Before the World Trade Organization

Russia – Measures Concerning Traffic in Transit
(DS512)

Australia’s Third Party Executive Summary

27 February 2018
## CASES CITED IN THIS EXECUTIVE SUMMARY

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I. INTRODUCTION

1. Australia considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) as well as the rights and obligations of WTO Members and the proper function of panels provided for under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

II. THE EXCEPTIONAL NATURE OF THE SECURITY EXCEPTION

2. Australia recalls that Article XXI(b) is an exception to a Member’s obligations under the GATT 1994, and its use is explicitly limited by the text of the provision.

3. This text reflects the shared concerns of the drafters, understandable in light of two world wars, regarding the interplay of national security and sovereignty in the realm of international trade. The specific reference to fissionable materials reflects concerns regarding the devastating nuclear experience during World War II. A call for coherence with the United Nations Charters reflects the expectation that the "International Trade Organisation" would function as a UN organisation, like other Bretton Woods institutions.

4. The US delegation that contributed to drafting the original security exception expressly observed the delicate balance the provision would need to address, stating:

   … we cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial focus.¹

5. In addition, the Norwegian Chair of the Working Group foresaw that the spirit in which Members interpreted these provisions would be the only guarantee against abuse.²

6. This spirit is best reflected in the restraint WTO Members have demonstrated for the past 20 years. It is no accident that, in over two decades of WTO jurisprudence, this is the first time a WTO panel has been called upon to consider a Member's invocation of Article XXI.

7. In light of the balance of sensitive interests Article XXI seeks to accommodate – as well as the responsibility of Members to guard against undue use of this exception – Australia submits that each invocation of Article XXI must be considered carefully on a case-by-case basis.

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¹ EPCT/A/PV/33, p. 20-21 and Corr. 3.
III. JURISDICTION OF A PANEL TO REVIEW A MATTER WHERE A MEMBER INVOKES ARTICLE XXI(b)

8. In its First Written Submission, Russia appears to suggest that a Member's invocation of Article XXI(b) automatically takes a dispute outside the jurisdiction of a panel.³

9. Russia submits that neither the Panel nor the WTO as an institution has jurisdiction over this matter⁴ on the basis that the measures Ukraine has challenged were introduced pursuant to Russia’s right "to take any action which it considers necessary for the protection of its essential security interests in the time of war or other emergency in international relations".⁵

   (i) Does the Panel have jurisdiction to consider this matter?

10. Article 7(1) of the DSU defines a panel's standard terms of reference as: to examine the matter referred to it, in the light of the relevant provisions in the covered agreement(s) cited by the parties to the dispute; and make such findings as will assist in making the recommendations or rulings provided for in the relevant agreement(s). Article 7(2) of the DSU further provides that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

11. The Appellate Body has explained that the use of the words "shall address" indicates that panels are in fact "required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".⁶

12. The Panel in this dispute was established with these standard terms of reference.⁷

13. In this dispute, Ukraine has cited Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3(a), XI:1 and XXIII:1 of the GATT 1994, claiming that the measures at issue violate Russia's obligations with respect to these provisions. Russia has cited Article XXI(b)(iii) of the GATT 1994 as a complete defence to Ukraine's claims of violation (while also advancing additional arguments related to temporal matters).

14. In Australia's view, it follows that Article 7 of the DSU vests the Panel with the jurisdiction to examine and make findings with respect to each of the "relevant provisions in the covered agreements" that Ukraine and Russia have cited. Australia therefore disagrees with Russia's submission that the Panel does not have jurisdiction over this matter.

   (ii) Does the Panel have the discretion to decline to exercise its jurisdiction?

³ First Written Submission of the Russian Federation, para. 47.
⁴ First Written Submission of the Russian Federation, para. 7. (emphasis added)
⁵ First Written Submission of the Russian Federation, para. 5.
⁶ Appellate Body Report, Mexico – Taxes on Soft Drinks, para. 49. (emphasis added)
⁷ Dispute Settlement Body – Minutes of meeting held in the centre William Rappard on 21 March 2017 (WT/DSB/M/394).
15. As outlined above (at paragraphs 11 and 12), Article 7 of the DSU does not simply empower a panel to address the relevant provisions of the covered agreements cited by the parties, but in fact requires a panel to do this.

16. In discharging this adjudicative function, Article 11 of the DSU obliges a panel to:

… make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

17. More broadly, Article 3.2 of the DSU recognises that the dispute settlement system: (i) is a "central element in providing security and predictability to the multilateral trading system"; and (ii) serves to preserve the rights and obligations of Members under the covered agreements. This is reinforced by Article 3.3 of the DSU, which highlights that the ability of Members to bring disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

18. In addition, Article 19.2 of the DSU prohibits a panel from making findings that would "add to or diminish the rights and obligations provided in the covered agreements".

19. The Appellate Body has confirmed that the dispute settlement system is the fundamental means through which Members' rights and obligations are enforced:

… allowing measures to be the subject of dispute settlement proceedings ... is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements".8

20. The Appellate Body has also recognised that, while panels enjoy some discretion in discharging their core adjudicative function, "this discretion does not extend to modifying the substantive provisions of the DSU".9

21. In addition, in examining a panel's obligation in Article 11 of the DSU, the Appellate Body has observed that "[i]t is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".10

9 Appellate Body Report, India-Patents (US), para. 92. (emphasis added)
10 Appellate Body Report, Mexico – Taxes on Soft Drink, para. 51.
22. Furthermore, the Appellate Body has noted that a Member's right under Article 3.3 of the DSU to initiate a WTO dispute when it considers that benefits accruing to it are being impaired by another Member implies that a Member "is entitled to a ruling by a WTO panel".11

23. It was on the basis of these rights and obligations – with respect to both Members and panels – that the Appellate Body upheld the panel's conclusion in Mexico – Taxes on Soft Drinks that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in that case that ha[d] been brought before it".12

24. In Australia's view, if the Panel were to decline to exercise its jurisdiction in this matter, this would deprive Ukraine of its rights under Articles 3.2 and 3.3 of the DSU to bring a dispute in order to remedy the benefits it considers Russia's measures are impairing.

25. Australia considers that declining to exercise jurisdiction in this dispute would also be inconsistent with the Panel's obligations under Articles 7, 11 and 19.2 of the DSU to:

(i) address the relevant provisions of the covered agreements cited by Ukraine and Russia;
(ii) make an objective assessment of this matter, including an objective assessment of the facts and the applicability of and conformity with the relevant provisions of the GATT 1994; and
(iii) not add to or diminish the rights and obligations of either Ukraine or Russia.

26. Accordingly, in order to give full effect to the rights and obligations provided in the DSU, Australia submits that the Panel cannot decline to exercise its jurisdiction to address the matters before it.

IV. SCOPE OF REVIEW OF ARTICLE XXI(B) OF THE GATT 1994

27. By its terms, Article XXI(b) provides that nothing in the GATT 1994 shall be construed to prevent a Member "from taking action which it considers necessary for the protection of its essential security interests" in three specific factual circumstances.

28. Australia considers that the use of the words "it considers necessary" in Article XXI(b) of the GATT 1994 indicates that it is for a Member to determine "its essential security interests" and the actions "it considers necessary" for the protection of those interests.13 In Australia's view, a panel's task in reviewing the "necessity" aspect of Article XXI(b) is limited to determining

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11 Appellate Body Report, Mexico – Taxes on Soft Drink, para. 52. (emphasis original)
13 Australia's third party oral statement at the first meeting of the Panel, para. 11.
whether the Member in fact considers the action necessary (such as by having regard to the Member’s statements and conduct).

29. Accordingly, in this dispute, Australia submits that Article XXI(b) does not require the Panel to make its own determination of what “it considers necessary” (such as by engaging in a proportionality analysis) or to substitute its determination for that of Russia’s. In this light, considerations of “reasonableness” or “plausibility” risk infringing upon the deference that must be accorded to Russia under Article XXI(b) by having the Panel second-guess what Russia considers necessary.

30. However, this deference to Russia does not preclude the Panel from undertaking any review of Russia’s invocation of Article XXI(b) or dispense with the Panel’s obligation to undertake an objective assessment of the matter before it, including an objective assessment of the facts of the case.

31. While Australia considers that the text of Article XXI(b) empowers a Member to determine for itself what action “it considers necessary” – and, accordingly, a panel’s nature and scope of review of this “necessity” aspect is limited – Australia sees a broader role for a panel in determining whether that (necessary) action was taken “for the protection of” the Member’s essential security interests.

32. Australia observes that the ordinary meaning of “for” is “[w]ith the object or purpose of”; “with a view to”; “conducive to; leading to; giving rise to; with the result or effect of”.14 In Australia’s view, a factual assessment of this “purposive” aspect of Article XXI(b) requires a panel to examine whether there is a “sufficient nexus” between the action taken and the Member’s essential security interests.15 If the action taken by a Member is not “capable of making … some contribution”16 to protecting the essential security interests identified, it would be reasonable for a panel to determine that the action was not in fact taken “for” such a purpose, consistent with Article XXI(b).17

33. In Australia’s view, this factual analytical framework allows a panel to discharge its obligations under the DSU to make an objective assessment of the matter before it,18 while giving effect to the explicit deference accorded to Members under Article XXI(b).

34. Accordingly, in this dispute, Australia submits that it is for Russia to determine for itself what action “it considers necessary” under Article XXI(b). However, the Panel must undertake a factual analysis of whether Russia does in fact consider the action necessary; and, if so,

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15 European Union's third party submission, para. 56; Appellate Body Report, *EC – Seal Products*, para. 5.169.
17 European Union's third party submission, para. 53; Appellate Body Report, *Colombia-Textiles*, para. 5.68.
18 *Understanding on Rules and Procedures governing the Settlement of Disputes* Article 11.
whether that (necessary) action was in fact taken "for the protection of" Russia's essential security interests.

V. CONCLUSION

35. In order to give proper effect to Members' rights and obligations under the WTO covered agreements, and to the Panel's obligations and terms of reference under the DSU, Australia submits that the Panel should exercise its jurisdiction to address all relevant provisions in the GATT 1994 cited by Ukraine and Russia in this dispute, including Article XXI(b)(iii).

36. Article XXI(b)(iii) reflects the critical importance of national security interests to Members' fundamental sovereignty. Deference to a Member's determination of what action "it considers necessary" to protect its essential security interests is explicit in the text of this provision and must be given proper effect. However, in Australia's view, this deference is not absolute.

37. In Australia's view, in undertaking its objective assessment of this matter, the Panel should determine:

   (i) whether Russia in fact considers the actions it has taken are necessary for the protection of its essential security interests (such as by having regard to Russia's statements and conduct); and
   (ii) whether those (necessary) actions were in fact taken for the protection of Russia's essential security interests.