1 ARTICLE XXI

1.1 Text of Article XXI

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

1.2 General

1. The Panel in *US – Origin Marking (Hong Kong, China)* underlined the balance between Members' flexibility to take unilateral trade-related actions and the review of the use of such flexibility:

> "[W]e consider that the security and predictability of the multilateral trading system are intricately related to Members pursuing unilateral trade-related action within the scope of the requisite multilateral review carefully framed and provided for in the

> WTO's dispute settlement mechanism. In that sense, the reading discussed here serves the security and predictability of the multilateral trading system by allowing for sufficient flexibility for Members to adopt the measures they consider necessary for the protection of their security interests, while at the same time ensuring that this flexibility is exercised within the limits intended by the drafters."[1]

2. The Panel in *US – Origin Marking (Hong Kong, China)* noted the limited scope in which security-related issues are addressed in the WTO:

> "We underscore that we agree with the United States that the WTO should not become a forum to discuss security issues generally. Rather, the WTO Agreement and its annexes set forth the limited circumstances under which the WTO and its dispute settlement mechanism have been tasked with addressing security matters linked to international trade. Only in those circumstances, would it be appropriate for those issues to be addressed."[2]

1.3 Order of analysis

3. In *Russia – Traffic in Transit*, considering the respondent's argument that the Panel lacked jurisdiction to evaluate the WTO-consistency of the challenged measures, the Panel decided to address this jurisdictional issue, before proceeding to assessing the merits of the complainant's claims:

> "The novel and exceptional features of this dispute, including Russia's argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute. Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.
>
> The Panel must therefore determine, first, whether it has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994. If the Panel finds that it does not, then it will be unable to make findings on Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and with commitments in Russia's Accession Protocol."[3]

4. The Panel in *US – Origin Marking (Hong Kong, China)* examined, first, the merits of the complainant's claims, before proceeding to the assessment of the respondent's invocation of the security exception under Article XXI:

> "The next question is how to proceed from here. We note that the panel in *Russia – Traffic in Transit* reviewed the action under Article XXI(b) without first establishing whether there was any breach under the covered agreements. That panel took the view that an evaluation of the challenged measures under Article XXI(b) did not necessitate a prior determination that they would be WTO-inconsistent. The panel based this view on two inter-related considerations, namely that: (1) the circumstances in Article XXI(b)(iii) 'involve a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measure at issue is to be evaluated'; and (2) there is 'no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure.'[4] We further note that the panel in *Saudi Arabia – IPRs* followed what it considered to be 'common practice', namely to begin with an examination of the claims of inconsistency with the relevant covered agreement, to be followed, if any such inconsistency were found to exist, with an assessment of

[1] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.148.
[2] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.149.
[3] Panel Report, *Russia – Traffic in Transit*, paras. 7.24-7.25.
[4] *(footnote original)* Panel Report, *Russia – Traffic in Transit*, para. 7.108.

> whether the aspect(s) of the measure(s) at issue would be covered by one or more exceptions.[5]
>
> …
>
> On this basis we proceed to examining whether the United States has breached its obligation under Article IX:1 of the GATT 1994, which is the claim we have identified to be the most specific to the measure at issue. If we find a breach of that provision, we turn to the exception in Article XXI(b) and examine what the review of that exception entails."[6]

1.4 Article XXI(b)

1.4.1 Jurisdiction of a panel to review the invocation of Article XXI(b)

1.4.1.1 General

5. In *Russia – Traffic in Transit*, the main issue raised under Article XXI(b)(iii) was the extent, if any, of jurisdiction a WTO panel had over the invocation of this provision by a respondent. Russia, the respondent, argued that the Panel lacked jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994:

> "Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist. Russia asserts that this emergency presented threats to Russia's essential security interests. Russia argues that, under Article XXI(b)(iii), both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision.
>
> While Russia acknowledges that the Panel was established with standard terms of reference under Article 7.1 of the DSU, it argues that the Panel nevertheless lacks jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994. In Russia's view, the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measures taken pursuant to Article XXI. Russia considers that the issues that arise from its invocation of Article XXI(b)(iii) go beyond the scope of trade and economic relations among Members and are outside the scope of the WTO[.]"[7]

6. The Panel in *Russia – Traffic in Transit* noted, first, that WTO panels have "the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction."[8] The Panel then recalled that the DSU contained no special or additional provision regarding disputes in which Article XXI is invoked, and found, therefore, that the respondent's invocation of this provision in this dispute was within the Panel's terms of reference.[9] Noting that Russia's argument was based on the text of Article XXI(b)(iii), the Panel set out to interpret the text to make findings on that argument.[10]

7. The Panel in *US – Steel and Aluminium Products (Turkey)*, after a detailed textual/grammatical analysis of the text, rejected the United States' argument on the self-judging nature or non-justiciability of Article XXI(b).[11] The Panel concluded:

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[5] *(footnote original)* Panel Report, *Saudi Arabia – IPRs*, para. 7.6. The panel, however, noted that a "panel's choice on how to order and structure its analysis will often reflect, expressly or implicitly, one or more particular circumstances of the case at hand" (ibid. para. 7.3).

[6] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.187 and 7.190.

[7] Panel Report, *Russia – Traffic in Transit*, paras. 7.27-7.28.

[8] Panel Report, *Russia – Traffic in Transit*, para. 7.53.

[9] Panel Report, *Russia – Traffic in Transit*, para. 7.56.

[10] Panel Report, *Russia – Traffic in Transit*, paras. 7.57-7.58.

[11] Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.121-7.137.

> "In conclusion, the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii). The Panel does not consider that Article XXI(b) of the GATT 1994 is 'self-judging' or 'non-justiciable' in the sense argued by the United States, nor that the provision contains a 'single relative clause' that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. In light of this conclusion and in accordance with relevant requirements of the DSU, the Panel turns to assess the United States' invocation of Article XXI(b) of the GATT 1994 in relation to the measures at issue."[12]

8. In coming to this conclusion, the Panel in *US – Steel and Aluminium Products (Turkey)* stated that the absence of any provision in the text of Article XXI(b) regarding the review of actions taken pursuant to this provision is not determinative:

> "The provision of relevance to this dispute, Article XXI(b) of the GATT 1994, establishes a right to take action for the protection of a Member's essential security interests and explicitly enumerates conditions in the subparagraphs that are an integral part of that right. The absence of explicit provision or elaboration in Article XXI(b) of the GATT 1994 as to whether and how its invocation may be reviewed does not, in itself, preclude or otherwise determine the review of that provision in dispute settlement proceedings.[13] Rather, the scope and nature of such review derives from the terms of Article XXI(b) of the GATT 1994 and requirements of the DSU established under the WTO Agreement, which acknowledges *inter alia* the role of the WTO dispute settlement system in 'providing security and predictability to the multilateral trading system'. If Article XXI(b) of the GATT 1994 is raised in dispute settlement proceedings, the DSU requires that it be addressed in accordance with the terms of the provision itself and within an objective assessment of the relevant measures and claims to make findings that will assist the DSB to make recommendations provided for in the covered agreements."[14]

1.4.1.2 Chapeau of Article XXI(b)

1.4.1.2.1 "which it considers"

9. The Panel in *Russia – Traffic in Transit* noted that, in terms of its scope, the phrase "which it considers" may be interpreted in three different ways:

> "The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause 'which it considers'. The adjectival clause can be read to qualify only the word 'necessary', i.e. the necessity of the measures for the protection of 'its essential security interests'; or to qualify also the determination of these 'essential security interests'; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well."[15]

10. The Panel in *Russia – Traffic in Transit* tested first, the third scenario which gave the phrase "which it considers" the most extensive scope. According to the Panel, while a mere meaning of the words and the grammatical structure of the chapeau could be interpreted to mean that the phrase "which it considers" qualifies the three subparagraphs of Article XXI(b), the logical structure of the provision would support the opposite view:

> "As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the

[12] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.143.
[13] (*footnote original*) The Panel notes that the invocation of Article XX of the GATT 1994 titled "General Exceptions" has been reviewed in WTO dispute settlement proceedings notwithstanding the absence of an explicit provision in Article XX on whether and how its invocation may be reviewed.
[14] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.140.
[15] Panel Report, *Russia – Traffic in Transit*, para. 7.63.

> adjectival clause 'which it considers' qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?
>
> A similar logical query is whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination. In answering this last question, the Panel will focus on the last set of circumstances, envisaged in subparagraph (iii), to determine whether, given their nature, the evaluation of these circumstances can be left wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel."[16]

11. On this basis, the Panel in *Russia – Traffic in Transit* concluded that the requirements set out in subparagraph (iii) are of an objective nature, and that the phrase "which it considers" does not qualify the determination of the circumstances described in that subparagraph:

> "In sum, the Panel considers that the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause 'which it considers' in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[17]

12. The Panel found support for this interpretation in the negotiating history of Article XXI.[18]

13. The Panel in *Russia – Traffic in Transit* concluded that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not extend to the circumstances described in each of its subparagraphs:

> "The Panel concludes that the adjectival clause 'which it considers' in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[19]

14. The Panel in *Russia – Traffic in Transit* therefore rejected the view that Article XXI(b)(iii) is "self-judging" or "non-justiciable":

> "It follows from the Panel's interpretation of Article XXI(b), as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 is not totally 'self-judging' in the manner asserted by Russia.
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> Consequently, Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's

[16] Panel Report, *Russia – Traffic in Transit*, paras. 7.65-7.66.
[17] Panel Report, *Russia – Traffic in Transit*, para. 7.82.
[18] Panel Report, *Russia – Traffic in Transit*, para. 7.100.
[19] Panel Report, *Russia – Traffic in Transit*, para. 7.101.

> invocation of Article XXI(b)(iii) is 'non-justiciable', to the extent that this argument also relies on the alleged totally 'self-judging' nature of the provision.[20]"[21]

15. The Panel in *US – Origin Marking (Hong Kong, China)* noted that Article XXI(b) provides for unilateral action, but that the issue was the extent of the phrase "which it considers":

> "The question, therefore, is not whether Article XXI(b) provides for a unilateral determination by the invoking Member. It clearly does. The question is rather, what is covered by that determination? That – and, again, the parties agree – depends on what the phrase 'which it considers' extends to."[22]

16. In *US – Origin Marking (Hong Kong, China)*, the issue of whether the phrase "which it considers" in the chapeau of Article XXI(b) extends to its subparagraphs arose again, and, as in previous disputes, the parties took opposing views:

> "In the United States' view, the phrase 'which it considers' relates to all that follows in the text, that is, the *chapeau and* the subparagraphs. The subparagraphs, therefore, in the United States' view, are circumstances the invoking Member 'considers' present, and in this way serve as guidance for that Member's exercise of its rights under the provision.
>
> In Hong Kong, China's view the phrase 'which it considers' does not extend to the subparagraphs. For Hong Kong, China, therefore, the existence of an action of the type described in the subparagraphs is not self-judging but is instead for a panel to decide on the basis of an objective review. The third parties that commented on Article XXI(b) share Hong Kong, China's view, which leads to the same interpretive result as the one reached by the panel in *Russia – Traffic in Transit*.
>
> The interpretive question that we need to resolve, therefore, is whether the phrase 'which it considers' in the *chapeau* of Article XXI(b) extends to the subparagraphs following the *chapeau*. If it does, it is the invoking Member's unilateral determination that governs the application of the subparagraphs, and a panel may not replace this determination with its own. If it does not extend to the subparagraphs, the application of the subparagraphs is subject to a panel's review and Article XXI(b) is not self-judging in its entirety, but only partly self-judging."[23]

17. The Panel in *US – Origin Marking (Hong Kong, China)* concluded that the phrase "which it considers" in the chapeau of Article XXI(b) does not extend to its subparagraphs:

> "Having examined the structure of the text of Article XXI(b) in all three authentic languages, we have discerned a clear meaning, namely that the phrase 'which it considers' does not extend to the subparagraphs.[24] This is the case even if one were

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[20] (*footnote original*) Another way of making the argument that a Member's invocation of Article XXI(b)(iii) is non-justiciable is by characterizing the problem as a "political question", as was also advanced by the United States. The ICJ has rejected the "political question" argument, concluding that, as long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. (See, for example, International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations*, (United Nations) (1962) I.C.J. Reports, p. 155. See also International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (1995), Case No. IT-94-1-A, paras. 23-25.) Moreover, the Panel notes that in *Mexico –Taxes on Soft Drinks*, the Appellate Body expressed the view that a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU, or the right of a Member to seek redress of a violation of obligations within the meaning of Article 23 of the DSU. The Panel therefore considers that this way of characterizing the problem as a basis for the Panel to decline to review Russia's invocation of Article XXI(b)(iii) is also untenable. (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.)

[21] Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.103.

[22] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.28.

[23] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.29-7.31.

[24] (*footnote original*) We note that our analysis of the ordinary meaning of Article XXI(b)(iii) differs in some respects from the approach taken by the panel in *Russia – Traffic in Transit* (Panel Report, *Russia – Traffic in Transit*, paras. 7.63-7.66), due perhaps to our more detailed focus on the text and structure of the

> to accept the structure advocated by the United States, namely that the subparagraphs are the continuation of a single relative clause that starts in the *chapeau*. Even under this proposed structure (which, as noted above, does not work for the third of the three subparagraphs), nothing connects what is in those subparagraphs to the verb 'consider'. That verb thus does not do 'double duty', but instead only relates to the adjective 'necessary' in the *chapeau*. Therefore, in our assessment the United States' reading is not supported by the text.[25]
>
> The grammatical structure of Article XXI(b) as discerned from the text, thus, suggests that what is in the subparagraphs is not subject to the invoking Member's own determination but is instead subject to objective determination by a panel. The role of the subparagraphs, thus, would be to circumscribe (and limit) the circumstances in which the invoking Member may take action which it considers necessary for the protection of its essential security interests."[26]

18. The Panel also found that its textual interpretation found support in the context of the provision as well as object and purpose of the GATT 1994.[27]

19. The Panel in *US – Origin Marking (Hong Kong, China)* underlined that the political nature of essential security interests does not exclude actions taken pursuant to Article XXI(b) from evaluation by a WTO panel:

> "[W]e are cognizant that the international institutional framework in which the WTO operates, has the United Nations at the centre of multilateral action dealing with the maintenance of international peace and security.[28] The United Nations is therefore the main international organization for the discussion of security issues generally. The WTO was established to provide the 'common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement'.[29] To that extent, the WTO was entrusted with providing the multilateral framework on international trade.[30] Within the covered agreements, there are provisions, other than Article XXI(b) that directly refer to security-related matters that affect international

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provision (see also fn **Error! Bookmark not defined.** below on the text-based approach to interpretation in the Vienna Convention).

[25] (*footnote original*) We note that our conclusion that the United States' reading is not supported by the text of Article XXI(b) does not rest on whether such reading, as argued by Hong Kong, China, would render the subparagraphs ineffective. Rather, it is based, as explained above, on our understanding of the grammatical structure of the provision. We do not therefore need to address the question, extensively discussed among the parties and third parties, whether the United States' reading would be contrary to the effectiveness principle (see United States' responses to Panel question No. 46, paras. 205-216, and No. 47, paras. 217-223; second written submission, paras. 49-57; Hong Kong, China's responses to Panel question No. 46, paras. 153-159, and No. 47, paras. 160-162). We also note that the panel in *Russia – Traffic in Transit* questioned the *effet utile* of the subparagraphs if the determination of the circumstances therein were left exclusively to the discretion of the invoking Member, see Panel Report, *Russia – Traffic in Transit*, para. 7.65.

[26] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.88-7.89.

[27] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.101-7.104, 7.112, 7.125, 7.131 and 7.150.

[28] (*footnote original*) Article 1 of the Charter of the United Nations (UN Charter).

[29] (*footnote original*) Article 2.1 of the Marrakesh Agreement.

[30] (*footnote original*) We note that in response to a question from the Panel, the United States referred to certain provisions of the ITO Charter on how the ITO was meant to address political matters or issues with reference to the United Nations and the ICJ (Articles 86(3) and 96 of the ITO Charter). According to the United States, such provisions reflect that the ITO Charter negotiators recognized that the ITO would not be the appropriate forum for certain matters. (United States' response to Panel question No. 100, paras. 113-116). In this regard, we note that it is difficult to support the United States' conclusion without the benefit of any practical guidance from the operation of the ITO, which never existed beyond the text of the ITO Charter adopted by its negotiators. Additionally, as noted in this section the WTO Agreement does include a range of provisions that touch on issues relating to "security" matters.

We note that the institutional framework of the ITO Charter referred to by the United State was not incorporated into the GATT or the WTO. Moreover, we do not see how the differences of competence between the ITO and the United Nations may inform how the WTO generally, or its dispute settlement specifically, would transgress the security and predictability of the multilateral trading system by addressing issues of a political nature. We therefore do not see the context referred to by the United States contradicting the view set out in this paragraph.

> trade; chief among them is Article 2.2 of the TBT Agreement, which refers to 'national security requirements'. While recognizing that this concept is distinct from 'essential security interests' as used in Article XXI(b) it nonetheless shows that WTO Members raise within the WTO institutional framework (e.g. within the TBT Committee) trade-related concerns with respect to security measures taken by Members. In this context, we consider that the political nature of essential security interests does not *in itself* warrant the exclusion of any evaluation thereof by a panel, particularly, bearing in mind our reading of the terms of Article XXI(b) described above."[31]

1.4.1.2.2 "essential security interests"

20. The Panel in *Russia – Traffic in Transit* described the term "essential security interests" as follows:

> "'Essential security interests'[32], which is evidently a narrower concept than 'security interests', may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[33]

21. The Panel in *Russia – Traffic in Transit* stated that it is for each WTO Member to define its essential security interests, but added that this discretion is not unlimited:

> "The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.
>
> However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ('[a] treaty shall be interpreted in good faith …') and Article 26 ('[e]very treaty … must be performed [by the parties] in good faith') of the Vienna Convention."[34]

22. The Panel in *Russia – Traffic in Transit* cautioned against labelling trade interests as essential security interests, and referred, in this context, to the obligation of good faith:

> "The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of 'reciprocal and mutually advantageous arrangements' that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system."[35]

23. The Panel in *Russia – Traffic in Transit* stated that it is for the respondent to articulate its essential security interests arising from an emergency in international relations, and that the required level of articulation depends on the emergency in international relations at issue:

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[31] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.147.

[32] (*footnote original*) The term "essential security interests" appears in Article XXI of the GATT 1994, Article XIV*bis* of the GATS, Article 73 of the TRIPS Agreement, Article 10.8.3 of the TBT Agreement and Article III:1 of the Revised Agreement on Government Procurement. The term "national security" appears in Articles 2.2, 2.10, 5.4 and 5.7 of the TBT Agreement, and Article III:1 of the Revised Agreement on Government Procurement.

[33] Panel Report, *Russia – Traffic in Transit*, para. 7.130.

[34] Panel Report, *Russia – Traffic in Transit*, paras. 7.131-7.132.

[35] Panel Report, *Russia – Traffic in Transit*, para. 7.133.

> "It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.
>
> What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict."[36]

24. The Panel in *Russia – Traffic in Transit* found that, in the case at hand, Russia provided a satisfactory articulation of its essential security interests at issue:

> "In the case at hand, the emergency in international relations is very close to the 'hard core' of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.
>
> Given the character of the 2014 emergency, as one that has been recognized by the UN General Assembly as involving armed conflict, and which affects the security of the border with an adjacent country and exhibits the other features identified by Russia, the essential security interests that thereby arise for Russia cannot be considered obscure or indeterminate.[37] Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances. Moreover, there is nothing in Russia's expression of those interests to suggest that Russia invokes Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994."[38]

25. The Panel in *Russia – Traffic in Transit* pointed out that the principle of good faith applies not only to the definition of essential security interests but also to their connection with the challenged measures:

> "The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), 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."[39]

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[36] Panel Report, *Russia – Traffic in Transit*, para. 7.134-7.135.

[37] (*footnote original*) Russia also attempts to show that it genuinely has national security interests that it considers to be under threat. For example, Russia emphasizes that the 2016 measures were expressly enacted in accordance with a 2006 law authorizing the imposition of economic sanctions for national security reasons, Federal Law No. 281-FZ. This 2006 law, entitled "On the Special Economic Measures" authorizes the President of the Russian Federation, acting on the basis of proposals of the Security Council of the Russian Federation, to impose economic sanctions where circumstances require the "immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state …, when such act poses a threat to the interests and security of the Russian Federation". (Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006, (Federal Law No. 281-FZ), (Exhibit RUS-8).) The Panel considers that this demonstrates that the 2016 measures were adopted by Russia as a response to acts considered by the President of the Russian Federation and the Security Council of the Russian Federation to pose a threat to Russia's interests and security.

[38] Panel Report, *Russia – Traffic in Transit*, paras. 7.136-7.137.

[39] Panel Report, *Russia – Traffic in Transit*, para. 7.138.

26. In reviewing the connection between Russia's essential security interests and the challenged measure, the Panel in *Russia – Traffic in Transit* applied the following test:

> "The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency."[40]

27. The Panel in *Russia – Traffic in Transit* concluded that Russia demonstrated the connection between its essential security interests and the challenged measures:

> "In these circumstances, the measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency. This conclusion is not undermined by evidence on the record that the general instability of the Ukraine-Russia border did not prevent some bilateral trade from taking place along parts of the border.
>
> This being so, it is for Russia to determine the 'necessity' of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause 'which it considers' is to be given legal effect."[41]

1.4.1.3 Subparagraphs (i) and (ii)

1.4.1.3.1 "relating to"

28. The Panel in *Russia – Traffic in Transit* stated that the phrase "relating to" refers to an objective relationship between ends and means:

> "The connection between the action and the materials or the traffic described in subparagraphs (i) and (ii) is specified by the phrase 'relating to'. The phrase 'relating to', as used in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a 'close and genuine relationship of ends and means' between the measure and the objective of the Member adopting the measure. This is an objective relationship between the ends and the means, subject to objective determination."[42]

1.4.1.4 Subparagraph (iii)

1.4.1.4.1 "taken in time of"

29. The Panel in *Russia – Traffic in Transit* stated that the phrase "taken in time of" connotes a chronological concurrence, and represents an objective fact:

> "The phrase 'taken in time of' in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understands this phrase to require that the action be taken *during* the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination."[43]

30. The Panel in *Russia – Traffic in Transit* pointed out that the existence of war or an emergency in international relations is amenable to objective determination:

> "Moreover, as for the circumstances referred to in subparagraph (iii), the existence of a war, as one characteristic example of a larger category of 'emergency in international relations', is clearly capable of objective determination. Although the confines of an 'emergency in international relations' are less clear than those of the

[40] Panel Report, *Russia – Traffic in Transit*, para. 7.139.
[41] Panel Report, *Russia – Traffic in Transit*, paras. 7.145-7.146.
[42] Panel Report, *Russia – Traffic in Transit*, para. 7.69.
[43] Panel Report, *Russia – Traffic in Transit*, para. 7.70.

> matters addressed in subparagraphs (i) and (ii), and of 'war' under subparagraph (iii), it is clear that an 'emergency in international relations' can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination."[44]

31. The Panel in *US – Steel and Aluminium Products (Turkey)* stated that the phrase "taken in time of" creates a temporal link between the action and the relevant circumstances:

> "Further, under subparagraph (iii) of Article XXI(b), action for the protection of essential security interests must be 'taken in time of' an emergency in international relations. As discussed above, the Panel understands these opening terms of subparagraph (iii) to qualify and describe the 'action' referred to in Article XXI(b). The phrase 'taken in time of' in subparagraph (iii) describes the temporal link between the action taken by a Member under Article XXI(b) and the 'war or other emergency in international relations' in subparagraph (iii) of that Article."[45]

1.4.1.4.2 "war or other emergency in international relations"

32. The Panel in *Russia – Traffic in Transit* described "war" as follows:

> "The use of the conjunction 'or' with the adjective 'other' in 'war *or other* emergency in international relations' in subparagraph (iii) indicates that war is one example of the larger category of 'emergency in international relations'. War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)."[46]

33. The Panel in *Russia – Traffic in Transit* stated that the existence of an emergency in international relations requires circumstances more serious than political or economic differences between relevant Members:

> "Moreover, the reference to 'war' in conjunction with 'or other emergency in international relations' in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be 'emergencies in international relations' within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.
>
> An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[47] Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.[48]"[49]

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[44] Panel Report, *Russia – Traffic in Transit*, para. 7.71. See also ibid. para. 7.77.
[45] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.155.
[46] Panel Report, *Russia – Traffic in Transit*, para. 7.72.
[47] (*footnote original*) This interpretation of an emergency in international relations is consistent with the preparatory work, referred to in paragraph 7.92 below, which indicates that the United States, when proposing the provision of the Geneva Draft of the ITO Charter that was carried over into Article XXI of the GATT 1947, and in referring to an "emergency in international relations", had in mind particularly the situation that existed between 1939 and 1941. During this time, the United States had not yet participated in the Second World War, yet owing to that situation, had still found it necessary to take certain measures for the protection of its essential security interests.
[48] (*footnote original*) This understanding is well-entrenched historically in diplomatic practice. See, e.g. Article 11 of the Covenant of the League of Nations: "Any war or threat of war, whether immediately affecting

34. The Panel in *Russia – Traffic in Transit* pointed out that in describing a situation as an emergency in international relations, there is no need to make a characterization of that situation under international nor determine the actors that are responsible for it:

> "The Panel notes that it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general."[50]

35. The Panel in *Russia – Traffic in Transit* found the situation between Russia and Ukraine as from 2014 represented an emergency in international relations:

> "There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.
>
> Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994."[51]

36. The Panel also concluded that the challenged measures had been taken in time of emergency in international relations.[52]

37. The Panel in *US – Steel and Aluminium Products (Turkey)* pointed out that reference to "war" in the text of Article XXI(b)(iii) informs the meaning of "emergency in international relations":

> "The Panel finds that the reference to 'war' informs the meaning of 'emergency in international relations' as part of the circumstances 'in time of' which a Member may act under Article XXI(b) for the protection of its essential security interests. In particular, the Panel considers that an 'emergency in international relations' within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a 'war' in terms of its impact on international relations. This understanding is supported by the French and Spanish language versions of Article XXI(b)(iii) of the GATT 1994, where the terms corresponding to 'emergency in international relations' are '*grave tension internationale*' and '*grave tensión internacional*' respectively. The term '*grave*' in these languages may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations."[53]

38. The Panel in *US – Steel and Aluminium Products (Turkey)* found that the US Department of Commerce reports based on which the challenged measures had been taken did not address the existence of the emergency in international relations:

> "The analysis and conclusions of the USDOC in the Steel and Aluminium Reports do not purport to identify or address the existence of an 'emergency in international relations' within the meaning of Article XXI(b)(iii) of the GATT 1994. The determinations of US domestic authorities under Section 232 relate to a different legal standard and basis under US municipal law than the provisions of the covered

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any of the members of the League or not, is hereby declared a matter of concern to the whole League … [i]n case any such emergency should arise …". (Covenant of the League of Nations, done at Paris, 28 June 1919, League of Nations Treaty Series, Vol. 108, p. 188.)

[49] Panel Report, *Russia – Traffic in Transit*, paras. 7.75-7.76.

[50] Panel Report, *Russia – Traffic in Transit*, para. 7.121.

[51] Panel Report, *Russia – Traffic in Transit*, paras. 7.122-7.123.

[52] Panel Report, *Russia – Traffic in Transit*, para. 7.125.

[53] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.154.

> agreements within the Panel's mandate under the DSU. Accordingly, the factors relied upon by the USDOC and conclusions in the Steel and Aluminium Reports are distinct from, and cannot be directly transposed to, the terms of Article XXI(b)(iii) of the GATT 1994 and the objective assessment required under Article 11 of the DSU. Therefore, the factors treated cumulatively by US domestic authorities under Section 232 may not be regarded as having commensurate relevance or weight in the Panel's objective assessment as to whether the measures were taken 'in time of war or other emergency in international relations' under Article XXI(b)(iii) of the GATT 1994. The assessment of the Panel in this dispute concerns the United States' specific arguments in connection with the existence of an 'emergency in international relations' under Article XXI(b)(iii) and, in particular, its references to an international situation of global excess capacity in steel and aluminium."[54]

39. In this regard, the Panel in *US – Steel and Aluminium Products (Turkey)* noted that the factors analysed in the US Department of Commerce reports did not address the issue of emergency in international relations:

> "In the Panel's view, the factors raised by the United States on the impact of imports on domestic producers of steel and aluminium, including the consideration of US domestic authorities of 'national security' under Section 232, pertain more to the 'action which [the United States] considers necessary for the protection of its essential security interests' under paragraph (b) of Article XXI. However, in accordance with the ordinary meaning of its terms, subparagraph (iii) requires a distinct inquiry as to whether the actions were taken in time of an 'emergency in international relations' based on an objective assessment of relevant evidence and arguments."[55]

40. The Panel in *US – Steel and Aluminium Products (Turkey)* disagreed with the United States' arguments that global excess capacity in steel and aluminium pointed to an emergency in international relations:

> "In this connection, the Panel notes the evidence submitted by the United States of international concerns regarding global excess capacity in steel and aluminium, including the discussion of such concerns in the Steel and Aluminium Reports. The statements at the international level referred to by the United States indicate that the issue of global excess capacity in steel and aluminium has been a topic of high-level discussion and expressions of concern in various international fora. As reflected in information provided by the United States in this dispute, the discussion of global excess capacity focuses on specific sectors and is evidence of the fact that the issue has been raised as a matter of international attention within the conduct of international relations of various countries. Notwithstanding such evidence of international engagement, the Panel recalls that an 'emergency in international relations' under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.
>
> Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an 'emergency in international relations' during which a Member may act under Article XXI(b)(iii). For example, the G20 Global Steel Forum Report 'focuses on the steel sector and provides concrete policy solutions to reduce steel excess capacity'. In referring to excess steelmaking capacity as 'a global challenge that has become particularly acute since 2015', the report highlights various efforts within the Global Steel Forum in light of trends in the sector as part of '[g]lobal cooperation to find solutions to tackle excess capacity in the steel market'. Such evidence submitted by the United States in this dispute reflects international concern expressed in the context of cooperative efforts to address excess capacity in a specific sector. In the Panel's view, however, the gravity or severity of an 'emergency in

[54] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.158.
[55] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.161.

> international relations' within the meaning of Article XXI(b)(iii), particularly regarding the impact on international relations of situations falling under that provision, has not been established based on the evidence and arguments submitted in this dispute. In reaching this conclusion, the Panel is mindful of its mandate in this dispute as well as the balance of rights and obligations reflected in the terms of Article XXI of the GATT 1994 interpreted in accordance with the DSU."[56]

41. Based on this assessment, the Panel in *US – Steel and Aluminium Products (Turkey)* concluded that the measures at issue had not been taken in time of war or other emergency in international relations, and that therefore the inconsistencies found with Articles I:1, II:1, and XI:1 of the GATT 1994 were not justified under Article XXI(b)(iii) of that Agreement.[57]

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[56] Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.162-7.163.
[57] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.164.