Before the World Trade Organization

Russia – Measures Concerning Traffic in Transit
(DS512)

Responses of Australia to the Panel’s Questions

20 February 2018
Q1. What do you mean by justiciability? Is non-justiciability anything more than a case of a flagrant lack of jurisdiction?

1. A key argument made by Russia (and supported by the United States) in this dispute is that Russia’s invocation of Article XXI(b)(iii) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) automatically takes the dispute outside of the Panel's jurisdiction.1 In Australia's view, regardless of whether this is described as an issue of "jurisdiction" or "justiciability", the core question is whether the Panel is empowered to examine – and make findings with respect to – Russia's invocation of Article XXI(b)(iii).

2. As outlined in Australia's written submission,2 Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires the Panel to examine and make findings with respect to each of the "relevant provisions in the covered agreements" that Ukraine and Russia have cited.

3. Moreover, the Panel's obligation under Article 11 of the DSU to make an objective assessment of the matter before it (including an objective assessment of the facts of the case), requires the Panel to exercise its validly established jurisdiction.3

4. In this dispute, Russia has cited Article XXI(b)(iii) of the GATT 1994 as a complete defence to Ukraine's claims of violation.

5. Accordingly, in Australia's view, the DSU vests the Panel with the requisite authority to examine and make findings with respect to Russia's invocation of Article XXI(b)(iii) of the GATT 1994.

Q6. Assume for the sake of argument that the Panel were to determine whether the Russian Federation’s assertion that the action it took was necessary for the protection of its essential security interest was reasonable or plausible. Can the Panel undertake this assessment without the Russian Federation having indicated what its “essential security interests are”? 

6. As outlined in Australia's oral statement, 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

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1 Russia’s first written submission, para. 7; United States' third party oral statement at the first meeting of the Panel, paras. 1, 6, 35-36.
2 Australia's third party written submission. See, in particular, paras. 6-10.
3 See Australia's third party written submission, paras. 12-22; Appellate Body Report, Mexico – Taxes on Soft Drinks, para. 51.
A panel's scope of review with respect to Article XXI(b) of the GATT 1994 is therefore more limited than under Article XX.  

7. For these reasons, Australia is cautious about the Panel defining its role as determining whether Russia's assertion that its action was necessary for the protection of its essential security interests was "reasonable" or "plausible". In Australia's view, 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. 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.

8. 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.

9. In Australia's view, to discharge this obligation, 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.

10. In Australia's view, a factual assessment of the latter "purposive" aspect of Article XXI(b) requires the Panel to determine whether there is a "sufficient nexus" between Russia's actions and its essential security interests. To this end, Australia considers that Russia is required to identify its relevant essential security interests.

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4 Australia's third party oral statement at the first meeting of the Panel, para. 11.
5 Australia's third party oral statement at the first meeting of the Panel, paras. 13-17.