BEFORE THE WORLD TRADE ORGANIZATION

Russia – Measures Concerning Traffic in Transit

(WT/DS512)

Third Party Oral Statement of Australia

Geneva, 25 January 2018
I.  INTRODUCTION

1. Members of the Panel, thank you for the opportunity to present Australia's views in this dispute. In this statement, Australia will focus on two significant aspects of Article XXI(b) of the GATT 1994: (i) the exceptional nature of the provision; and (ii) the scope of the review to be undertaken by the Panel with respect to this provision.

II.  THE EXCEPTIONAL NATURE OF THE SECURITY EXCEPTION

2. To begin, Australia recalls that Article XXI(b) is an exception to a Members' 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.

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1 EPCT/A/PV/33, p. 20-21 and Corr.3
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.

III. SCOPE OF REVIEW

8. Panels are empowered by their terms of reference and the DSU\(^3\) to make findings with respect to each of the provisions invoked by the parties to a dispute. In this dispute, Russia has claimed that the measures at issue are necessary for the protection of its essential security interests, taken in time of emergency in international relations, consistent with Article XXI(b)(iii) of the GATT 1994.\(^4\)

9. In Australia's view, for the reasons outlined in our written submission (which we will not repeat here), Russia's invocation of Article XXI(b)(iii) places the provision squarely within the Panel's jurisdiction. However, Australia does not suggest that the scope of the Panel's review is therefore unlimited.

10. 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.

11. In Australia's view, the use of the words "it considers necessary" 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. However, this deference to a Member with respect to determining what it considers necessary does not preclude a panel from undertaking any review of a Member's invocation of Article XXI(b).

12. Rather, in view of a panel's obligation to make an objective assessment of the matter before it,\(^5\) Australia considers that a panel may undertake a factual review to determine: (i) whether the Member considers the action necessary for the protection of its essential security interests; and (ii) whether that (necessary) action is taken for the protection of its essential security interests.

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\(^3\) Understanding on Rules and Procedures governing the Settlement of Disputes.

\(^4\) Russia's first written submission, para. 37.

\(^5\) Understanding on Rules and Procedures governing the Settlement of Disputes, Article 11.
13. Australia agrees with the European Union that, in light of the deference explicitly accorded to Members under Article XXI(b), a panel's scope of review with respect to this provision is more "limited" than under Article XX.⁶

14. To this end, Australia considers that a panel's role is not to make its own determination of what "it considers necessary" or to substitute its determination for that of the invoking Member. Accordingly, unlike Article XX, Australia does not interpret Article XXI(b) as requiring a panel to engage in a proportionality analysis – such as by weighing and balancing the restrictive effect of the relevant measure against its contribution to its objective; or by considering whether alternative measures are reasonably available.

15. Rather, in Australia's view, a panel's task in reviewing the "necessity" aspect of Article XXI(b) is limited to determining whether the Member in fact considers the action necessary (such as by having regard to the Member's statements and conduct).

16. For this reason, Australia is cautious about defining – as the European Union has – the critical question for a panel to resolve as "whether the invoking Member can plausibly consider that the measure is necessary".⁷ In Australia's view, considerations of "plausibility" risk infringing upon the deference accorded to Members under Article XXI(b) by inviting a panel to second-guess what the Member considers necessary.

17. 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.

18. 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".⁸ 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.⁹ If the action taken by a

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⁶ European Union's third party submission, para. 63.
⁷ European Union's third party submission, para 62. (emphasis added)
⁹ European Union's third party submission, para. 56; Appellate Body Report, EC – Seal Products, para. 5.169.
Member is not "capable of making … some contribution"\(^{10}\) to protecting the essential security interests identified, it would be reasonable for a panel to determine that the action was not \textit{in fact} taken "for" such a purpose, consistent with Article XXI(b).\(^{11}\)

19. Australia considers that this factual analytical framework allows a panel to discharge its obligations under the DSU to make an objective assessment of the matter before it,\(^{12}\) while remaining faithful to the deference accorded to Members under Article XXI(b).

20. 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 \textit{in fact} consider the action necessary; and, if so, whether that (necessary) action was in fact taken "\textit{for the protection of}" Russia's essential security interests.

IV. CONCLUSION

21. Article XXI(b) reflects the critical importance of national security interests to Members' fundamental sovereignty. Deference to a Member's determination of what action "\textit{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.

22. Rather, a panel is both empowered and required to assess whether the invoking Member \textit{in fact} considered that action to be \textit{necessary}; and whether that (necessary) action was \textit{in fact} taken "\textit{for the protection of}" a Member's essential security interests.

23. Australia thanks the Panel for the opportunity to present our views.


\(^{11}\) European Union's third party submission, para. 53; Appellate Body Report, \textit{Colombia-Textiles}, para. 5.68.

\(^{12}\) \textit{Understanding on Rules and Procedures governing the Settlement of Disputes} Article 11.