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## **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 *China – Raw Materials* examined Article XI:2(a) of the GATT 1994, and contrasted the language used therein (an "essential product to the exporting Member") with the language found in Article XXI(b) of the GATT 1994:

"The Panel does not consider that the terms of Article XI:2, nor the statement made in the context of negotiating the text of Article XI:2 that the importance of a product 'should be judged in relation to the particular country concerned', means that a WTO Member may, on its own, determine whether a product is essential to it. If this were the case, Article XI:2 could have been drafted in a way such as Article XXI(b) of the GATT 1994, which states: 'Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests' (emphasis added). In the Panel's view,

the determination of whether a product is 'essential' to that Member should take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)."<sup>1</sup>

### 1.3 Article XXI(b)

#### 1.3.1 Jurisdiction of a panel to review the invocation of Article XXI(b)(iii)

2. In *Russia – Traffic in Transit*, the respondent argued that the Panel lacked jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994.<sup>2</sup> The Panel noted, first, that the complainant's claim under Article XXI was within the Panel's terms of reference within the meaning of the DSU:

"Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 (the covered agreements). The covered agreements include, *inter alia*, the Multilateral Agreements on Trade in Goods, including the GATT 1994, more particularly Articles XXII and XXIII, as elaborated and applied by the DSU. Article 1.2 of the DSU provides that the rules and procedures of the DSU shall apply subject to such special or additional rules on dispute settlement contained in the covered agreements as are identified in Appendix 2 to the DSU. Appendix 2 of the DSU does not refer to any special or additional rules of procedure applying to disputes in which Article XXI of the GATT 1994 is invoked.

The Panel recalls that Ukraine requested the DSB to establish a panel pursuant to the provisions of the DSU and Article XXIII of the GATT 1994. On 21 March 2017, the DSB established the Panel in accordance with Article 6 of the DSU, with standard terms of reference as provided in Article 7.1 of the DSU. Article 7.2 of the DSU requires that the Panel address the relevant provisions in any covered agreements cited by the parties to the dispute.

Given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU."<sup>3</sup>

3. The Panel then noted that the respondent nevertheless argued that the Panel lacked jurisdiction to review the respondent's invocation of Article XXI(b)(iii) because "the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel".<sup>4</sup> In other words, the respondent argued that the interpretation of Article XXI was "self-judging", and that, therefore "Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations".<sup>5</sup> Considering that the respondent's jurisdictional plea was based on its interpretation of Article XXI(b)(iii), the Panel found it appropriate to interpret this provision:

"[T]he Panel's evaluation of Russia's jurisdictional plea requires it, in the first place, to interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements."<sup>6</sup>

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<sup>1</sup> Panel Report, *China – Raw Materials*, para. 7.276.

<sup>2</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.28.

<sup>3</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.54–7.56.

<sup>4</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.57.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.57.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.58.

4. The Panel ultimately rejected the respondent's argument that Article XXI(b)(iii) is self-judging, as well as a third party's argument that this provision is "non-justiciable".<sup>7</sup> In reaching this conclusion, the Panel formulated an interpretation of various parts of subparagraphs (i) to (iii) as well as the chapeau of Article XXI(b), as reproduced below.

5. The Panel considered the legal question posed by the respondent's argument above to be "whether the adjectival clause 'which it considers' in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b)".<sup>8</sup>

6. The Panel found, at the outset, that the "set of circumstances described in the enumerated subparagraphs" operate as limitative qualifying clauses:

"[I]f 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."<sup>9</sup>

7. The Panel added that, given that the subject matters listed in subparagraphs (i) to (iii) of Article XXI(b) are "substantially different", it is "obvious that these subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet in order to fall within the ambit of Article XXI(b)".<sup>10</sup> The Panel then set out to examine the text of subparagraphs (i) to (iii) of Article XXI(b).

8. With respect to subparagraphs (i) and (ii) of Article XXI(b), the Panel in *Russia – Traffic in Transit* focused on the opening clause "relating to", which connects the "action" in the chapeau of Article XXI(b) to the subject matter in each subparagraph. The Panel considered that this opening phrase entails an objective relationship between the "action" and the relevant subject matter contained in the subparagraph.<sup>11</sup> The Panel informed its understanding of this relationship on the basis of the interpretation advanced by the Appellate Body in the context of Article XX(g) of the GATT 1994:

"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."<sup>12</sup>

9. The Panel then examined the text and context of subparagraph (iii) of Article XXI(b), the object and purpose of the WTO Agreement and the GATT 1994, statements made by GATT contracting parties and WTO Members concerning Article XXI(b)(iii) of the GATT 1994, and the negotiating history surrounding Article XXI(b)(iii) of the GATT 1947.

10. Beginning with the text and context of Article XXI(b)(iii), the Panel considered the meaning of the phrase "taken in time of" in subparagraph (iii):

"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."<sup>13</sup>

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<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.103.

<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.64.

<sup>9</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>10</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>11</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.69.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.69.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.70.

11. The Panel considered that the existence of war as a characteristic example of an emergency in international relations would be clearly capable of objective determination. The Panel further determined 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".<sup>14</sup> Furthermore, for the Panel, the use of the word "or" in the phrase "war or other emergency in international relations" "indicates that war is one example of the larger category of 'emergency in international relations'".<sup>15</sup>

12. The Panel also found that the reference to "war" or "other emergency in international relations", as well as the content of the matters discussed in subparagraphs (i) and (ii) of Article XXI(b), meant that "political or economic differences would not be sufficient to constitute an "emergency in international relations":

"[P]olitical 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."<sup>16</sup>

13. In the light of the text and context surrounding the provision, the Panel provided its understanding of what could constitute an "emergency in international relations":

"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. 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.

Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was 'taken in time of' an 'emergency in international relations' under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination."<sup>17</sup>

14. The Panel then took into account the object and purpose of the WTO Agreement and the GATT 1994 in its interpretation of subparagraph (iii) of Article XXI(b). The Panel noted statements made by prior panels and the Appellate Body referring to the importance of the security and predictability of the multilateral trading system and the use of non-trade-related legitimate objectives so as not to circumvent GATT and WTO obligations. The Panel considered that these statements did not support an interpretation of subparagraph (iii) of Article XXI(b) allowing for the invocation of that provision to be subject only to the unilateral will of the invoking Member:

"Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade.<sup>18</sup> At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse

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<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.71.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72.

<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.75.

<sup>17</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.76–7.77.

<sup>18</sup> (original footnote) See Appellate Body Reports, *EC – Computer Equipment*, para. 82; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 433; *Argentina – Textiles and Apparel*, para. 47; and *EC – Chicken Cuts*, para. 243.

to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."<sup>19</sup>

15. The Panel then surveyed the pronouncements of GATT contracting parties and WTO Members concerning Article XXI to determine if they revealed a common understanding as to the meaning of the provision. Noting differences in positions and the absence of a common understanding, the Panel found that situations of armed conflict and acute international crisis were involved in many of the invocations of Article XXI(b)(iii):

"It is notable, however, that a significant majority of occasions on which Article XXI(b)(iii) was invoked concerned situations of armed conflict and acute international crisis, where heightened tensions could lead to armed conflict, rather than protectionism under the guise of a security issue. It therefore appears that Members have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes. The Panel does not assign any legal significance to this observation, but merely notes that the conduct of Members attests to the type of circumstance which has historically warranted the invocation of Article XXI(b)(iii)."<sup>20</sup>

16. Thus, the Panel concluded that the text of Article XXI(b)(iii), in its context and in the light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, led to the conclusion 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 an "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.<sup>21</sup>

17. Turning then to the negotiating history of Article XXI of the GATT 1947<sup>22</sup>, the Panel considered that the negotiating history demonstrated that the drafters considered that:

"a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;

b. the 'balance' that was struck by the security exceptions was that Members would have 'some latitude' to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and

c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter."<sup>23</sup>

18. The Panel also noted that the negotiations on the Charter of the International Trade Organization and the GATT 1994 occurred very shortly after the end of the Second World War. In the Panel's view, the discussions of "security" issues throughout the negotiating history should therefore be understood in that context.<sup>24</sup>

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<sup>19</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>20</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.81.

<sup>21</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.82.

<sup>22</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.83.

<sup>23</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.98.

<sup>24</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.99.

19. The Panel concluded, therefore, that the negotiating history of Article XXI(b) of the GATT 1947 confirmed that a panel would have a role in evaluating the invocation of this provision:

"The negotiating history therefore confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself. In other words, there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny."<sup>25</sup>

20. In the light of this conclusion, the Panel concluded that Article XXI(b) "vest[s] 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". Accordingly, the Panel considered that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging".<sup>26</sup> The Panel thus rejected the respondent's argument that the Panel lacked jurisdiction to review the respondent's invocation of Article XXI(b)(iii), as well as a third party's argument that the respondent's invocation of the same provision was "'non-justiciable', to the extent that this argument also relies on the alleged totally 'self-judging' nature of the provision".<sup>27</sup>

### **1.3.2 Subparagraphs of Article XXI(b)**

#### **1.3.2.1 Subparagraph (iii)**

##### **1.3.2.1.1 "war or other emergency in international relations"**

21. Turning to the facts in the dispute, the Panel in *Russia – Traffic in Transit* made particular note of the types of evidence that the respondent produced as part of its invocation of Article XXI(b)(iii) of the GATT 1994. The Panel noted that, in its opening statement at the second substantive meeting, the respondent had identified a "hypothetical situation" that could amount to an emergency in international relations under Article XXI(b)(iii). This hypothetical situation, as formulated by the respondent, was as follows:

- a. Unrest within the territory of a country neighbouring a Member, occurring in the immediate vicinity of the Member's border;
- b. The loss of control by that neighbouring country over its border;
- c. Movement of refugees from that neighbouring country to the Member's territory; and
- d. Unilateral measures and sanctions imposed by that neighbouring country or by other countries, which are not authorized by the United Nations, similar to those imposed against Russia by Ukraine."<sup>28</sup>

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<sup>25</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.100.

<sup>26</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.102.

<sup>27</sup> (*original footnote*) 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.)

<sup>28</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.114.

22. When asked how closely the hypothetical situation described above reflected the actual situation on the ground, the respondent's representative explained that the respondent had referred to the hypothetical "in order not to introduce again some information that Russia cannot disclose".<sup>29</sup> The respondent's representative also referred to a paragraph from the complainant's Trade Policy Review Report (TPRM Report), which explained, in the words of the respondent's representative, "what is going on and how real these whole hypothetical questions are". The TPRM Report underscored two specific events or characteristics of the relations between the two parties as "factors that had adversely affected the complainant's economic performance in 2014 and 2015".<sup>30</sup>

23. The Panel noted that Paragraph A(i) of the TPRM states that the TPRM is "not ... intended to serve as a basis for the enforcement of specific obligations under the covered Agreements or for dispute settlement procedures".<sup>31</sup> Notwithstanding this paragraph, the Panel considered that the respondent had referred to relevant portions of the complainant's TPRM Report "solely to further identify the situation that it had presented in its first written submission" as the emergency in international relations that had occurred in a particular year and presented threats to its essential security interests.<sup>32</sup> The Panel further added the following:

"Russia had also previously asserted that the circumstances that led to the imposition of the measures at issue were publicly available and known to Ukraine. Russia did *not* refer to the relevant paragraph of Ukraine's 2016 Trade Policy Review Report as evidence that Ukraine (or Russia, for that matter) characterizes that situation as an emergency in international relations for the purposes of the present proceedings. The Panel therefore does not consider that paragraph A(i) of the TPRM applies to this situation, or that the Panel is thereby precluded from taking into account Russia's reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report."<sup>33</sup>

24. On the basis of the evidence presented to it, the Panel considered that the respondent had identified the situation that it had considered to be an emergency in international relations by reference to the following factors:

"(a) the time-period in which it arose and continues to exist, (b) that the situation involves Ukraine, (c) that it affects the security of Russia's border with Ukraine in various ways, (d) that it has resulted in other countries imposing sanctions against Russia, and (e) that the situation in question is publicly known. The Panel regards this as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring, and which it argues is an emergency in international relations."<sup>34</sup>

25. The Panel ultimately found that the evidence above showed the existence of an emergency in international relations within the meaning of Article XXI(b) of the GATT 1994 between the parties:

"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."<sup>35</sup>

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<sup>29</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.115.

<sup>30</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.115.

<sup>31</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.117.

<sup>32</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.118.

<sup>33</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.118.

<sup>34</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.119.

<sup>35</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.122.

26. The Panel also noted, in this context, that "it is not relevant to this determination which actor or actors bear international responsibility" for the emergency in international relations.<sup>36</sup>

#### 1.3.2.1.2 "taken in time of"

27. Once the Panel had found that an emergency in international relations existed between the parties, it determined that the measures at issue were "taken in time of" that emergency. The Panel found that all of the measures were introduced *during* the emergency in international relations beginning as least in 2014, and thus, were "taken in time of" such emergency for purposes of subparagraph (iii)<sup>37</sup>:

"[T]he Panel notes that the 2016 Belarus Transit Requirements were introduced by Russia on 1 January 2016, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were introduced on 1 July 2016, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were introduced by Russia in November 2014. All of the measures were therefore introduced during the emergency in international relations and thus were 'taken in time of' such emergency for purposes of subparagraph (iii)."<sup>38</sup>

### 1.3.3 Chapeau of Article XXI(b)

#### 1.3.3.1 "essential security interests"

28. The Panel in *Russia – Traffic in Transit* found the term "essential security interests" to encompass a narrower concept than that of "security interests". It considered that "essential 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".<sup>39</sup>

7.127. The Panel pointed out that whether specific interests constitute "essential security interests" would depend "on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances". Thus, it would be left "to every Member to define what it considers to be its essential security interests".<sup>40</sup> The Panel qualified this statement by noting that a Member is not "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".<sup>41</sup> This obligation of good faith, as noted by the Panel, is a general principle of law and a principle of general international law which underlies all treaties, as codified in Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties.<sup>42</sup>

7.128. According to the Panel, 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. The Panel noted such an example of this:

"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."<sup>43</sup>

7.129. In the light of the obligation of good faith, in the Panel's view, it would be "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency

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<sup>36</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.121.

<sup>37</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.124-7.125.

<sup>38</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.124.

<sup>39</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.130.

<sup>40</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.131.

<sup>41</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132.

<sup>42</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.132.

<sup>43</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.133.



in international relations sufficiently enough to demonstrate their veracity".<sup>44</sup> The Panel further elaborated on what would constitute a "sufficient level of articulation":

"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."<sup>45</sup>

7.130. Turning to the facts of the case, the Panel noted that the emergency in international relations was "very close to the 'hard core' of war or armed conflict". While the respondent had not explicitly articulated the essential security interests that it considered the measures at issue were necessary to protect, it did, in the Panel's view, refer to certain characteristics of the emergency in international relations that concerned the security of the border between the parties.<sup>46</sup> For the Panel, this was sufficient for the respondent's identification of its essential security interests:

"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. 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."<sup>47</sup>

### 1.3.3.2 "which it considers"

29. Having discussed the obligation of good faith with respect to a respondent's definition of "essential security interests", the Panel applied this obligation to the establishment of the connection between a respondent's essential security interests and the measures at issue. The Panel considered that 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 those interests".<sup>48</sup> The Panel stated, therefore, that it would need to review whether the measures "are so remote from, or unrelated to, the ... emergency that is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency".<sup>49</sup>

30. Turning to the facts in the dispute, the Panel considered that there was a clear correlation between the change in government in the complainant's territory during the relevant period of time, the newly sworn-in government's decision to sign an association agreement with a relevant third party during the same relevant period of time, the deterioration in relations between the parties (as evidenced by a UN General Assembly resolution), and the sanctions imposed by several countries against the respondent. The Panel further elaborated as follows:

"In other words, Ukraine's decision to pursue economic integration with the European Union rather than with the [Eurasian Economic Union] cannot reasonably be seen as unrelated to the events that followed, and led to the emergency in

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<sup>44</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.134.

<sup>45</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.135.

<sup>46</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.136.

<sup>47</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.137.

<sup>48</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.138.

<sup>49</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.139.

international relations, during which Russia took a number of actions in respect of Ukraine, including the adoption of the 2016 measures."<sup>50</sup>

31. The Panel noted that the specific measures at issue operated so as to ban the transit of goods subject to sanctions imposed by the respondent from transiting across the border of the respondent's territory with another country. The bans were imposed specifically to prevent the circumvention of the import bans imposed by the respondent under one of the legal instruments at issue in the dispute, which, itself, was a response taken by the respondent to the sanctions imposed on it by other countries during the relevant period in response to the emergency in international relations.<sup>51</sup> The Panel added as follows:

"[A]ll of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia's relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict."<sup>52</sup>

32. In the light of the above, the Panel considered that the measures at issue could not be regarded as being so remote from or unrelated to the emergency in international relations, such that it was not implausible that the respondent implemented the measures for the protection of its essential security interests arising out of that emergency. In the Panel's view, this conclusion was not undermined by the evidence on the record that the general instability of the border between the parties did not prevent some bilateral trade from taking place along parts of that border.<sup>53</sup> The Panel emphasized that it was for the respondent to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion followed by logical necessity for the Panel if the adjectival clause "which it considers" was to be given legal effect.<sup>54</sup>

33. Prior to concluding its analysis of the respondent's invocation of Article XXI(b)(iii), the Panel also responded to an argument raised by the parties concerning the interpretation of the phrase "if that party considers" in Articles 22.3(b) and 22.3(c) of the DSU. The Panel ultimately rejected this argument on the basis that the relevant context in the DSU leading to the proposed interpretation was not present in Article XXI(b) of the GATT 1994:

"The Panel has been referred to *EC – Bananas III (Ecuador) (Article 22.6 – EC)* in which the arbitrators interpreted the phrase 'if that party considers' in Articles 22.3(b) and 22.3(c) of the DSU as providing a margin of appreciation to the party which was nevertheless subject to review by the arbitrators. The arbitrator's decision regarding the scope of review under Article 22.3 of the DSU was based on the fact that the discretion accorded to the complaining party under the relevant subparagraphs of that provision was subject to the obligation in the introductory words to Article 22.3 of the DSU, which provides that '[i]n considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures'. There is no equivalent obligation anywhere in the text of Article XXI that expressly conditions the discretion accorded to an invoking Member under the chapeau of Article XXI(b)."<sup>55</sup>

34. In the light of the above, the Panel found that the respondent had satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.<sup>56</sup>

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<sup>50</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.142.

<sup>51</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.143.

<sup>52</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.144.

<sup>53</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.145.

<sup>54</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.146.

<sup>55</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.147.

<sup>56</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.148.