WTO Issues Groundbreaking Decision on GATT National Security Exception

APRIL 9, 2019

On April 5, 2019, a World Trade Organization (WTO) dispute settlement panel issued the first substantive WTO panel decision interpreting the "essential security" provision of the *General Agreement on Tariffs and Trade* (GATT 1994). The decision, which is still subject to appeal, has significant implications for other important disputes currently pending at the WTO—including the ongoing challenges to the steel and aluminum tariffs that the Trump Administration imposed under Section 232 of the Trade Expansion Act of 1962 and the challenge that Qatar is pursuing against the United Arab Emirates (UAE) in connection with the blockade imposed in 2017.

The dispute—*Russia – Measures Concerning Traffic in Transit*—arose following the serious deterioration of relations between Ukraine and Russia in February 2014. Between 2014 and 2018, Russia imposed a number of measures that restricted Ukraine from using transit routes across Russia for traffic destined for markets in Central Asia. Ukraine challenged the restrictions at the WTO on the grounds that they were contrary to Article V of the GATT 1994—which provides for freedom of transit—as well as various specific commitments of the *Protocol of Accession of the Russian Federation to the WTO*.

Russia responded by invoking the essential security provision of the GATT 1994, Article XXI, and in particular Article XXI(b)(iii), which provides that a WTO Member may take any action "which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations." This was the first time since the WTO's founding that a WTO Member had invoked the provision in a dispute. Thus, this was also the first time that a WTO panel had been asked to interpret the meaning of Article XXI, including the key questions of whether the phrase "which *it considers* necessary" means the provision is "self-judging" by the WTO Member invoking the exception, or whether other elements of the text of Article XXI qualify (and thus limit) the self-judging nature of the provision.

Russia asserted that Article XXI *is* self-judging and that the dispute involved obvious and serious national security matters that the WTO was not designed or equipped to handle. Thus, in Russia's view, its invocation of Article XXI meant the panel lacked jurisdiction to evaluate Ukraine's claims. The United States took a similar position as a third party participant, arguing that Article XXI is self-

judging and that the panel "lack[ed] the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute." The United States also argued that each individual WTO Member has the "inherent right" to take steps that it considers necessary for the protection of its essential security interests. In the United States' view, a dispute in which Article XXI is invoked is "non-justiciable" because there are no legal criteria by which a Member's consideration of its essential security interests can be judged.

The WTO panel rejected these arguments. It first found that it was necessary for the panel to interpret Article XXI(b) of the GATT 1994 in order to address Russia's jurisdictional claims. It then found that the provision is not totally "self-judging" in the manner that Russia and the United States had asserted. In addition, while the panel ultimately found that Russia had met the requirements for invoking Article XXI(b)(iii)—because it concluded that Russia had imposed the challenged measures in the time of an emergency in international relations and satisfied the conditions of the Article XXI(b) chapeau—it interpreted "emergency in international relations" to refer 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." It also concluded that "political or economic differences" between WTO Members would not be sufficient, in and of themselves, to fall within the scope of subparagraph (iii).[1]

The panel's interpretation of Article XXI is likely to have important consequences for other pending disputes, including the dispute between Qatar and the UAE concerning the blockade imposed in 2017 and several WTO challenges to the duties that the United States imposed on steel and aluminum imports pursuant to Section 232 of the Trade Expansion Act of 1962. The UAE – Qatar dispute is the furthest along in the WTO process, with a panel established in late 2017—although the UAE has recently eased some of its measures, possibly in response to the WTO challenge. The UAE has invoked Article XXI in this dispute, and it continues to maintain that its measures are justified on essential security grounds. The United States, Saudi Arabia and several other third parties have supported the UAE's position.

Meanwhile, in the Section 232 disputes, China, the European Union, Canada, Mexico, Norway, Russia, Turkey, India, and Switzerland have all challenged the United States' duties on steel and aluminum as inconsistent with the GATT 1994 and the Agreement on Safeguards. The WTO Dispute Settlement Body established panels in seven of the disputes in November 2018.

The United States has already invoked Article XXI in these disputes, arguing that the duties were necessary for the protection of its essential security interests given the key role that steel and aluminum play in the United States' national defense. It has also argued that a WTO panel has no jurisdiction to evaluate and issue findings in the disputes, other than to note that the United States has invoked Article XXI. Given the panel's findings in *Russia – Measures Concerning Traffic* in Transit, it is not clear that the panels in these disputes will accept the United States' arguments. It remains to be seen how the United States will respond to this development if it occurs.

In addition, the panel's findings also suggest that the United States will face similar issues if the Trump Administration decides to impose duties in any of the ongoing Section 232 investigations of imports of autos and auto parts, uranium, and titanium sponge. This is significant, as the recent

rejection by the US Court of International Trade of the constitutional challenge to Section 232 in the *American Institute for International Steel, Inc. v. United States* dispute has left parties with few other viable options for challenging the United States' imposition of tariffs under the law.[2]

Finally, there have been significant concerns that the increasing invocation of the Article XXI exception in WTO disputes would open Pandora's box and encourage WTO Members to cite the exception in defense of a wide variety of overtly protectionist measures. If the panel's findings are upheld, it should help ameliorate this risk, at least to some extent.

WilmerHale continues to monitor this issue closely.

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1. The WTO panel further elaborated that:

> "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."

Panel Report, *Russia – Measures Concerning Traffic in Transit*, para. 7.75

2. See *American Institute for International Steel, Inc. v. United States*, Slip Op. 19-37 (Ct. Int'l Trade Mar. 25, 2019). In this case, a three-judge panel of the U.S. Court of International Trade rejected plaintiffs' argument that Section 232 was unconstitutional on the ground that it lacks an intelligible principle, and therefore constitutes an improper delegation of legislative authority to the President, in violation of principles of separation of powers.

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