LANDMARK RULING ON THE WTO NATIONAL SECURITY EXCEPTION

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Legal Briefings – By **Lode Van Den Hende, Eric White and Lukas Maly**

In a landmark decision concerning Ukraine's complaint against Russia's transit restrictions, a WTO Panel has ruled for the first time on the nature of the GATT national security exception.

The Panel took the view that the invocation of the exception is justiciable and subject to scrutiny by the WTO Dispute Settlement Body (DSB). This is contrary to the position long held by the US (and invoked by Russia in the current dispute) that the exception is totally "self-judging", i.e. that it can be unilaterally invoked by a Member without the possibility of further scrutiny. The Panel ultimately concluded that – in the circumstances – Russia's invocation of the exception was justified.

The implications of the ruling will reverberate far beyond the Ukraine-Russia dispute at hand. A number of WTO Members, including the US and Saudi Arabia, have sought to rely on the self-judging nature of the security exception in their pending WTO disputes, a position they may now need to revisit. Further, the ruling could also play a role in any prospective WTO dispute against the recent activation of US sanctions for "trafficking" in Cuban property under Title III of the Helms-Burton Act.

PANEL REPORT IN RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT

Background

The dispute concerns Ukraine's challenge to measures imposed by Russia on 30 November 2014, 1 January 2016 and 1 July 2016, respectively, on the transit of certain goods by road and rail through the territory of Russia, as well as the publication and administration of those measures.

These were part of a broader set of measures (such as import bans) adopted by Russia in the context of the Ukraine crisis and Ukraine's decision to seek closer integration with the EU (as documented by the signing of the Ukraine-EU Association Agreement in 2014).

In essence, the Russian measures provide that:

- transport from Ukraine to Kazakhstan and Kyrgyzstan (and, in practice, also Mongolia, Tajikistan, Turkmenistan and Uzbekistan) can only go through the Belarus-Russia border and is subject to additional conditions;
- certain goods can only be transported if Kazakhstan and Kyrgyzstan obtain a derogation from the Russian authorities, effectively amounting to complete transit bans;
- transit of certain goods subject to veterinary surveillance and plant goods is not permitted through Belarus and must take place exclusively through checkpoints on the Russian side of the external customs border of the Eurasian Economic Union.

Arguments of the parties

Ukraine argued the Russian measures are in breach of Article V GATT (freedom of transit), Article X GATT (publication and administration of trade regulations), and related commitments in Russia's WTO Accession Protocol.

Russia's response was principally that it considers the measures in question necessary for the protection of its essential security interests within the meaning of Article XXI(b)(iii) GATT. It claimed that it adopted those measures as a result of the "*emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests*". Russia further argued that Article XXI(b)(iii) GATT is totally "self-judging" and that, as a result, the Panel should limit its findings to a statement of the fact that Russia has invoked that provision without further engaging on the substance of Ukraine's claims.

Ukraine as well as nine intervening Members, including the EU, argued that the invocation by Russia of Article XXI(b)(iii) GATT is justiciable and therefore capable of findings by the Panel (albeit disagreeing as to the degree of judicial scrutiny required). Only one Member took the opposite position: the US. This is not particularly surprising given that the US has long argued that the Article XXI exception is non-justiciable, most recently in the context of its imposition of steel and aluminium tariffs which are currently subject to pending WTO proceedings.

Panel's findings on the justiciability of Article XXI(b)(iii) GATT

The Panel rejected the position that Article XXI(b) GATT is totally self-judging.

By way of background, Article XXI(b) stipulates that "*[n]othing 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*

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 [...]*"

The Panel noted that the adjectival clause "which it considers" in Article XXI(b) can be read to qualify (i) only the "necessity" of the measures taken by a Member for the protection of its "essential security interests", (ii) also the determination that the measures were indeed taken for the protection of those essential security interests, or (iii) the determination as to whether the circumstances described in the three subparagraphs of the provision exist (which would effectively render the exception non-justiciable). The Panel ultimately concluded that while the first determination is at the discretion of each Member, the other two determinations are subject to at least some level of objective scrutiny by the DSB.

On the key issue of justiciability of Article XXI(b), the Panel started its analysis by recognising that the clause "which it considers" could be read as allowing the invoking Member to *subjectively determine* whether the circumstances described in subparagraphs (i) to (iii) to that provision are met, rendering the provision effectively self-judging. However, it took the view that a better interpretation is that the security exception requires an objective review as to whether the requirements of the relevant subparagraph are satisfied, for the following reasons:

- In light of the logical structure of Article XXI(b), the function of the three subparagraphs is to limit the discretion accorded to the Member in invoking the exception to the three sets of circumstances described therein. As such, to leave the determination of whether these requirements were satisfied exclusively to the discretion of the invoking Member would deprive those clauses of any practical effect.

- If Article XXI(b) were to be interpreted as a totally self-judging provision, any Member could unilaterally suspend its WTO obligations by invoking this provision, leaving the affected Members unprotected. In the Panel's view, this reading is not justified as it would go against the basic purpose of the WTO law regime, namely to "*promote the security and predictability of the reciprocal and mutually advantageous agreements and*

the substantial reduction of tariffs and other barriers to trade".

- The position that Article XXI(b) GATT is not totally self-judging is also confirmed by the negotiating history of the provision (which the Panel considered in great detail).

While this has not been expressly considered in the Panel Report, we note that there is an additional argument (made by the EU) in support of the Panel's conclusion. Article 7.2 of the Dispute Settlement Understanding (DSU) provides that "*Panels shall address the relevant provisions in any covered agreement or agreements* [which includes GATT] *cited by the parties to the dispute*". When the WTO dispute settlement system was being established in the 1980s and 1990s, the Members could have expressly excluded the security exception in Article XXI GATT from the scope of the DSU. The fact that they have not done so implicitly confirms that that it was their intention that the invocation of this provision be subject to the jurisdiction of the DSB.

The legal test under Article XXI(b) GATT

Based on the Panel's approach in the current case, the legal test under Article XXI(b) GATT effectively proceeds in two steps:

- **First step**: Are the measures in question covered by the relevant subparagraph of Article XXI(b) GATT? As noted above, this will require an objective determination as to whether the requirements under the relevant subparagraph are satisfied.

- **Second step**: If the measures are indeed covered by the relevant subparagraph of Article XXI(b), were they in reality taken for the protection of the Member's essential security interest or for some unrelated reason? Here, a lesser degree of scrutiny applies, with the Panel effectively limiting itself to ensuring that the Member interprets and applies the provision in *good faith*.

With regards to the second step, the Panel noted that the term "essential security interests" is a narrower concept than "security interests" and would generally refer to 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*".

According to the Panel, each Member is free to define what it considers to constitute its "essential security interests". However, this is subject to the Member's obligation to interpret and apply the provision in good faith, including not to use it as a means to circumvent its obligations under the GATT. Importantly, the Panel noted that this would be the case, for example, if the Member were to re-label what are in fact trade interests as essential security interest. To guard against this risk, the Member will be required to articulate the purported essential security interests in sufficient detail.

The obligation of good faith applies also to establishing a connection between the measures at issue and the essential security interests that they are purported to protect. The Member invoking Article XXI(b) will thus need to demonstrate that the measures "are not implausible" as being protective of the essential security interests from which they are said to arise.

Finally, the question of whether the specific measures imposed by a Member are "necessary" for the protection of its essential security interests is left exclusively for the Member to determine. In other words, there is no requirement for the measures to be proportionate.

Panel's application of Article XXI(b)(iii) GATT to the Russian measures

In accordance with the legal test outlined above, the Panel started its analysis by considering whether the measures adopted by Russia were covered by subparagraph (iii) of Article XXI(b), i.e. whether they were taken in time of war or other emergency in international relations.

According to the Panel, an "emergency in international relations" is a "*situation of armed conflict, or of a latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state*". The Panel was satisfied that the situation between Ukraine and Russia since 2014 constituted such an emergency. Since the measures were adopted between November 2014 and July 2016, they were clearly "taken in the time of" that emergency, thereby meeting the requirements of Article XXI(b)(iii).

The Panel continued by assessing whether the essential security interests invoked by Russia are sufficiently articulated to demonstrate that they arise from the emergency at issue.

In this regard, the Panel referred to the fact that the 2014 emergency has been recognised by the UN General Assembly as involving armed conflict and that it affected the security of the Ukraine-Russia border. Moreover, there was nothing to suggest that Russia invoked the security exception as a means to circumvent its WTO obligations. In light of this, the Panel concluded that Russia's articulation of its essential security interests (despite Russia's "allusiveness" in this regard) met the minimum requirements.

Finally, the Panel reviewed whether the measures were so removed from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented them for the protection of its essential security interest arising out of that emergency. Having considered the relevant circumstances, it concluded that this was not implausible.

In light of the above, and noting that it was for Russia to determine the "necessity" of its measures, the Panel ultimately concluded that the measures benefited from the security exception in Article XXI(b)(iii) GATT. Ukraine did not appeal the Panel ruling which was adopted by the DSB on 26 April 2019. This means that the ruling is now final.

IMPLICATIONS FOR THE WTO AND BEYOND

Pending WTO proceedings invoking the security exception

There are a number of pending WTO proceedings which could turn on the application of the Article XXI(b) security exception. These include, in particular, actions by various WTO Members (including the EU or China) against the steel and aluminium tariffs imposed by the US under Section 232 of the Trade Expansion Act of 1962.

As we have noted in our previous briefing, the US has sought to defend these measures on the basis of the security exception in Article XXI(b)(ii) GATT. The justification advanced is that steel and aluminium are goods and materials required (indirectly) for the purpose of supplying the military and that US capacity in these sectors is therefore necessary for national security.

This argument seems to lack credibility, *inter alia*, because:

- The US President has made various public statements which reveal a broader trade/protectionist purpose behind these measures;
- The US has exempted certain countries with high levels of steel and aluminium imports from the measures. However, there does not appear to be any basis to argue that such imports do not pose a threat to national security while imports from other (including least-developed) countries do; and
- The US Department of Defence (DoD) has itself stated in a memo (which has since been removed from the internet) that the tariffs are not necessary for national security: "*[…] the US military requirements for steel and aluminium each only represent about three percent of US production. Therefore, DoD does not believe that the finds in the reports* [the Department of Commerce reports advocating for the tariffs] *impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements*."

The US has objected to the adoption of the Panel Report in the Russia-Ukraine dispute noting that the Panel's analysis was "*unpersuasive and problematic for systemic reasons*" and that the Panel did not "*sufficiently examine the Russian Federation's assertion that invocation of national security was 'self-judging'*". This suggests that – in light of the ruling at hand – the US is concerned about its ability to defend the steel and aluminium tariffs on the basis of the security exception. The same holds true for the adoption of any similar measures in the future, such as the repeatedly threatened tariffs on cars from the EU.

Nonetheless, given that the US is currently blocking the appointment of new Members of the WTO Appellate Body – which will render the adjudicator unable to function in December 2019 – it could take years before the actions against the US tariffs come to a final resolution.

Other recent WTO actions in which the security exception has been cited are the Qatar dispute against Saudi Arabia, and Russia's own challenge against measures imposed by Ukraine in the follow-up to the Ukraine crisis. The latter is still at a consultation stage but there is a question mark as to whether Russia will ultimately request formal proceedings given that the Panel would likely rule in favour of Ukraine for the same reasons it found for Russia in the current dispute.

US sanctions under the Helms-Burton Act

Title III of the Helms-Burton Act of 1996 allows US nationals whose property was expropriated pursuant to the Cuban Revolution of 1959 to bring damages actions against companies "trafficking" in such property. The application of Title III has been suspended following the EU-US agreements of 1997 and 1998. However, the Trump Administration has recently announced that it will allow claims under Title III and this decision came into effect on 2 May 2019.

As noted in our previous briefing, Title III lawsuits could introduce risks to many parties currently conducting business in Cuba (such as multinational hotel chains). This is because Title III has a broad extraterritorial reach, it applies to a broad range of dealings with confiscated property (including using or profiting from such property), and also due to the potentially significant damages awards (assessed based on the current market value of the property confiscated).

EU defendants of Title III lawsuits will be to a large extent protected by the EU blocking statutes. These statutes prohibit the enforcement of US court judgments relating to Title III within the EU and allow EU companies sued in the US to recover any damages through legal proceedings against US claimants before EU courts. Nonetheless, an EU defendant who is subject to a successful claim in the US might be left out of pocket if the claimant does not have assets in the EU against which it could recover.

The EU has already signalled that it may initiate a WTO action in respect of the activation of Title III. Depending on the precise legal basis for any such WTO action, the US would probably seek to rely (at least in part) on the security exemptions in Article XXI(b)(iii) GATT (and the corresponding exception in Article XIV *bis*(1)(b)(iii) GATS).

Given that these measures come at a time of tensions between the US and Cuba (and especially given the accusations that Cuba has supplied Venezuela with military personnel in the context of the current US-Venezuela standoff), the US would appear to stand a better chance of relying on the security exception here than in the case of its steel and aluminium tariffs.

To succeed, the US will need to show, in the first instance, that the tensions constitute an "emergency in international relations". This should be, in principle, possible given that this term has been defined broadly by the Panel and includes a situation of "heightened tension or crisis". It will, however, also need to demonstrate that the measures were truly taken for the protection of the US' "essential security interests". This is where the US is likely to struggle to make its case given that Cuba does not seem to pose any immediate threat to it and the sanctions are primarily targeted at third country investors who obviously pose even less of a threat.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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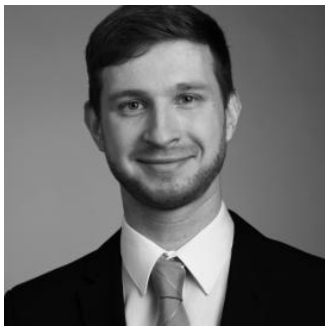

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