, *inter alia*, under Article V and Article X of the GATT 1994. However, Russia asserted that the measures in question were necessary for the protection of its essential security interests (which it had taken in response to the emergency in international relations that occurred in 2014 that presented threats to Russia's essential security interests) and invoked Article XXI (b)(iii) of the GATT 1994. Russia specifically noted that the panel lacked the jurisdiction to address the matter.

Given this is the first WTO Dispute Settlement Body report which deals with national security exception and its importance in recent times, this update limits its focus to the issues surrounding national security exception in this dispute and its potential impact on future panels.

(i) On Jurisdiction

Taking into consideration the arguments of Russia and Ukraine, the panel ruled that it has jurisdiction to review a measure that is sought to be adopted pursuant to Article XXI(b)(iii) of the GATT 1994. Some of the key reasons advanced by the panel are as follows:

- The *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("**DSU**") does not provide for any special or additional rules of procedure applying to disputes wherein Article XXI is invoked, and therefore, Russia's Article XXI defense is under its terms of reference under the DSU.[1]
- The question as to whether a Member State has the exclusive power to decide whether the requirements for the application of Article XXI(b)(iii) are met in a given case would necessarily require the panel to interpret the meaning of Article XXI(b)(iii).[2]
- Whilst interpreting Article XXI(b)(iii), the panel noted that though a Member has the discretion to take action *if it considers necessary* to protect its essential security interests pursuant Article XXI(b), the circumstances under Article XXI(b) (i) to (iii) operate as *limitative qualifying clauses* to such discretion which can be exercised by a Member. If the determination of applicability of discretion is

[1] Panel Report, *Russia – Traffic in Transit*, para. 7.54 – 7.56
[2] Ibid. para. 7.58

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left exclusively to the invoking Member, there would be no use or effet utile of the limitative qualifying clauses.[3]

- The panel, thereafter, interpreted different phrases under Article XXI(b)(iii) and noted that the phrase "taken in time of" requires that the action be taken *during* war or other "emergency in international relations" is an objective fact amenable to objective determination.[4]
- It also took into consideration object and purpose of the GATT 1994 and Marrakesh Agreement while interpreting Article XXI(b)(iii) and noted that it would be contrary to the security and predictability of multilateral trading system to interpret Article XXI as an expression of unilateral will.[5]
- The panel, thus, concluded that the adjectival clause "which it considers necessary" in the chapeau of Article XXI(b)(iii) does not qualify the determination of circumstances in sub-paragraph (iii) and for an action/measure to fall under Article XXI(b), it must *objectively* be found to meet the requirements in one of the subparagraphs of Article XXI(b).[6]

Finally, based on the facts available on record, the panel concluded that the state of affairs between Russia and Ukraine rose to the level of war or other emergency in international relations since 2014 and the Russian measures were taken in time of this emergency under Article XXI(b)(iii) of the GATT 1994.

(ii) On the Conditions of the Chapeau of Article XXI(b) of the GATT 1994

With respect to the adjectival clause "which it considers", the panel framed the issue as to whether this adjectival clause is limited to qualify the "necessity" of the measures for the protection of the invoking Member's essential security interests or does it extend to determination of the "essential security interests".[7] The panel did a balancing act on this issue. While the panel acknowledged that specific security interest of a State would vary with changing circumstances, it noted that the discretion of a Member to designate particular concerns as "essential security interests" is limited by its good faith obligation.[8] With respect to the issue as to in what cases or circumstances, a Member may be said to have validly invoked the essential security interest, the panel laid down a *sufficiency* test:

- It is 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;[9]
- What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. The less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with *greater specificity* than would be required when the emergency in international relations involved, for example, armed conflict.[10]

Based on the above, the panel noted that a review of defense of national security exception would require the determination of question - whether the challenged measures are so remote from, or unrelated to the

[3] Ibid. para. 7.65
[4] Ibid. para. 7.70 – 7.77
[5] Ibid. para. 7.79.
[6] Ibid. para. 7.82. Interestingly, the panel also independently referred to and discussed the negotiating history of Article XXI of the GATT 1947 to support its conclusion.
[7] Ibid. para. 7.127.
[8] Ibid. para. 7.131 – 7.132.
[9] Ibid. para. 7.134
[10] Ibid. para. 7.135.

emergency in question that it implausible for the invoking Member to implement the measures for the protection of its essential security interests arising out of the emergency.[11]

Applying the above test to the facts on record, the panel noted that Russian measures could not be regarded so remote to the 2014 emergency that the challenged measures would seem implausible. Interestingly, the panel thereafter noted that "[T]his being so, it is for Russia to determine the necessity of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause "which it considers" is to be given legal effect."[12]

Potential Impact on United States' Imposition of Higher Tariffs on Steel and Aluminium

The issue of national security exception which has been the focal point of contention in the above *Russia – Traffic in Transit* dispute between Russia-Ukraine is also central to few other disputes at the WTO including a series of disputes concerning certain measures of the United States on steel and aluminium products ("**Section 232 Disputes**").[13] The United States has consistently defended these measures stating that - the tariffs imposed under Section 232 of the US Trade Expansion Act were necessary for the protection of its essential security interests given the key role steel and aluminium plays in US national defence; these measures were therefore justified under Article XXI of the GATT 1994 and not subject to review by a WTO panel.[14]

While the dispute concerning United States imposition of higher tariffs on steel and aluminium is pending, the panel report in *Russia – Traffic in Transit* dispute provides guidance on how the "national security" exception claims may be determined by the future panels. *First*, it seems unlikely that the panels in Section 232 Disputes would take a contrary view on justiciability of national security exception claims. Second, the panel report makes it clear that the threshold to meet the requirements of Article XXI(b) is high. More specifically, 'that the United States has a very uphill task to prove that its measures meet the requirements of Article XXI(b)' is evident from the panel's observations: "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."[15] This is considering the fact that the United States' invocation of higher tariffs on steel and aluminium is not anywhere close to situations such as armed conflict like in the case of *Russia – Traffic in Transit* dispute.

That being said, one or both the parties may challenge the report in *Russia – Traffic in Transit* before the WTO Appellate Body and as a result, the panel report may not attain finality anytime soon. This is also considering the impasse created by the United States at the WTO, wherein it is consistently blocking appointments to the Appellate Body. Further, as the decision of the panel in one dispute is not binding on another panel, the panel in dispute concerning United States imposition of higher tariffs on steel and aluminium may take a contrary view or even expand the scope of discretion of Members to take action for the purpose of national security – although such an outcome seems less likely.

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[11] Ibid. para. 7.139.
[12] Ibid. para. 7.146.
[13] See, e.g., DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556 and DS564
[14] See, e.g., https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm
[15] Panel Report, *Russia – Traffic in Transit*, para. 7.133.