

The Russia-Ukraine WTO Panel Report and the security exception: analysis and implications

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Advaiyot Sharma, Master student in International Law at South Asian University, New Delhi, advaiyot.sharma@gmail.com, 17 April 2019

A WTO Panel has for the first time ruled on the merits of a matter in which the GATT Article XXI security exception was invoked by a Member to justify deviation from its WTO obligations.

Brief facts and the measure at issue

In *Russia - Measures Concerning Traffic In Transit*,^[1] Ukraine complained against Russia under the WTO dispute settlement mechanism, requesting a Panel to consider the legality of Russia's imposition of varying degrees of transit restrictions and imposition of stringent border measures and conditions on Ukrainian goods destined for Kazakhstan and other Central Asian countries.

Ukraine alleged that Russia's conduct violated its WTO obligations, specifically under GATT Article V (an obligation to ensure freedom of transit of goods through territories of Members) and Russia's Accession Protocol. On its part, Russia relied on one of the security exceptions provided in GATT Article XXI as a justification to derogate from its general WTO obligations. Specifically, Russia invoked Article XXI(b)(iii), a GATT security exception which allows Members to take actions in a case where such an action is "taken in time of war or other emergency in international relations" (and consequently deviate from their WTO obligations by virtue of that action). Russia argued for the existence, in its opinion, of an "emergency in international relations", a reference to the geopolitical tension between Russia and Ukraine, as a ground under Article XXI(b)(iii).

Notable aspects of the dispute

The facts don't seem particularly complicated, given the level of technical complexity most trade disputes at the WTO involve. Why, then, is this dispute and this Panel Report so significant? Two reasons are notable. First, since it was the first WTO dispute settlement Panel to *comprehensively* consider the merits of a case wherein a

party was invoking a security exception, the Panel first had to clarify whether such a case could be treated as a normal trade dispute (as suggested by the complainant, Ukraine), or whether the invocation of a security exception *itself* completely altered the general understanding of the Panel's role and the entire WTO dispute settlement process (as suggested by the respondent, Russia). Thus, recognizing the "novel and exceptional features"[2] of the dispute, the Panel chose to adopt an ICJ-like approach, first examining whether or not it had jurisdiction to adjudicate on Russia's invocation of the security exception, before it could proceed to the determination of the merits of the case.

Secondly, and more importantly, while considering the merits of the case, the Panel had to construe the scope of Article XXI(b)(iii), the GATT security exception which allows Members to take actions in a case where such an action is "taken in time of war or other emergency in international relations." In the most significant holding of the Panel in the case, one which may potentially have larger ramifications beyond the present dispute, the Panel observed that the existence of "war or other emergency in international relations", as envisioned under Article XXI(b)(iii), involves a "fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated." [3]

This understanding, complemented by the Panel's other holding that WTO Members do not have unlimited leeway to determine what they consider to be their essential security interests, is what makes this dispute notable in WTO jurisprudence. Thus, by setting a threshold for the applicability of Article XXI(b)(iii) in order to justify the application of a measure violative of general GATT obligations, the Panel has, for the first time, clearly defined the scope of the exception under Article XXI(b)(iii).

The parties' arguments

Briefly, Russia argued that the security exceptions under Article XXI must be understood to be entirely self-judging, thus rendering the invocation of any such measures completely immune from any review by a WTO Panel. Thus, in Russia's interpretation, once a Member states that the measures at issue were undertaken as actions that the *Member considers* necessary for the protection of its essential security interests, the Panel must defer to such a statement and limit itself to a recognition of the Member's invocation of the security exception, and it must end there, thereby precluding any objective assessment by the Panel of the character of the measures taken under Article XXI. Ukraine, on the other hand, rejected the view that Article XXI

provided a totally self-judging right and opposed the view of a unilateral determination of the existence of grounds justifying a Member's invocation of security exceptions.

The third-party submissions reveal expected details. The EU maintained its previously documented stance in favour of giving the Panel the right to review the determination of the necessity and the *bona fide* application of the measure invoked for the protection of essential security interests, although with a standard of review having greater deference to the invoking Member's view. The US, on the other hand, firmly stuck to its own well-entrenched stance of the self-judging nature and non-justiciability of measures taken under Article XXI.

The Panel's analysis and findings

1. Security exceptions: Self-judging v. subject to review

The Panel undertook an analysis of the phrase "which it considers" found in the chapeau of Article XXI(b). Highlighting that the *specific* security exceptions enumerated under Articles XXI(b)(i)-(iii) serve as "limitative qualifying clauses"^[4] to an unlimited self-judging right available to Members invoking the exceptions, the Panel found that these act in a manner so as to curtail the discretionary powers of the Members under Article XXI. The Panel invoked Article 31(1) of the VCLT and adopted a purposive interpretation of Article XXI(b)(iii), leading to the conclusion that the usage of "which it considers" in the chapeau of Article XXI(b) does not qualify the substantive requirement of the existence of circumstances which fall under the specific security exceptions listed under Articles XXI(b)(i)-(iii).

By implication, the Panel found fit for self-judging by a WTO Member invoking a national security exception *only* the necessity of the *adoption* of the purported action taken by a Member for the protection of its essential security interests, not such action's *conformity* with the specific requirements enumerated under Articles XXI(b)(i)-(iii). Thus, any action which the invoking Member claims falls under one of the specific security exceptions is subject to Panel scrutiny and objective determination.

2. Scope of the security exception under Article XXI(b)(iii)

After locating its jurisdiction to review the measures, the Panel proceeded to determine whether the measures at issue (Russia-imposed transit hurdles for

Ukrainian goods) were "taken in time of war or other emergency in international relations" as required under Article XXI(b)(iii). As mentioned earlier, at the outset of this determination, the Panel makes a crucial observation, that the specific exception covering situations of war or other emergency in international relations under Article XXI(b)(iii) is premised on "a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated."^[5]

This indicates that a "fundamental change of circumstances" is essentially a prerequisite for the invocation of the security exception under Article XXI(b)(iii) to justify measures taken in time of "war or other emergency in international relations." This observation of the Panel has serious implications and serves to restrict the scope of application of the security exception: a Member will not be able to justify its measures as those taken in times of an emergency in international relations, unless such an emergency involves a situation which evidences "a fundamental change of circumstances which radically alters the factual matrix."

3. Determining an "emergency in international relations" under Article XXI(b)(iii)

Russia was relying on an emergency in international relations (involving deteriorating relations between the countries in the period post-2014) to justify its imposition of the transit restrictions. Consequently, the Panel had to decide whether the situation as described by Russia could be considered to be an "emergency in international relations" under Article XXI(b)(iii).

The Panel relied on UN General Assembly Resolutions^[6] (recognising international concern over the escalating situation between Russia and Ukraine, as well as the existence of an armed conflict between them) and details of certain sanctions imposed against Russia by certain countries, as providing evidence of the existence of an "emergency in international relations" between Russia and Ukraine since 2014. The Panel also found that since the measures at issue came into existence during the identified emergency in international relations, they were "taken in time of" such emergency and therefore fulfilled the requirements of Article XXI(b)(iii).

4. Scope of "essential security interests", the plausibility test, and determination of the "necessity" of a measure taken to protect essential security interests

The Panel then had to interpret the scope and extent of a Member's "essential security interests". The Panel held that the notion of a State's "essential security interests" must be limited to "those interests relating to the quintessential functions of the state" [7], which the Panel held included "the protection of its territory and its population from external threats, and the maintenance of law and public order internally." Most importantly, the Panel found that while it indeed remains the prerogative of every Member to determine what it considers to be its essential security interests, such power is not unfettered. Such a determination must be made in good faith. Thus, a WTO Member may only use the power of determining its essential security interests in good faith and in order to genuinely protect such interests.

Thus, the notion of "essential security interests" cannot be read in such a manner so as to cover any and every security interest, and consequently, not every GATT-violative measure, allegedly taken to protect national security, can be justified under the exceptions enumerated under Article XXI. A *malafide* application of a measure, undertaken merely to bypass GATT obligations, but under the guise of protection of essential security interests, would not pass muster and cannot be justified by the invocation of Article XXI exceptions.

The Panel went on to incorporate the notion of good faith to lay down the "plausibility test" – a test to determine "whether the measures are so remote from, or unrelated to, the 2014 emergency that it is *implausible* that Russia implemented the measures for the protection of its essential security interests arising out of the emergency." [8] The Panel (in furtherance of its previous analysis) found that the measures at issue restricting the transit of goods across Russia were in the backdrop of an emergency in Russia's relations with Ukraine, and one which was directly related to the security of the Russia-Ukraine border. Consequently, the Panel found that the measures at issue could not be regarded to be so remote from, or unrelated to, the 2014 emergency, that it was implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency.

Finally, the Panel, in line with its earlier reasoning (its finding that the self-judging right extended only to the *necessity* of the *adoption* of the action), subject to the requirements and threshold of application laid down earlier, noted that it was for Russia to determine the "necessity" of the measures for the protection of its essential security interests, and agreed with Russia's determination of the necessity of invocation of the measures at issue.

Thus, the Panel found that Russia had, in this case, met all the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and the measures at issue were consequently covered by the specific security exception laid down under Article XXI(b)(iii) of the GATT, thereby justifying Russia's deviation from its WTO obligations. Effectively, the Panel held that Russia's actions were in conformity with its WTO obligations under GATT Article XXI(b)(iii).

Key takeaways

The following may be considered to be the key takeaways from this Panel ruling:

1. The security exception under GATT Article XXI is not non-justiciable or entirely self-judging. A WTO Member invoking a national security exception has the liberty to self-judge only the necessity of the *adoption* of the action taken by a Member for the protection of its essential security interests, and not such action's *conformity* with the specific requirements enumerated under Articles XXI(b)(i)-(iii).
2. The exception covering situations of war or other emergency in international relations under Article XXI(b)(iii) is premised on "a fundamental change of circumstances which radically alters the factual matrix". Thus, unless the existence of such drastically altered circumstances are proven, it will be difficult to justify a measure allegedly taken under Article XXI(b)(iii).
3. In its analysis, the Panel considered an "emergency in international relations" to encompass four exigencies a State may face – a situation of armed conflict, a situation of latent armed conflict, a heightened tension or crisis, or a general instability engulfing or surrounding a state.^[9] Apart from hostilities in an armed conflict, the existence of the other situations identified by the Panel as possibly constituting an "emergency in international relations" may prove factually complex to conclusively prove.
4. A WTO Member does not have unlimited power to determine what it considers to be its essential security interests. Such a determination is subject to good faith and genuine belief, and the test is of "plausibility", i.e. the measures must not be so remote from, or unrelated to, the alleged emergency that it is implausible that the Member implemented the measures for the protection of its essential security interests arising out of the emergency. Consequently, a Member may not elevate simply any concern to that of an essential security interest. A measure undertaken merely to bypass GATT obligations, under the

guise of protection of essential security interests, cannot be justified by the invocation of Article XXI exceptions.

Larger implications

In addition to being a pioneering ruling on the interpretation of the elements and standard of review of the security exceptions under WTO law, this ruling also needs to be seen in the larger perspective and in light of the current state of affairs the WTO finds itself in.

First and foremost, it will be fascinating to see how this development affects the Panel proceedings in the pending US national security tariffs cases.^[10] Interestingly, while Russia took the position that Article XXI should be viewed as an entirely self-judging provision in response to the complaint filed by Ukraine, it may be forced to take a contrary stance in the US steel and aluminium tariffs case.^[11] How a fresh Panel in the US tariffs case treats the potential American argument of non-justiciability of measures taken under Article XXI remains to be seen.

Further, given the Appellate Body stalemate, there remains looming uncertainty over any AB ruling on the Russia-Ukraine case, in the event that either party decides to appeal certain issues of this case. Pending such an AB ruling, the Panel's ruling in the Russia-Ukraine case remains subject to confirmation, but it is clear that the Panel's approach has been to narrow down both the scope of the security exception under Article XXI(b)(iii), as well as the latitude given to WTO Members invoking the exception to justify a measure otherwise violative of their obligations under the covered agreements.

Thus, if the threshold and tests laid down by the Panel in the Russia-Ukraine case are to be followed, it is difficult to see how the US could use the GATT security exception to justify the imposition of its "national security tariffs" in the steel and aluminium tariffs cases. Clearly, there is nothing significant to suggest that the American measures were introduced upon the existence of a "fundamental change in circumstances" which could be evidence of an emergency in international relations - an indispensable requirement that the US must prove, before it can go on to justify the measure as one taken to protect its essential security interests arising out of such an emergency.

Moreover, given the US administration's reluctance to constructively engage with the WTO, this ruling may serve to further deepen the divide between the WTO and the

American conception of the WTO order. How the US administration responds to this ruling in the days to come will be evidentiary of their stand in the next few months. Again, geopolitical considerations involving the US, Russia and Ukraine will also play a role in any political response.

Nonetheless, by first rejecting the notion of complete immunity from review for Members invoking national security as an exception to fulfilling their WTO commitments, and then by considerably limiting the scope of application of the security exception, the Panel in *Russia- Traffic In Transit* has sent a strong message. Yet, only time will tell how far-reaching the impact of this ruling will be on the overall WTO dispute settlement system and the larger multilateral trading regime under the aegis of the WTO.

[1] Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019.

[2] *Ibid*, par. 7.24.

[3] *Ibid*, par. 7.108.

[4] *Ibid*, par. 7.65

[5] *Ibid*, par. 7.108.

[6] *Ibid*, par. 7.122.

[7] *Ibid*, par. 7.130.

[8] *Ibid*, par. 7.139.

[9] *Ibid*, par. 7.76.

[10] United States – Certain Measures on Steel and Aluminium Products, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds552_e.htm (11/04/2019).

[11] See generally Tania Voon, 'Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era', *AJIL Unbound* 113, p. 48, available

at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CF8C3DCDF2CD924CAEEDD147840668F9/S2398772319000035a.pdf/security_exception_in_wto_law_entering_a_new_era.pdf (11/04/2019).