

SIDI International Economic Group

Article XXI GATT and the Security Exception in International Trade

Introduction

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Article XXI GATT

Security Exceptions

- ❑ Nothing in this Agreement shall be construed
- ❑ (a) ...
- ❑ (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
- ❑ (iii) taken in time of war or other emergency in international relations;

Russia – Traffic in Transit (DS512) Panel Report

- ❑ First case ever under Art.XXI. Adopted without appeal 5 April 2019. Distinguished panel chaired by former AB member prof. G. Abi-Saab
 - ❑ Ukraine v. Russia: Restrictions imposed by Russia on the transit of Ukraine's exports through Russia due to the tensions between the two countries
 - Panel findings (1): the provision is justiciable
- Subpara.(b) is not self-judging**
- ❑ - a panel has the power to review objectively whether a situation of «emergency in int'l relations» exists between the two countries, i.e
 - ❑ - a situation of (latent) armed conflict or heightened tension or crisis, or of general instability surrounding a state (very close to the hard core of war or armed conflict)
 - ❑ - and whether the action «was taken in time of» such emergency
 - ❑ The panel found Russia's restrictions justified by Art. XXI GATT

Russia – Traffic in Transit

– Panel findings (2)

- The chapeau («action which the invoking Member considers necessary for the protection of its essential security interests»):
 - While it is for each Member to define for itself what action is necessary, and to define such interests:
 - Such interests must be sufficiently articulated to demonstrate their veracity:
 - -- the requirement of good faith requires that the measures at issue are not «implausible» as measures protective of such interest

The panel developed in an annex its investigation of preparatory works and past GATT practice to show that the drafters (notably the US) and GATT Contracting Parties intended the invocation of the exception to be limited to war-like situations

Saudi Arabia – Measures concerning the Protection of intellectual Property rights (Qatar) DS 567

- ❑ Panel report circ.2020, appealed «in the void» but case settled in 2022
- ❑ Saudi Arabia's alleged failure to provide adequate protection of intellectual property rights held by or applied for entities based in Qatar after tensions erupted between them
- ❑ The Panel adopted the same criteria than in DS 512
- ❑ With respect to Saudi Arabia's invocation of the security exception in Article 73(b)(iii) of TRIPS (=XXI GATT), the Panel found that the requirements for invoking it were met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, had the result of preventing Qatari company beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.
- ❑ Instead, the Panel found that the requirements for invoking Article 73(b)(iii) were not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties in favor of Qatari company beoutQ (“implausible relation”).

Saudi Arabia – IPRs (continued)

- ❑ The Panel analysis:
 - ❑ 1. whether the existence of a “war or other emergency in international relations” has been established in the sense of subparagraph (iii) to Article 73(b); YES
 - ❑ 2. whether the relevant actions were “taken in time of” that war or other emergency in international relations; YES
 - ❑ 3. whether the invoking Member has articulated its relevant “essential security interests” sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; YES (protection “from the dangers of terrorism and extremism”), and
 - ❑ 4. whether the relevant actions are so remote from, or unrelated to, the “emergency in international relations” as to make it plausible as protective of these interests (YES, BUT ONLY SOME; other too remote from the protection of essential security interests)

US – Steel and Aluminium Products DS 544/552/556/564) panel reps. Dec 2022

- ❑ US additional duties challenged by China, Norway, Switzerland, Turkey as in breach of Art.I.1, II, IX.1 GATT.
- ❑ Panels findings:
 - ❑ 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 (Art.XXI exception is justiciable).
 - ❑ The terms of Article XXI(b)(iii) appear to distinguish the relevant emergency under that subparagraph from an emergency in purely domestic or national affairs and indicate the "international" character of the emergency.
 - ❑ the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action which it considers necessary for the protection of its essential security interests" within the meaning of Article XXI(b).
 - ❑ The Panels found that the US measures had not been taken " in case of war or..."

US – Origin Marking (Hong-Kong)

DS 597, panel report circ. Dec.2022

- ❑ The dispute arises from the US requirement introduced after China's repression in H.K. that products imported in the US from HK be marked as China. HK claimed discrimination under Art.IX.1 GATT
- ❑ ISSUES: The interpretation and application of Article XXI(b) of the GATT 1994, including:
 - ❑ 1. Where a panel determines that a proposed interpretation of a WTO provision is not supported by the text of that provision, there is no need to test the proposed interpretation against the context and the object and purpose of the treaty
 - ❑ 2. The phrase "which it considers" in the chapeau does not extend to the subparagraphs. Therefore, Article XXI(b) is only partly self-judging in that the subparagraphs are not subject solely to the invoking Member's own determination. Instead, the subparagraphs are subject to review by a panel
 - ❑ 3. Two elements must be satisfied for an action to be justified under Article XXI(b)(iii): (a) there must be a "war or other emergency in international relations"; and (b) the action must be "taken in time of" that "war or other emergency in international relations".
 - ❑ 4. The phrase "emergency in international relations" refers to a state of affairs of the utmost gravity, in effect a situation representing a breakdown or near-breakdown in the relations between states or other participants in international relations.

US- Origin Marking (Hong Kong) - 2

- ❑ The invoking Member's view, as well as that of other countries or Members implicated in the emergency in international relations, are relevant for a panel's examination under Article XXI(b)(iii). However, this does not mean that a panel must solely rely on the invoking Member's appreciation of the situation, or that a panel cannot refer to objective parameters to conclude on the existence or not of such an emergency.
- ❑ A determination of whether a given situation constitutes an "emergency in international relations" is to be examined on a case-by-case basis, considering the circumstances and context in which Article XXI(b)(iii) is invoked. The further removed that a situation is from war or comparable threat to international peace and security, the more explanation a respondent would usually need to provide
- ❑ Conclusion: US has not demonstrated that the situation was an emergency in int'l relations under Art.XXI(b)(iii) so that the US measure is not justified

US Reactions and reflections

- ❑ US has declared that it considers Art. XXI exceptions as non-justiciable («as US has always held») and that it does not intend to comply with the panels' findings in DS 544/552/556/564 and DS 597
- ❑ US has appealed «in the void» to avoid the panel reports being adopted by the DSB, but without recognizing the jurisdiction of the WTO in the matter
- ❑ US has also announced it will seek an authoritative interpretation of Art. XXI under Art. IX WTO
- ❑ US has thus opened another frontal challenge to the rule-based WTO system after having paralyzed the AB
 - Academic discussions are on-going whether:
 - ❑ (A) «non-violation complaints» could be resorted to in such instances, and
 - ❑ (B) an «automatic rebalancing» right should be granted to affected members in case of invocation of Art. XXI(b)(iii) to protect «economic security» beyond « war-like emergency in int'l relations»
- ❑ EU had reacted to US extra-duties (DS 548) by considering them safeguards and imposing countermeasures under Art. 8.2 of Safeguards Agr. (challenged in turn by US in DS 559), both cases suspended in 2022