

# Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review

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## Abstract

The invocation of national security exceptions under Article XXI of the General Agreement on Tariffs and Trade (GATT) 1994 has long been viewed as “self-judging”. In the landmark case of *Russia—Measures Concerning Traffic in Transit*, the panel of the WTO’s dispute settlement body (DSB) addressed two important but previously considered ambiguous issues. First, the Panel confirmed its jurisdiction to review its members’ invocation of Article XXI of GATT 1994. Second, offering a detailed interpretation of Article XXI, especially paragraph (b) and its subparagraph (iii), the panel distinguished the objective requirements from the self-judging features, and held that it has the jurisdiction to determine whether the objective requirements of Article XXI have been satisfied when a member invokes the national security exception, and the member’s discretion is also expected to be limited by its *good faith* obligation, which, as an established principle of international law, shall apply to both the member’s definition of the essential security interests and its connection to the measures being taken.

## I. Introduction

1. In *The Wealth of Nations*, Adam Smith justified only one exception to free trade, which is national defence.<sup>1</sup> When the General Agreement on Tariffs

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1 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Books IV-V, 40 (Andrew Skinner ed., 1999). See also Roger P. Alford, *The*

and Trade (GATT) was enacted in 1947,<sup>2</sup> its Article XXI offered “an exception to all World Trade Organisation (WTO) rules that could be exercised at the sole discretion of a member state”.<sup>3</sup> A member state could invoke the article whenever “it considers” it to be “necessary for the protection of its essential security interests”.<sup>4</sup> The provisions of GATT 1947, incorporated into GATT 1994, have continued to have legal effects that have become an essential part of the WTO’s multilateral agreements. GATT 1994, Article XXI states:

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.

2. Derogating from the member states’ treaty commitments and obligations, the drafting of the security exceptions clause was an effort to strike a

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Self-Judging WTO Security Exception, 3 Utah LR (2011), 757 (scholarship.law.n-d.edu/law\_faculty\_scholarship/330). [Date of visit: 20 August 2019.]

2 For the preparatory work of GATT Article XXI, see, generally, WTO, WTO Analytical Index, GATT 1994, Article XXI (www.wto.org/english/res\_e/publications\_e/ai17\_e/gatt1994\_art21\_gatt47.pdf). [Date of visit: 20 August 2019.]

3 Roger P. Alford, above n.1, 698.

4 Ibid.

balance between state sovereignty and free trade.<sup>5</sup> It reflected the ongoing nature of the relationship between nature, danger, sovereignty and security.<sup>6</sup> Roger P. Alford (2011) explained this as follows:

The WTO security exception carries forward Adam Smith's great insight: defence is more important than free trade. The security exception is an anomaly, a unique provision in international trade law that grants the Member States freedom to avoid trade rules to protect national security. In the long history of GATT and the short history of the WTO, that freedom has never been challenged seriously. Member states understand the exception to be self-judging, and presume that it will be exercised with wisdom and in good faith.<sup>7</sup>

3. However, John Jackson argued that Article XXI provides "a dangerous loophole to the obligations" contained in the agreement.<sup>8</sup> According to him, it creates an undesirable asymmetry between national sovereignty and multilateralism in terms of how the global economy is governed. In a world that has become increasingly interconnected, it favours the more powerful nations and reinforces their superior position.<sup>9</sup> Further, in Jackson's view, not only does the article open the door to political abuse, but some of its provisions may also foster protectionism by disguising it as security.<sup>10</sup>

4. As mentioned above, Article XXI has long been widely interpreted as "self-judging", based on the wording "which it considers necessary".<sup>11</sup> Alford defined "self-judging" in the global context as the ability of member states to determine, at their sole discretion, whether under the circumstances of a given

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5 Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 *Virginia JIL* (2003), 365, 390-396. See also Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *Yale JIL* (2001), 413, 479-480 ([digitalcommons.law.yale.edu/yjil/vol26/iss2/7](http://digitalcommons.law.yale.edu/yjil/vol26/iss2/7)). [Date of visit: 20 August 2019.]

6 Anne Orford, *The Politics of Collective Security*, 17 *Michigan JIL* (1996) 373, 398.

7 Roger P. Alford, above n.1, 758.

8 John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, Bobbs-Merrill Company (1969), 748.

9 *Ibid.* See also, Wesley A. Cann, Jr., above n.5, 414.

10 John H. Jackson, above n.8, 752.

11 See generally, Roger P. Alford, above n.1.

situation, the facts meet the requirements for the security exception.<sup>12</sup> However, there has been a great deal of debate on the degree of “self-judging” for which Article XXI provides. Alford expanded on the different options as follows:

According to one interpretation, a Member State can decide for itself whether a measure is essential to its security interests and relates to one of the enumerated conditions. Another interpretation would recognise a Member State’s prerogative to determine for itself whether a security exception is applicable, but would impose a good faith standard that is subject to judicial review. Under a third interpretation, a Member State can decide for itself whether “it considers” a measure to be “necessary for the protection of its essential security interests”, but the enumerated conditions are subject to judicial review.<sup>13</sup>

Under the first interpretation, which can be referred to as total self-judging, the phrase “which it considers necessary” in Article XXI(b)(iii) has been taken to mean that no member state, panel, or other adjudicatory body affiliated with the WTO has the right to judge whether another member’s actions meet the article’s requirements.<sup>14</sup> Accordingly, even in the GATT and WTO agreements, “international trade law is subordinated to national security”.<sup>15</sup>

Supporting the second and third interpretations are those who favour the addition of the good faith standard to “self-judging” and those who contend that even this is not enough. The latter have tended to bifurcate the security exception into subjective and objective aspects in which a nation’s security interests are still treated as “self-judging” matters but the other provisions are governed by objective standards.<sup>16</sup> This has been viewed as a “purposive approach that balances the competing interests of protecting national sovereignty and maintaining stability in the international trading regime”.<sup>17</sup> Given that Article XXI was intended to create a legal obligation, “it must be

12 Ibid., 702.

13 Ibid., 704.

14 Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 *U Penn JI Econ L* (1998), 263, 268-69.

15 Ibid.

16 Roger P. Alford, above n.1, 704. See also, e.g., Dapo Akande & Sope Williams, above n.5, 365, 399-400; Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 *Michigan JIL* (1991), 558, 587-91.

17 Roger P. Alford, above n.1, 706.

interpreted in a way that the final decision does not rest with the party invoking national security”.<sup>18</sup> To a certain extent, the second and third interpretations suggest an alternative view that Emmerson justified as follows:

Security exceptions allow members restricted, but lawful, derogation from their trade obligations [is] subject to review by a dispute settlement body. This doctrinal perspective—encapsulated by binding rules, procedures, “accountability, openness and equality”—considers that security exceptions have judicially discoverable limitations.<sup>19</sup>

Based on the foregoing, it is imperative that the wording of Article XXI be analyzed to distinguish between self-judging exceptions and judicially discoverable limitations.

5. As previously mentioned, the alleged self-judging nature has been controversial due to the wording of the clause in the chapeau of Article XXI(b), specifically two phrases: “which it considers necessary” and “essential security interests”.<sup>20</sup> In the recent case of *Russia—Traffic in Transit*,<sup>21</sup> the WTO panel addressed this and other issues.

## II. *Russia—Measures Concerning Traffic in Transit*

6. On 5 April 2019, a panel of the WTO’s dispute settlement body (DSB) handed down a landmark ruling in the case of *Russia—Measures Concerning Traffic in Transit* (hereinafter the *Russia—Ukraine Case*).<sup>22</sup> In so doing, the panel addressed two important matters that had previously been unclear. The first was whether the panel had jurisdiction to review a WTO member’s invocation of Article XXI(b)(iii) of GATT 1994. The second was how and to what extent the invocation of the “national security exceptions” under Article XXI(b)(iii) could be reviewed. At issue was the meaning of the wording of both the chapeau of Article XXI(b) and the enumerated subparagraphs of

18 See, e.g., Dapo Akande & Sope Williams, above n.5, 365, 383.

19 Andrew Emmerson, Conceptualising Security Exceptions: Legal Doctrine or Political Excuse, 11 *Journal of International Economic Law* (2010), 135, 136–37.

20 As Bhala suggested, “GATT Article XXI contains three parts that are not, or at least ought not to be, particularly controversial: Article XXI(a), XXI(b)(i), and XXI(c).” See Raj Bhala, above n.14, 276.

21 *Russia—Traffic in Transit*, WTO Panel Report, WT/DS512/R (5 April 2019).

22 *Ibid.*

paragraph (b). The panel identified the objective requirements of Article XXI(b)(iii) that must be met when the security exception is invoked. This became the first dispute in which a WTO dispute settlement panel interpreted Article XXI, especially paragraph (b) and its subparagraph (iii).<sup>23</sup>

7. Ukraine initiated the case, presenting it as “an ordinary trade dispute” involving Russia’s restrictive trade measures, alleging that such measures were inconsistent with Russia’s treaty commitments.<sup>24</sup> In response, Russia argued that the dispute “involves obvious and serious national security matters” that the country considered necessary to protect its essential security interests.<sup>25</sup> Obviously, Russia followed the first interpretation of “total self-judging” as discussed in the previous section. Invoking Article XXI(b)(iii) of GATT 1994 to justify its trade restrictions, Russia claimed that its response had been triggered by the escalating domestic political turmoil in Ukraine in 2014.<sup>26</sup> It asserted that based on the self-judging nature of Article XXI, “the Panel lacks jurisdiction to further address the matter. Accordingly, Russia submits that the Panel should limit its findings in this dispute to a statement of the fact that Russia has invoked Article XXI(b)(iii), without further engaging on the substance of Ukraine’s claims”.<sup>27</sup> Consistent with this position, Russia refrained from responding to the Ukraine’s specific claims of non-compliance, which Russia treated as being outside the panel’s terms of reference.<sup>28</sup>

In greater detail, Russia’s argument is that:

The WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an

23 Ibid., para.7.20 &7.80. According to the panel’s survey in the appendix to the ruling, it “reveals differences in positions and the absence of a common understanding regarding the meaning of Article XXI. In the panel’s view, this record 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”.

24 Ibid., para.7.21.

25 Ibid., para.7.22.

26 Ibid., para.7.4.

27 Ibid., para.7.4.

28 Ibid., para.7.23.

emergency in international relations, and whether such emergency exists in a particular case.<sup>29</sup>

8. Accordingly, the panel addressed the jurisdictional issues before turning to the substantive issues.<sup>30</sup> Specifically, it focused on the following questions:

- (1) Whether the panel had the jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994;
- (2) Whether the clause in the chapeau of Article XXI(b) qualifies determination of the matters set forth in the article's enumerated subparagraphs;
- (3) Whether Russia's measures were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii);
- (4) Whether the conditions set forth in the chapeau of Article XXI(b) were satisfied, specifically "essential security interests", "necessity" and "emergency in international relations".

9. The panel first addressed the jurisdictional issue. At paragraph 7.53 of the report, the panel stated that, as an international adjudicative tribunal, it had inherent jurisdiction to carry out its adjudicative function, including all matters arising from its own "substantive jurisdiction". The panel found that, (1) according to Article 1.1 and Appendix 1 of the dispute settlement understanding (DSU), the DSU rules and procedures applied to GATT 1994, including Article XXI; and (2) Article 1.2 and Appendix 2 of the DSU identified the specific agreements to which the DSU rules and procedures would apply, subject to special or additional rules on dispute settlement that did not include Article XXI. The panel was established by the DSB "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".<sup>31</sup> Therefore, as there were no special or additional rules in the DSU applicable to Article XXI disputes, "Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU".<sup>32</sup>

29 Ibid., para.7.28.

30 Ibid., para.7.25.

31 Ibid., para.7.55.

32 Ibid., para.7.54-7.56.

10. But Russia seemed to make a deeper level jurisdictional argument: there can be a certain area of subject matter that can be solely within the appreciation of the member concerned. The panel summarized this argument as follows. First, Russia interprets Article XXI(b)(iii) as “self-judging”. It argues that the panel has no jurisdiction to review its invocation of the article because once the article is invoked, the member’s actions become exempt from DSB scrutiny. Under the article, the panel’s subject matter jurisdiction does not extend to matters that the members deem necessary to protect their national security interests in times of war or other emergencies. Russia contends that it has met the conditions for invoking the article.<sup>33</sup> To evaluate Russia’s jurisdictional claim, the panel is required to first interpret Article XXI(b)(iii) 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>34</sup>

11. To interpret Article XXI(b)(iii), the panel started with the clause “which it considers necessary” in the chapeau of Article XXI(b), finding that this was the strongest argument for the self-judging nature of an invocation of Article XXI. It then started to examine whether this clause qualified the determination of the matters contained in the enumerated subparagraphs. The panel said, in brief:

Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that “which [the Member] considers necessary for the protection of its essential security interests”.<sup>35</sup>

The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause “which it considers”. The adjectival clause can be read to qualify only the word “necessary”, i.e. the necessity of the measures for the protection of “its essential security interests”; or to qualify also the determination of these “essential security interests”; or finally and maximally,

33 Ibid., para.7.57.

34 Ibid., para.7.58.

35 Ibid., para.7.62.



to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.<sup>36</sup>

12. The panel first considered the last, maximalist argument, and found that, although the words and grammatical construction of Article XXI(b) may seemingly accommodate an interpretation of the clause “which it considers” that qualifies the determination of subparagraphs (i) to (iii), the logical structure of the article suggests that it is clear the three sets of circumstances found in Article XXI(b)(i), (ii) and (iii) “qualify and limit” the invoking member’s exercise of discretion under the chapeau.<sup>37</sup> To examine this most extensive hypothesis, the panel need to find out whether it was reasonable to leave the determination of those “limitative qualifying clauses”<sup>38</sup> (subparagraphs (i) to (iii) of Article XXI(b)) exclusively to the discretion of the invoking member, and what the object and purpose or added value of these limiting qualifying clauses would be under such an interpretation.<sup>39</sup> In other words, whether the subject matter of each subparagraph of Article XXI(b) “lends itself to purely subjective discretionary determination” by the invoking member,<sup>40</sup> or it is “designed to be conducted objectively” by the panel.<sup>41</sup>

13. Given the nature of these circumstances enumerated in subparagraphs (i) to (iii), the panel probed this issue with a focus on the last set of circumstances set forth in subparagraph (iii).<sup>42</sup> At paragraph 7.67 of the report, the panel said,

7.67. As previously noted, the words of the chapeau of Article XXI(b) are followed by the three enumerated subparagraphs, which are relative clauses qualifying the sentence in the chapeau, separated from each other by semicolons. They provide that the action referred to in the chapeau must be:

- (i) “relating to fissionable materials or the materials from which they are derived”;

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36 Ibid., para.7.63.

37 Ibid., para.7.65.

38 Ibid.

39 Ibid.

40 Ibid., para.7.66.

41 Ibid.

42 Ibid.

- (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”.

As the subject matter differs substantially between the three subparagraphs (“fissionable materials”, “traffic in arms”, and “war or other emergency in international relations”), it is clear 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>43</sup> Further, when connecting the subject matter to the member’s action, subparagraphs (i) and (ii) use the phrase “relating to”, which was interpreted by the appellate body as requiring a “close and genuine relationship of ends and means between the measure and the objective of the Member adopting the measure”.<sup>44</sup> This is an “objective relationship subject to an objective determination”.<sup>45</sup>

14. After examining such an “objective relationship subject to an objective determination” in subparagraphs (i) and (ii) of Article XXI(b), the panel turned to subparagraph (iii), focusing on the apparently subjective term “emergency in international relations”. The panel found that, in subparagraph (iii), the phrase “taken in time of” is a “chronological concurrence” that describes the “connection between the action and the events of war or other emergency”.<sup>46</sup> The panel interpreted this to mean that the action must be taken during the course of such war events or other emergencies, and this “chronological concurrence” is an objective fact that is subject to an objective determination.<sup>47</sup> Also in the same subparagraph, war, as one aspect of the larger category “emergency in international relations”, can clearly be objectively determined. The parameters of an “emergency in international relations”, however, are more opaque than the tangible goods and materials

43 *Ibid.*, para.7.68.

44 *Ibid.*, para.7.69. See US—Shrimp, WTO AB Report, WT/DS58/AB/RW (22 October 2001), para.136; China—Raw Materials, WTO AB Report, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R (30 January 2012), para.355; and China—Rare Earths, WTO AB Report, WT/DS431/AB/R ; WT/DS432/AB/R ; WT/DS433/AB/R (7 August 2014), para.5.90.

45 *Ibid.*, para.7.69.

46 *Ibid.*, para.7.70.

47 *Ibid.*, para.7.70.

referred to in subparagraphs (i) and (ii), or “war” in subparagraph (iii). Nonetheless, in the context of the three subparagraphs and their subject matter, the phrase “emergency in international relations” can only be understood as belonging to the same category of objective facts and being subject to the same objective determination.<sup>48</sup> The panel continued,

7.72. The use of the conjunction “or” with the adjective “other” in “war or other emergency in international relations” in subparagraph (iii) indicates that war is one example of the larger category of “emergency in international relations”. War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict). The dictionary definition of “emergency” includes a “situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action”, and a “pressing need . . . a condition or danger or disaster throughout a region”.

7.73. “International relations” is defined generally to mean “world politics”, or “global political interaction, primarily among sovereign states”.<sup>49</sup>

To provide a context for interpreting “emergency in international relations” in Article XXI(b) subparagraph (iii), the panel considered the matters addressed in subparagraphs (i) and (ii): fissionable materials, traffic in arms, ammunition and the implements of war in addition to the goods and materials needed to supply the military establishment. Although the three subparagraphs of Article XXI(b) have different requirements, they share similar concerns based on their specific security interests. Such interests, like the interests that grow out of war in subparagraph (iii), pertain to defence and the military, or to maintaining law and public order. The “emergency in international relations” in subparagraph (iii) must therefore be understood as engendering the same type of interests as the matters referred to in subparagraphs (i) and (ii) of Article XXI(b).<sup>50</sup> Further, conjoining “war” with “other emergency in international relations” in subparagraph (iii), and examined in the context of other interests generated by war, together with the goods and materials referred to in subparagraphs (i) and (ii), suggests that “political or economic differences between Members are not sufficient, of themselves, to constitute an

48 Ibid., para.7.71.

49 Ibid., para.7.72-7.73.

50 Ibid., para.7.74.

emergency in international relations for purposes of subparagraph (iii)". The members are likely to engage in political or economic conflicts with each other over time. However, although these might be viewed as politically compelling, they are not "emergencies in international relations" within the meaning of subparagraph (iii) unless they pertain to "defence or military interests", or to maintaining "law and public order".<sup>51</sup>

An emergency in international relations can therefore be interpreted as "armed conflict", "latent armed conflict", "heightened tension or crisis", or "general instability engulfing or surrounding a state".<sup>52</sup> These conditions generate specific types of interests, whether they be defence, military, or law and public order.<sup>53</sup> Therefore, because emergency in international relations represents an objective state of affairs, whether an action is "taken in time of" an "emergency in international relations" under Article XXI(b), subparagraph (iii) is an objective fact that must be objectively adjudicated.<sup>54</sup>

15. To further strengthen this argument, the panel examined the object and purpose of GATT 1994 and the Marrakesh Agreement (WTO Agreement),<sup>55</sup> exploring whether they also support an interpretation of Article XXI(b)(iii) that mandated an objective review of the subparagraph (iii) requirements.<sup>56</sup> The panel found that, under both the GATT 1994 and WTO agreements, in specific circumstances, members can depart from their obligations and protect their non-trade interests. Like other exceptions in the two agreements, there is some flexibility because when the agreements were legislated, this was viewed as essential to achieving the broadest acceptance. However, if Article XXI is interpreted as a condition in which a member's GATT and WTO obligations are entirely governed by its own desires, it would be inconsistent with the principles of security and predictability envisioned for the WTO's multilateral trading system.<sup>57</sup>

51 *Ibid.*, para.7.75.

52 *Ibid.*, para.7.76.

53 *Ibid.*, para.

54 *Ibid.*, para.7.77.

55 See generally, Marrakesh Agreement Establishing the WTO ([www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)).

56 *Ibid.*, para.7.79. See also Appellate Body Reports, EC-Computer Equipment, para. 82; EC-Bananas III (Article 21.5-Ecuador II) / EC Bananas III (Article 21.5-US), para.433; Argentina-Textiles and Apparel, para.47; and EC-Chicken Cuts, para.243.

57 Russia-Traffic in Transit, WTO Panel Report, WT/DS512/R (5 April 2019), para.7.79.

The panel, after referring to the negotiating history of Article XXI, concluded that,

7.101. 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>58</sup>

16. After examining the language of Article XXI(b)(iii), the panel disposed of the jurisdictional issue as follows. It has interpreted Article XXI(b) as vesting in it the power to review whether the requirements in the subparagraphs have been met rather than leaving it to the sole discretion of the member state. Article XXI(b)(iii) is not totally “self-judging” as Russia contends.<sup>59</sup> Thus, Russia’s argument that the panel lacks jurisdiction to review its invocation of Article XXI(b)(iii) “must fail”.<sup>60</sup> Further, pursuant to the panel’s interpretation of Article XXI(b)(iii), the United States’ argument that Russia’s invocation of Article XXI(b)(iii) is “non-justiciable” also fails to the extent that it relies on the provision’s being totally “self-judging”.<sup>61</sup> It has been re-confirmed that Russia’s invocation of the article “is within the panel’s terms of reference under Article XXIII of GATT 1994, as further elaborated and modified by the DSU”,<sup>62</sup> and the panel “has the jurisdiction to determine whether the requirements of GATT 1994 Article XXI(b)(iii) have been satisfied”.<sup>63</sup>

17. Having established jurisdiction, the panel went on to determine whether Russia’s measures in this case were “taken in time of war or other emergency in international relations” within the meaning of Article XXI(b)(iii). In other words, the panel had to determine whether the situation between the Ukraine and Russia that had been ongoing since 2014 constituted an “emergency in international relations”. According to the panel, what

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58 Ibid., para.7.101.

59 Ibid., para.7.102.

60 Ibid., para.7.103.

61 Ibid. The panel also noted that the International Court of Justice(ICJ) has rejected the “political question” argument in its previous advisory opinion. See, for example, International Court of Justice, Advisory Opinion, Certain Expenses of the United Nations (United Nations), ICJ Reports 1962, 155.

62 Ibid., para.7.104.

63 Ibid.

mattered was that the UN General Assembly had recognised the nature of the emergency as involving armed conflict.<sup>64</sup> Using this standard, and considering the period in which these measures were taken, the panel declared itself “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”.<sup>65</sup> It confirmed that “all of the measures were therefore introduced during the emergency in international relations and thus were ‘taken in time of’ such emergency for purposes of subparagraph (iii)”.<sup>66</sup>

18. After rejecting the final and maximalist argument by saying 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 enumerated subparagraph, the panel returned to address the other two arguments: whether this adjectival clause in the chapeau qualified (1) both the determination of the invoking member’s essential security interests *and* the need for the measures to protect those interests, or (2) simply the determination of the necessity.<sup>67</sup>

19. Following additional evaluations, the panel arrived at some further conclusions: The term “essential security interests” ordinarily refers to the interests related to a state’s ultimate responsibilities, i.e., protecting its territory and population from external threats and maintaining law and internal public order. It seems to be a narrower concept than “security interests”.<sup>68</sup> Determining the precise interests that protect a state from external or internal threats depends on the circumstances and perceptions of the state, which vary. As a result, the members have been allowed to define what their essential security interests are.<sup>69</sup> The members, however, are not totally free to elevate any matter to the level of an “essential security interest”. Article XXI(b)(iii) must be interpreted and applied in good faith.<sup>70</sup> The panel observed:

7.132. [. . .] The obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as

64 Ibid., para.7.122. See also, UN General Assembly Resolution No. 71/205, 19 December 2016.

65 Ibid., para.7.123.

66 Ibid., para.7.124-7.125.

67 Ibid., para.7.127-7.128.

68 Ibid., para.7.130.

69 Ibid., para.7.131.

70 Ibid., para.7.132.

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.

7.133. 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.

7.134. It is therefore 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.

7.135. What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that 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.<sup>71</sup>

According to the panel, the obligation of good faith referred to in paragraphs 7.132 and 7.133 above applies to both the member’s definition of the essential security interests alleged to be affected by the international relations emergency, and most importantly, to the connection between the invoking member’s essential security interests and the measures being taken. When Article XXI(b)(iii) is invoked, this obligation becomes delineated because the measures “must meet a minimum standard of plausibility” that supports the essential security interests allegedly affected.<sup>72</sup>

71 Ibid., para.7.132-135.

72 Ibid., para.7.138.

20. In short, according to the panel, “it is left, in general, to every Member to define what it considers to be its essential security interests”<sup>73</sup> and to “determine the ‘necessity’ of the measures for the protection” thereof.<sup>74</sup> However, the member’s discretion is expected to be limited by its *good faith* obligation, which is a principle of law in general and international law specifically, given that it underlies all treaties. The obligation of good faith implies that members will not use the exceptions in Article XXI to circumvent their obligations under GATT 1994.<sup>75</sup> Consequently, for the panel, it will be within its purview to determine whether the measures taken were so remote or unrelated to the emergency that they could not plausibly be needed to protect the member’s essential security interests.<sup>76</sup> Nonetheless, in the Russia case, after all these tests were satisfied, “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.”<sup>77</sup> Based on the definition of “essential security interests” discussed above, and the examination of all factual grounds, and considering that the emergency referred to in this dispute had been recognised by the UN General Assembly as involving armed conflict, the panel found that Russia’s measures were covered by and met the requirements for invoking GATT 1994, Article XXI(b)(iii).<sup>78</sup>

### III. Conclusion

21. The Panel Report adopted by the DSB was a landmark ruling on the invocation of national security exceptions under Article XXI of GATT 1994. It clarified the following points:

#### (1) Jurisdiction to review

The invocation of national security exceptions under GATT Article XXI is within the panel’s terms of reference. The WTO has jurisdiction to determine whether the objective requirements of Article XXI(b) have been satisfied.<sup>79</sup>

73 Ibid., para.7.131.

74 Ibid., para.7.146.

75 Ibid., para.7.132-7.133.

76 Ibid., para.7.139.

77 Ibid., para.7.146.

78 Ibid., para.7.148-149.

79 Ibid., para.7.56 & 7.102-104.



## (2) Standard of Review

The circumstances in each of the three enumerated subparagraphs of Article XXI(b) are all subject to objective review. In addition to the tangible goods and materials referred to in subparagraphs (i) and (ii) that clearly mandated an objective review, the phrase “relating to” in both subparagraphs (i) and (ii) has also been interpreted by the panel as indicating “an objective relationship between the ends and the means, subject to objective determination”.<sup>80</sup>

According to the panel, the wording of “taken in time of war or other emergency in international relations” in subparagraph (iii) also concerns objective facts that are “amenable to objective determination”.<sup>81</sup>

Consequently, the adjectival clause “which it considers” in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in the enumerated subparagraphs. “Rather, for an action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in these subparagraphs of that provision”.<sup>82</sup>

Whereas “emergency in international relations” are interpreted by the panel as “armed conflict”, “latent armed conflict”, “heightened tension or crisis”, or “general instability engulfing or surrounding a state”,<sup>83</sup> “essential security interests”, as engendered by such “emergency in international relations” in subparagraph (iii) and the matters referred to in subparagraphs (i) and (ii),<sup>84</sup> were interpreted by the panel as pertaining to defence and military interests, as well as maintenance of law and public order interests.<sup>85</sup>

As an established principle of international law, the obligation to act in good faith underlies all international treaties. The obligation of good faith requires that members invoking Article XXI do not use the measures taken as disguised actions to circumvent their treaty obligations, or in any other way that would constitute abuse.<sup>86</sup> The obligation of good faith is to apply to both the member’s definition of the essential security interests and its connection to the measures being taken. A minimum requirement of plausibility in relation to the proffered essential security interests is needed to determine

80 Ibid., para.7.69.

81 Ibid., para.7.71-7.72.

82 Ibid., para.7.101.

83 Ibid., para.7.76.

84 Ibid., para.7.68-7.77.

85 Ibid., para.7.74.

86 Ibid., para.7.79 & 7.133.

whether the measures are “so remote from” or “unrelated to” the essential security interests and the emergency referred to in this dispute.<sup>87</sup>

### (3) Self-judging features

When all the objective requirements and good faith standards set forth as above are satisfied, it will be up to the invoking member to define both its specific “essential security interests” and the “necessity” of the measures for the protection of such essential security interests.<sup>88</sup>

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87 *Ibid.*, para.7.138.

88 *Ibid.*, para.7.146.

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