Russia – Measures Concerning Traffic in Transit

(DS512)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

February 27, 2018

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY ORAL STATEMENT

I. INVOCATION OF ARTICLE XXI IS SELF-JUDGING AND NOT SUBJECT TO REVIEW

1. Article XXI of the GATT 1994, in relevant part, states that "[n]othing 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 . . . taken in time of war or other emergency in international relations[.]" On its face, the text establishes two crucial points: first, nothing in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest; and second, the action necessary for the protection of its essential security interests is that "which it considers necessary for" such protection. That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens.

2. The self-judging nature of Article XXI is established through use of the crucial phrase: "which it considers necessary for the protection of its essential security interests." The ordinary meaning of "considers" is "regard (someone or something) as having a specified quality" or "believe; think". The "specified quality" for the action is that it is "necessary for" the protection of a Member's essential security. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("considers") an action as having the quality of being necessary.

3. The context of Article XXI(b)(iii) supports this understanding. First, the phrase "which it considers" is present in Article XXI(a) but not in Article XXI(c). Its use in Articles XXI(a) and XXI(b) highlights that, under these two provisions, it is the judgment of the Member that controls. The use of "which it considers" in Article XXI(b) should be given meaning and should not be reduced to inutility.

4. Second, the context provided by Article XX supports this understanding. This Article sets out "general exceptions", and a number of subparagraphs relate to whether an action is "necessary" for some listed objective. In none of these subparagraphs is the phrase "which it considers" used to introduce "necessary". It is also notable that the chapeau of Article XX subjects application of a measure qualifying as "necessary" under a subparagraph to a further requirement of, essentially, non-discrimination. No such qualification, which requires review of a Member's action, is present in Article XXI.

5. Third, the use of the phrase "it considers" in the GATT 1994 and other provisions of the WTO Agreement is used when the judgment resides in the named actor. Such provisions envision that a Member, a panel, the Appellate Body, or another entity takes an action where it "considers" that a situation arises. In each of these provisions, the judgment of whether a situation arises is left to the discretion of the named actor.

6. By way of contrast, and further context, we note at least two WTO provisions in which the judgment of the named actor is expressly subject to review through dispute settlement. Article 26.1 of the DSU permits non-violation complaints to be brought under the DSU, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party: "Where and to the extent that such party considers and a panel or the

Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following …". Thus, in this provision, Members explicitly agreed that "where … [a] party considers … that" is not enough, and they subjected the non-violation complaint to the additional check that "a panel or the Appellate Body determines that" the case is in fact a non-violation situation described in GATT 1994 Article XXIII:1(b). A similar limitation – that a "party considers and a panel determines that" – was agreed in DSU Article 26.2 for situation complaints described in GATT 1994 Article XXIII:1(c).

7. This context is highly instructive. No such review of a Member's judgment is set out in Article XXI, which only states "which it [a Member] considers necessary for the protection of its essential security interests". In agreeing to GATT 1994, Members could have subjected a Member's essential security judgment to an additional check through a similar phrase as in DSU Articles 26.1 and 26.2 – "and a panel [or the Appellate Body] determines that". But Members did not agree to this language in Article XXI. Accordingly, they did not agree to subject a Member's essential security judgment to review.

8. Russia's invocation of Article XXI did not occur in the DSB or prior to establishment of this Panel. The DSB established this Panel with standard terms of reference to examine the matter raised by Ukraine. However, the dispute is non-justiciable in the sense that the Panel cannot make findings on Russia's invocation, other than to conclude that Article XXI has been invoked.

9. This outcome is fully consistent with the Panel's terms of reference and the DSU. To recall, under Article 7.1, the Panel is charged with examining the matter raised by Ukraine "and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Similarly, DSU Article 11 calls for the Panel to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." But, were the Panel to make findings on Ukraine's claims in this dispute, that would be contrary to its terms of reference and Article 11. This is because such findings "will [not] assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements." No recommendation under DSU Article 19.1 is possible in this dispute because no antecedent finding that a measure is inconsistent with a covered agreement is possible, given the invocation of Article XXI.

10. In this way, the Panel will have "address[ed] the relevant provisions in any covered agreements cited by the parties to the disputes," consistently with DSU Article 7.2. It is erroneous to consider that to "address" a provision means that it is necessary for a Panel or the Appellate Body to make "findings" under that provision. Were this not so, each exercise of judicial economy by a panel or the Appellate Body would breach either DSU Article 7.2 or DSU Article 17.12.

II. THIS INTERPRETATION IS CONSISTENT WITH MEMBERS' HISTORICAL UNDERSTANDING OF ESSENTIAL SECURITY

11. Shortly after the GATT 1947 was concluded, a dispute arose between Czechoslovakia and the United States concerning export licenses that Czechoslovakia claimed the United States was withholding with respect to certain goods in a discriminatory manner. Czechoslovakia requested a decision under Article XXIII whether the United States had failed to carry out its obligations under Article I of the GATT 1947. The United States responded by invoking Article XXI.

12. In addressing the request from Czechoslovakia, it was commented that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security" and that "the Chairman … was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Article[] XXI which embodied exceptions to the general rule contained in Article I."

13. Based on this shared view, and upon a vote with only Czechoslovakia dissenting, the CONTRACTING PARTIES held that the United States had not failed to carry out its obligations under the Agreement. This early GATT action confirms the understanding of Article XXI as a self-judging exception to the general applicability of the other articles in the GATT.

14. In 1982, the European Communities and its member states, Canada, and Australia, spoke in the GATT Council to justify their application of trade restrictions for non-economic reasons against certain imports. The representative of the European Communities stated that it and its member states took these measures "on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights."

15. In the same Council discussion, the representative of Canada stated that "Canada's sovereign action was to be seen as a political response to a political issue" and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.

16. Expressing the same view, the representative of Australia stated that "the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification."

17. In that same Council discussion, the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment." Thus, the U.S. understanding of the security exemption in Article XXI has been consistent.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

18. General U.S. Answer to Questions from the Panel: As the Panel is aware, the United States considers that the text and negotiating history of GATT 1994 Article XXI, as well as its place within the broader WTO framework, indicate that this provision is non-justiciable. That is, the text leaves its invocation to the judgment of a Member through the phrase "that it considers

essential". A Member's judgment as to any element of this invocation is therefore not capable of findings by a panel. This being the case, the Panel would carry out its mandate, consistent with the terms of reference and the DSU, by acknowledging that Russia has invoked Article XXI and, on this basis, concluding that it cannot make findings as to whether Russia's measures are consistent with its WTO obligations.

19. In December 1945, the United States proposed the establishment of an International Trade Organization of the United Nations for the purpose of administering commercial relations between trading partners in accordance with rules set forth in a Charter for the Organization. The Draft Charter proposed by the United States the following year included two articles containing exceptions to certain provisions of the Charter. The articles, respectively and in relevant part, read as follows:

> Article 32 (General Exceptions to Chapter IV):
>
> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures …
>
> (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.
>
> Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):
>
> None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

20. Notably, these provisions as originally drafted do not appear to be self-judging. First, they lacked the key phrase that appears in the current text of Article XXI regarding action by a Member that "it considers necessary for" the protection of its essential security interests. Second, the essential security exception set out in Article 32 was one of twelve exceptions, several of which later formed the basis for GATT 1994 Article XX.

21. In March 1947, a general exception to Chapter V of the Draft Charter was put forward in Article XX (cf. Article 37 of the Charter). The proposed text read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …

> (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.

22. The chapeau of this provision on general exceptions and a number of the subparagraphs are identical to what would become Article XX in the GATT 1994. With its proviso, the chapeau contemplated review by a panel so that the exceptions would not be applied to discriminate unfairly. As the subparagraphs corresponding to essential security were included here together with other exceptions, and therefore were also subject to the proviso in the chapeau, this too suggests that the drafters did not, at this time, view the essential security exception in subparagraph (e) as self-judging.

23. On July 4, 1947, the United States proposed suggestions regarding the arrangement of the Charter as a whole, including the addition of a new Chapter VIII, entitled "Miscellaneous," and the placement in this new chapter of the proposed General Exceptions to the Charter as a whole. In this proposal, the United States also proposed additional text to make the self-judging nature of these exceptions apparent. Draft Article 94 stated:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of *which it considers contrary to* its essential security interests, or to prevent any Member from taking any action *which it may consider to be necessary to* such interests: …
>
> c) *In time of war or other emergency in international relations, relating to the protection of its essential security interests*;

24. For the first time in the drafting of the general exceptions, the text now referenced what a Member considered to be necessary – but this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interest. The drafting history thus shows a deliberate textual distinction drawn between the self-judging nature of general exceptions pertaining to essential security and those related to other interests that, unlike the removal of the security-based exceptions referenced above, were retained in Article 37.

25. Regarding the scope of application of the exception, at a meeting of the negotiating committee in 1947, the delegate from the Netherlands requested clarification on the meaning of the "essential security interests" of a Member, which the delegate suggested could represent "a very big loophole in the whole Charter." Responding to these concerns, the delegate from the United States explained that the exception would not "permit anything under the sun" and that the limitation on actions not consistent with the Charter related to the time in which such actions would be taken – *i.e.*, "in time of war or other emergency in international relations." The delegate suggested that there must be some latitude for security measures, and that it was a question of balance. In situations such as times of war, however, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

26. Moreover, "in defence of the text," the Chairman recalled the context of the exception as part of the Charter of the ITO, and that in that context "the atmosphere inside the ITO will be the

only efficient guarantee against abuses of the kind" raised by the Netherlands delegate. Therefore, the delegates and the Chairman recognized that the security exceptions would be self-judging and that no formal review of a Member's invocation of the exceptions could be requested.

27. During the same meeting, the Chairman noted that the question arose whether "we are in agreement that these clauses [on national security] should not provide for any means of redress". In response, the U.S. delegate noted that "[i]t is true that *an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter*; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other article." The U.S. delegate noted that Article 35(2) permitted recourse to its procedure "whether or not [a measure] conflicts with the terms of this Charter." Therefore, the negotiating history again demonstrates the negotiators understood that the essential security exception was "so wide in its coverage" that it was not justiciable; and that while the delegates considered that a claim for nullification or impairment "whether or not a measure conflicts" with the agreement might be available, they were clear that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.

28. The drafting history outlined above shows that the self-judging nature of the security exception in what was to become Article XXI was an intentional choice of the CONTRACTING PARTIES. In the course of the negotiation, the drafters continued to revise the general exception applicable to essential security, and agreed to separate it from the other exceptions so as to apply more broadly to the Charter as a whole. In so doing, they also agreed to the current formulation of the chapeau of Article XXI, which states that the exception would apply when a Member is taking "any action which it considers necessary for" the protection of its essential security interests. Therefore, both the text, in context, and the drafting history of Article XXI of the GATT 1994, confirm that a Member's invocation of its essential security interests in defence of an action "taken in time of war or other emergency in international relations" is self-judging and not justiciable by a dispute settlement panel.

29. Response to Question 1: We have used the term "jurisdiction" to refer to the ability of a Panel or the Appellate Body, under the terms of reference set by the DSB pursuant to the DSU, to organize and hear a dispute from a Member, including receiving submissions from the parties and third-parties. We have used the term "justiciability" to refer to the ability of the Panel or Appellate Body to make findings and provide a recommendation to the DSB.