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## **WTO Issues Ruling in Russia – Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable.**

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### **WTO Issues Ruling in *Russia – Traffic in Transit*: Measures Justified on National Security Grounds Are Justiciable**

On Friday, April 5, 2019, the decision of the World Trade Organization ("WTO") Panel in *Russia – Measures Concerning Traffic in Transit* (DS512) ("the Panel Report") was published.<sup>1</sup> The Panel Report is of major significance as this dispute is the first in which a WTO dispute settlement panel decided on the issue of jurisdiction over a dispute in which a WTO Member ("Member") claims that its measures were justified on national security grounds.

In essence, the Panel found that WTO panels have jurisdiction to review a Member's invocation of the national security exception. In the present case, the Panel determined that Russia had successfully established that its measures were taken in an "emergency in international relations" and, therefore, were covered by Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

#### **Background on the dispute**

The dispute was initiated by Ukraine on September 14, 2016. Ukraine challenged a number of Russian bans and restrictions on traffic in transit by road and rail from Ukraine across Russia and destined for Kazakhstan and the Kyrgyz Republic. Ukraine alleged that these

measures were inconsistent with Russia's obligations relating to the freedom of transit in Article V and the requirement to publish trade regulations in Article X of the GATT 1994. In addition, Ukraine claimed that the Russian measures were inconsistent with a number of Russia's commitments in its Protocol of Accession.

Russia had invoked the national security exception in Article XXI(b)(iii) of the GATT 1994, claiming that its measures were necessary for the protection of its essential security interests in respect of the emergency in international relations that occurred in 2014. Russia argued that the Panel did not have jurisdiction to adjudicate the dispute, as the national security exception should be considered as "totally self-judging."2

### The Panel's findings

The Panel began its analysis with the examination of Russia's arguments under the national security exception of Article XXI of the GATT 1994. This marks a difference with other cases in which a Member seeks to justify an otherwise WTO-inconsistent measure by relying on one of the general exceptions in Article XX. Typically, a Panel would first establish whether a Member's measures violate any of the substantive provisions of the GATT 1994 before turning to an assessment of whether these measures may be justified on grounds of, for example, public morals or the conservation of natural resources. This change in the normal order of analysis is of importance since Russia did not provide a substantive response to Ukraine's claims of violation.

On substance, the Panel found that it had jurisdiction to review Russia's invocation of Article XXI since there are no "special or additional rules of procedure" applying to that provision. The Panel then conducted a lengthy review of the negotiating history and context of this provision before concluding that Article XXI(b) requires an objective evaluation of whether the invoking Member has satisfied the requirements of that provision and that it is not only up to the invoking Member itself to make that determination. According to the Panel, "Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia."3

The Panel thereafter assessed whether Russia's measures were taken "in time of war or other emergency in international relations" within the meaning of Article XXI. Russia had referred to an emergency in international relations that occurred in 2014 that led Russia to take various actions, including imposing the measures at issue. The Panel found that it was neither relevant to determine which actor or actors bear international responsibility for the existence of this situation to which Russia referred, nor to characterize this situation under international law more generally.<sup>4</sup> Based on evidence adduced by Ukraine in the form of United Nations General Assembly resolutions, the Panel concluded that the situation between Ukraine and Russia since 2014 constituted an emergency in international relations and that each of the measures challenged by Ukraine was taken during the time of that particular emergency.

Then the Panel analyzed whether Russia's measures also complied with the requirement in the chapeau of Article XXI(b). The Panel found this to be the case, as it determined that the phrase "which it considers necessary" in the chapeau must be interpreted as meaning that it is entirely up to the Member imposing the measure and invoking the exception to determine such necessity. The Panel only provided a limitation on the ability of Members to determine such necessity by referring to the Member's obligation to adhere to the obligation of good faith as a general principle of law and a principle of general international law.<sup>5</sup> In the words of the Panel, "this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests." This characterization is of significant importance for future cases in which the national security exception may play a role (see "Importance of the findings" below). Based on this relatively lax standard, the Panel ultimately found that it was up to Russia to determine the necessity of its measures, as there was sufficient plausibility that the measures were linked to the emergency in international relations.

Notwithstanding the fact that it had determined that Russia's measures were covered by Article XXI(b)(iii) of the GATT 1994, the Panel nonetheless proceeded with an analysis of the substantive claims of violation. It did so because it was "mindful that, should its findings on Russia's invocation of Article XXI(b)(iii) be reversed in the event of an appeal, it may be

necessary for the Appellate Body to complete the analysis." This particular finding alone is questionable since, as the Panel itself acknowledges, a Panel should not decide on issues that are not absolutely necessary to dispose of the particular dispute.<sup>6</sup> Arguably, therefore, the Panel should have left it at the finding that Russia's measures were covered by Article XXI(b)(iii) of the GATT 1994.

In the second part of the report, the Panel addressed Ukraine's claims of violation. As noted earlier, Russia had not provided any substantive argumentation against any of these claims. The Panel therefore had little difficulty in finding that some of Russia's measures were *prima facie* inconsistent with Article V:2 of the GATT 1994 and with certain commitments in its Protocol of Accession. Finally, the Panel found that an inconsistency with a commitment in a Working Party Report, as incorporated in Russia's Protocol of Accession, could also be justified by Article XXI(b)(iii) of the GATT 1994.

#### Importance of the findings

The Panel's findings are significant for a number of reasons. First, the national security exception has been invoked by the United Arab Emirates, the Kingdom of Bahrain and the Kingdom of Saudi Arabia in three disputes initiated by Qatar (DS526, DS527 and DS528). Several other Members, notably the United States and Egypt, have openly expressed support for the position of these countries that issues of national security are political and are not matters appropriate for adjudication in the WTO dispute settlement system.<sup>7</sup> Second, the findings are of relevance for the disputes that have been initiated against the United States' measures on steel and aluminum pursuant to Section 232 and the Section 232 investigations on automobiles and parts, uranium, and titanium sponge. The United States has invoked the national security exception under Article XXI of the GATT 1994 in these disputes.<sup>8</sup> The Panel's findings in *Russia – Traffic and Transit* contradict the United States' historic position that this exception to a Member's treaty obligations is "self-judging" and, therefore, not subject to review by a WTO panel.

The Panel report may be appealed within 60 days by either of the parties.

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<sup>1</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, circulated April 5, 2019 ("the Panel Report" or "*Russia – Traffic in Transit*").

<sup>2</sup> Panel Report, *Russia – Traffic in Transit*, f.e. para. 7.26 and footnote 69.

<sup>3</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.102.

<sup>4</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.102.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132-7.138.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.152.

<sup>7</sup> WTO, Dispute Settlement Body, Minutes of the Meeting of 23 October 2017.

<sup>8</sup> See, f.e., Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress, Updated 2 April 2019, p. 23. Available at <https://fas.org/sgp/crs/misc/R45249.pdf>.