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DOI:10.1017/ilm.2019.40

INTRODUCTORY NOTE TO RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT (WTO)

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[April 5, 2019]

Introduction

On April 5, 2019, a World Trade Organization (WTO) panel (Panel) issued its decision in the dispute *Russia – Measures Concerning Traffic in Transit*.[1] This decision is notable because it is the first instance in which a WTO panel has been called on to interpret the national security provision of the General Agreement on Tariffs and Trade (GATT 1994), Article XXI.

Background

The dispute *Russia – Measure Concerning Traffic in Transit* arose following the serious deterioration of relations between Ukraine and Russia in connection with the 2014 change in government in Ukraine and the subsequent imposition of economic sanctions against Russian entities and persons by a number of other countries, including the United States.[2] Between 2014 and 2018, Russia imposed a number of restrictions on transit through its territory by road and rail.[3] These restrictions included laws that prohibited Ukraine from using any road or rail transit routes across the Ukraine-Russia border—and, for some categories of goods, to transit Russia at all—for traffic in transit destined for Kazakhstan and the Kyrgyz Republic.[4]

Ukraine challenged these transit restrictions at the WTO, arguing that the measures violate several provisions in Article V of the GATT 1994, which provides for freedom of transit, as well as specific commitments of the Protocol of Accession of the Russian Federation to the WTO (Russia's Accession Protocol). In response, Russia invoked Article XXI of the GATT 1994, the national security provision, 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."[5]

Article XXI of the GATT 1994 has not been invoked by a WTO member in any dispute since the founding of the WTO in 1995. Thus, this dispute is the very first time a WTO panel has been asked to interpret the meaning of Article XXI and, in particular, to address whether the phrase "which *it considers* necessary" in Article XXI(b)(iii) means that the provision is "self-judging." That is the position Russia took in the dispute, arguing before the Panel that the dispute involved obvious and serious national security matters that the WTO is not designed or equipped to handle and that, as a result, the Panel lacked jurisdiction to evaluate Ukraine's claims due to Russia's invocation of Article XXI.[6] According to this argument, Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a WTO member itself considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.[7]

The United States, which participated as a third party in the dispute, took a similar position as Russia, arguing that Article XXI is "self-judging" and that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute."[8] According to the United States, each WTO member has the "inherent right" to take matters that it considers "necessary" for the protection of its essential security interest under Article XXI.[9] The United States also took the position that a dispute in which Article XXI is invoked is "non-justiciable" because there are no legal criteria by which a WTO member's consideration of its essential security interests can be judged.[10]

The WTO Panel roundly rejected Russia's and the United States' arguments, finding first that it was necessary to interpret Article XXI(b)(iii) of the GATT 1994 in order to address Russia's jurisdictional claim and second that Article XXI(b)(iii) is not totally "self-judging" in the manner asserted by Russia and the United States.

The Panel's Decision

The Panel began its analysis of Article XXI by recalling that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction deriving from the exercise of their adjudicative function,

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https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

including the power to exercise their own substantive jurisdiction.[11] The Panel then addressed Russia's argument that Article XXI(b)(iii) carves out from a panel's subject matter jurisdiction measures that a member considers necessary for the protection of its essential security interests.[12] The Panel focused in particular on the meaning of the adjectival clause "which it considers" in the chapeau of Article XXI(b). According to the Panel, this clause could be interpreted in one of three ways: (1) as qualifying only the word "necessary," i.e., the necessity of the measures taken to protect "essential security interests"; (2) as qualifying the determination of these "essential security interests"; or (3) as qualifying the determination of the matters described in the three subparagraphs of Article XXI(b) as well.[13]

The Panel chose to focus initially on the third possibility and found, based on its interpretation of the ordinary meaning of the text, in context, and in light of the object and purpose of the GATT 1994, that the three subparagraphs of Article XXI(b) describe objective states of affairs or circumstances that can be objectively assessed by a WTO panel.[14] The Panel therefore found that Article XXI(b) vests in WTO panels the power to review, at a minimum, whether the requirements of one of the enumerated subparagraphs of Article XX(b) have been met, such that Article XXI(b) is not totally a "self-judging" provision.[15]

The Panel then turned to consider the first and second possibility, that is, whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.[16] The Panel found that, in general, it is left to every WTO member to define "what it considers" to be its "essential security interests," but in doing so, members must interpret and apply Article XXI in good faith and not use it as a means to circumvent their obligations under the GATT 1994.[17] The Panel found that the obligation of good faith applies not only to a member's definition of its essential security interests, but also to their connection with the measures at issue, and that the measures at issue "meet a minimum requirement of plausibility in relation to the proffered essential security interests."[18]

The Panel ultimately concluded that Russia met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 because the challenged measures were taken in the time of an emergency in international relations and the conditions of the chapeau of Article XXI(b) were satisfied.[19] Neither Russia nor Ukraine appealed the Panel's decision.

Conclusion

The Panel's ruling in *Russia – Measure Concerning Traffic in Transit* will likely have important consequences for future WTO disputes, including several pending WTO challenges to the United States' imposition of duties on steel and aluminum pursuant to Section 232 of the Trade Expansion Act of 1962.

China, the European Union, Canada, Mexico, Norway, Russia, Turkey, India, and Switzerland have all challenged the United States' imposition of duties on steel and aluminum under Section 232 as inconsistent with its obligations under the GATT 1994 and the Agreement on Safeguards.[20] The United States had already invoked Article XXI in these disputes, arguing that the tariffs imposed under Section 232 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, and that WTO panels lack jurisdiction to evaluate and rule on a WTO member's Article XXI defense.

In light of the Panel's ruling in *Russia – Measure Concerning Traffic in Transit*, it is likely that other WTO panels would also reject the United States' arguments and instead find it appropriate to engage in an evaluation of whether the Section 232 duties (or any other measure at issue) meet the requirements of Article XXI. The Panel's interpretation of Article XXI also leaves open the possibility that a WTO member could challenge the United States' invocation of national security under Article XXI as a failure to act in good faith.

The general principle of good faith, as it applies in international state relations, can be traced to Article 26 of the Vienna Convention on the Law of Treaties, under which states are normally considered to act in conformity with their treaty obligations and has been recurrently recognized by panels and the Appellate Body in WTO disputes.[21] Notably, the United States has taken the position in other disputes that the principle of good faith is not relevant for WTO proceedings in general, or only relevant as it relates to the issue of burden of proof.[22] It can thus be expected that the United States—unlike Russia and Ukraine—would appeal any unfavorable panel decision to the WTO Appellate Body. However, given the current vacancies on the Appellate Body and the United States' blocking of

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new appointments,[23] it is unclear when, or if, Appellate Body review of a panel's interpretation of Article XXI of the GATT 1994 may occur.

ENDNOTES

1 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (April 5, 2019) [hereinafter Panel Report].

2 *See id.* ¶¶ 7.7–7.10. In March 2014, Ukraine, and other countries, supported a UN General Assembly Resolution welcoming UN efforts to support "de-escalation of the situation with respect to Ukraine." *Id.* ¶ 7.8. A subsequent UN General Assembly Resolution expressly condemned the "temporary occupation of part of the territory of Ukraine," i.e., Crimea and the city of Sevastopol, and reaffirmed nonrecognition of its "annexation." *Id.*

3 *Id.* ¶¶ 7.10, 7.12, 7.14–7.17.

4 *Id.* ¶¶ 7.1, 7.10.

5 GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153, Art. XXI (1994) ("GATT 1994").

6 Panel Report, *supra* note 1, ¶ 7.22.

7 *Id.* ¶ 7.57.

8 *Id.* ¶ 7.51.

9 *Id.* ¶ 7.51.

10 *Id.* ¶ 7.52.

11 *Id.* ¶ 7.53.

12 *See id.* ¶ 7.58, *et seq*.

13 *Id.* ¶ 7.63.

14 Panel Report, ¶¶ 7.62–7.82.

15 *Id.* ¶¶ 7.100–7.101.

16 *Id.* ¶ 7.128.

17 *Id.* ¶¶ 7.131–7.133.

18 *Id.* ¶ 7.138.

19 *Id.* ¶¶ 7.62–7.82.

20 The WTO Dispute Settlement Body established panels in seven of the disputes in November 2018.

21 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS, 8 ILM 679, art. 26 (1969).

22 *See* Panel Report, *United States – Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS230/R, ¶ 7.268 (Mar. 31, 2008).

23 *See, e.g.*, ICTSD, *WTO Members Intensify Debate Over Resolving Appellate Body Impasse*, 22 BRIDGES 4, 4–7 (June 28, 2018).

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DOI:10.1017/ilm.2019.40

RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT (WTO)*
[April 5, 2019]



WT/DS512/R

5 April 2019

(19-2105) Page: 1/137

Original: English

RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

REPORT OF THE PANEL

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449

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https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

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Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
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Short Title	Full Case Title and Citation
EC – Bananas III (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, p. 2237
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
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Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403

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(*Continued*)

Short Title	Full Case Title and Citation
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R, DSR 2015:VII, p. 3567
Russia – Railway Equipment	Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R and Add.1, circulated to WTO Members 30 July 2018 [appealed by Ukraine 27 August 2018]
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017 [appealed by the European Union 29 June 2017]

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Short Title	Full Case Title and Citation
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Nicaraguan Trade	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 (unadopted)
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Orange Juice (Brazil)	Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Sugar Quota	GATT Panel Report, *United States – Imports of Sugar from Nicaragua*, L/5607, adopted 13 March 1984, BISD 31S/67
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

JUDGMENTS OF INTERNATIONAL COURTS AND TRIBUNALS CITED IN THIS REPORT.

Short Title	Full Case Title and Citation
Case Concerning the Northern Cameroons	International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons,* (Cameroon v. United Kingdom) (1963) ICJ Reports, p. 15
Case Concerning Oil Platforms	International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 161
Case of Military and Paramilitary Activities in and Against Nicaragua	International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua,* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 14
Certain Expenses of the United Nations	International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations,* (United Nations) (1962) I.C.J. Reports, p. 151
Nuclear Tests Case	International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case,* (Australia v. France) (1974) ICJ Reports, p. 253
Prosecutor v. Tadić	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

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1982 Decision	Decision Concerning Article XXI of the General Agreement
2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, or 2014 Belarus-Russia Border Bans	Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods takes place exclusively through the checkpoints across the Russian state border
2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods	Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the Government of Kazakhstan or the Government of the Kyrgyz Republic, which is then authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (below)
2016 Belarus Transit Requirements	Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from the Belarus-Russia border, and comply with a number of additional conditions related to identification and registration cards at specific control points on the Belarus-Russia border and the Russia- Kazakhstan border
A350	Airbus A350 Aircraft
April 1989 Decision	Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989
BCI	Business Confidential Information
CIS-FTA	Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx
Covered agreements	Agreements listed in Appendix 1 (of the Understanding on Rules and Procedures Governing the Settlement of Disputes)
CU	Customs Union
DCFTA	Deep and Comprehensive Free Trade Area Title IV (Trade and Trade-Related Matters) of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, L 161/13, Vol. 57, 29 May 2014, ISSN 1977-0677

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

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Abbreviation	Description
De facto measure	Restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic
Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
Decree No. 319	Decree of the President of the Russian Federation No. 319, "On Amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 July 2016
Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EaEU	Eurasian Economic Union
EaEU Treaty	Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GLONASS	Global Navigation Satellite System (Russian translation: Globalnaya Navigazionnaya Sputnikovaya Sistema)
Helms-Burton Act	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act
ICJ	International Court of Justice
Import Licensing Agreement	Agreement on Import Licensing Procedures
ITO	International Trade Organization
LA/MSF	Launch aid / member State financing
PJSC Notice	Public Joint-Stock Company "Russian Railways" Notice on assessing the fee for placing/removal of GLONASS seals at Moskovskaya, Privolzhskaya, Yugo-Vostochnaya (South-Eastern) Railways, dated 17 May 2016

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Abbreviation	Description
PJSC Order	Public Joint-Stock Company "Russian Railways" Order No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Ramírez – López Treaty	Treaty on Maritime Delimitation in the Caribbean Sea
Resolution No. 1	Resolution No. 1 of the Government of the Russian Federation, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
Rosselkhoznadzor	Russian Federal Service for Veterinary and Phytosanitary Surveillance
Russia's Accession Protocol	Protocol of the Accession of the Russian Federation, WT/MIN(11)/24; WT/L/839, 17 December 2011
Russia's Working Party Report	Report of the Working Party on the Accession of the Russian Federation to the WTO, WT/ACC/RUS/70 and WT/MIN(11)/2, dated 11 November 2011
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Ukraine's 2016 Trade Policy Review Report	Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334
UN Charter	Charter of the United Nations, done at San Francisco, 24 October 1945, UN Treaty Series Vol. 1, p. XVI
UN General Assembly	General Assembly of the United Nations
US Draft Charter	United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946
Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 115, p. 331
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-1, RUS-1	Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
UKR-2, RUS-2	Decree No. 319	Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016
UKR-3, RUS-4	Resolution No. 1	Resolution of the Government of Russian Federation No. 1, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
UKR-4	Resolution No. 732	Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016
UKR-5	Resolution No. 388	Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016
UKR-6, RUS-5	Resolution No. 147	Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016
UKR-7	PJSC Order	Order of PJSC "Russian Railways" No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
UKR-8, RUS-6	Resolution No. 276	Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016
UKR-9, RUS-3	Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
UKR-10, RUS-7	Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
UKR-11	Resolution No. 830	Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014
UKR-12	Resolution No. 625	Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015
UKR-13	Resolution No. 842	Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015
UKR-14	Resolution No. 981	Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015
UKR-15	Resolution No. 1397	Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015

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Panel Exhibit	Short Title (where applicable)	Full Title
UKR-16	Resolution No. 157	Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016
UKR-17	Resolution No. 472	Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016
UKR-18	Resolution No. 608	Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016
UKR-19	Resolution No. 897	Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016
UKR-20	Resolution No. 1086	Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016
UKR-21, RUS-10	Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
UKR-22, RUS-11	Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*) dated 21 November 2014
UKR-47		Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015
UKR-53	European Commission Press Release	Press release "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press-release_IP-15-6398_en.htm
UKR-58		Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, available at: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
UKR-70	Resolution No. 790	Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017
UKR-71	Decree No. 293	Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017
UKR-75		Instruction No. FS-EN-7/19132 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 10 October 2016
UKR-76		Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015
UKR-78	UNIAN Information Agency Article	UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin- podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html
UKR-80	RBK article	RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4
UKR-84		Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091
UKR-88		Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014
UKR-89	UN General Assembly Resolution No. 68/262, 27 March 2014	UN General Assembly Resolution No. 68/262 "Territorial integrity of Ukraine", 27 March 2014, A/RES/68/262

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Panel Exhibit	Short Title (where applicable)	Full Title
UKR-91	UN General Assembly Resolution No. 71/205, 19 December 2016	UN General Assembly Resolution No. 71/205 "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205
UKR-94	Resolution No. 1292	Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017
UKR-98, RUS-13	Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
UKR-102	The Regions of Central Asia, Eastern Asia and Caucasus	Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region, Income Group, and Subregion of the World
UKR-111	EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
UKR-112		Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014
RUS-8	Federal Law No. 281- FZ	Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006
RUS-12	Federal Law No. 390- FZ	Federal Law No. 390-FZ of the Russian Federation, "On Security", dated 28 December 2010
RUS-14		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946, dated 6 June 2014
RUS-15		Print-screen of the website of the State Border Guard Service of Ukraine, retrieved from: https://dpsu.gov.ua/ua/news/na- lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/
RUS-16		Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016
RUS-17		Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015
RUS-18		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/1134, dated 8 July 2014
RUS-19		Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015
RUS-20		Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017
RUS-22		Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018
RUS-23		Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018, 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018
RUS-24	Resolution No. 959	Resolution of the Russian Federation No. 959, "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014

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1 INTRODUCTION

1.1 COMPLAINT BY UKRAINE

1.1. On 14 September 2016, Ukraine requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 10 November 2016 between Ukraine and Russia. These consultations failed to resolve the dispute.[2]

1.2 PANEL ESTABLISHMENT AND COMPOSITION

1.3. On 9 February 2017, Ukraine requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, and Article XXIII of the GATT 1994 with standard terms of reference.[3] At its meeting on 21 March 2017, the Dispute Settlement Body (DSB) established a panel pursuant to Ukraine's request in document WT/DS512/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 22 May 2017, Ukraine requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 6 June 2017, the Director-General accordingly composed the Panel as follows[6]:

Chairperson:	Professor Georges Abi-Saab
Members:	Professor Ichiro Araki Dr Mohammad Saeed

1.6. Australia, Bolivia, Brazil, Canada, Chile, China, the European Union, India, Japan, Korea, Moldova, Norway, Paraguay, Saudi Arabia, Singapore, Turkey and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 PANEL PROCEEDINGS

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 28 June 2017.

1.8. After consultation with the parties, the Panel adopted its Working Procedures[7] and timetable[8] on 12 July 2017.

1.9. The Panel held a first substantive meeting with the parties on 23 and 25 January 2018. A session with the third parties took place on 25 January 2018. The Panel held a second substantive meeting with the parties on 15 May 2018.

1.10. On 31 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 January 2019. The Panel issued its Final Report to the parties on 28 March 2019.

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1.3.2 Additional Working Procedures for the Protection of Business Confidential Information

1.11. After consultation with both parties, the Panel adopted Additional Working Procedures concerning the protection of Business Confidential Information (BCI), on 25 August 2017.[9]

1.3.3 Request for enhanced third party rights by certain third parties

1.12. On 10 November 2017, Australia, Canada and the European Union jointly requested the Panel to grant to all of the third parties certain additional third-party rights in these proceedings. The Panel invited the parties and other third parties, on 20 November 2017, to comment on the joint request. On 1 December 2017, Ukraine, Russia and certain of the other third parties (Brazil, China, Japan, Singapore and the United States) provided comments on the joint request. In a communication dated 9 January 2018, the Panel informed the parties and third parties that it had decided to grant the following enhanced third-party rights to all of the third parties:

a. The right to attend the portions of the party session of the first substantive meeting at which the parties deliver their opening oral statements, and closing oral statements, respectively; and

b. The right to receive the provisional written versions of the parties' opening oral statements and closing oral statements, respectively, at the portions of the party session of the first substantive meeting at which those statements are delivered, as well as the final versions of such oral statements at the end of the day on which they are delivered.

1.13. The Panel's decision is set out in Annex B-1.

1.3.4 Russia's request for a preliminary ruling

1.14. In its first written submission, Russia requested that the Panel issue a ruling, no later than the date for filing the parties' second written submissions, that the category of measures identified in Ukraine's first written submission as the "2014 transit bans and other transit restrictions" is outside the Panel's terms of reference.[10]

1.15. On 13 March 2018, the Panel issued a communication to the parties in which it advised that it had decided to address the issue of whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, together with the merits, and would therefore defer its ruling on that issue until the issuance of the Report.[11]

1.16. The Panel's ruling on whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, and other issues concerning the Panel's terms of reference, is addressed in Section 7.7 of this Report.

1.3.5 Russia's complaint of alleged breaches of confidentiality by a third party

1.17. In a letter to the Panel dated 14 March 2018, Russia complained that the European Union, a third party in this dispute, had violated confidentiality obligations under various provisions of the DSU and of the Working Procedures by publishing the European Union's third-party submission and third-party statement on the website of the European Commission's Directorate-General for Trade.[12] By communication dated 16 March 2018, the Panel invited the European Union and any other third parties, as well as Ukraine, to provide any comments on Russia's complaint by 21 March 2018. Accordingly, on 21 March 2018, the European Union, Australia, Brazil, Canada, the United States and Ukraine each provided comments on Russia's complaint. On 23 March 2018, the Panel invited Russia to respond to these comments by 4 April 2018. On that date, Russia provided its response.

1.18. On 16 May 2018, the Panel issued a ruling in which it declined to take any action in respect of the published European Union third-party submission and third-party statement on the grounds that it did not consider that such publication violated the confidentiality obligations under Article 18.2 of the DSU, the Working Procedures or any other applicable confidentiality obligations. Particularly, the Panel did not agree with the proposition that legal arguments and opinions of parties in WTO dispute settlement proceedings were inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU. The Panel's ruling is set out in Annex B-2.

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1.3.6 Other procedural complaints

1.19. In an email message dated 28 March 2018, Ukraine alleged that Russia had failed to file Exhibit RUS-20 (UKR) in accordance with paragraph 25 of the Working Procedures because it filed this exhibit by means of reference to a web link. In a communication to the parties dated 6 April 2018, the Panel noted that Russia had promptly submitted a paper version of Exhibit RUS-20 (UKR) by 5:00 p.m. on the due date for submission, and that in accordance with paragraph 25(b) of the Working Procedures, Exhibit RUS-20 (UKR) therefore formed part of the factual record in this dispute. The Panel also noted that, due to the size of the exhibit, the PDF file containing Exhibit RUS-20 (UKR) could not be attached to an email message. The Panel therefore requested Russia to provide Exhibit RUS-20 (UKR) to Ukraine in one of the other formats set forth in paragraph 25(b) of the Working Procedures, namely, on a USB key, a CD-ROM or a DVD.

1.20. In an email message dated 18 May 2018, Russia complained that Ukraine had failed to file Exhibits UKR-106 (BCI) through UKR-115 in accordance with subparagraph (a) of the Panel's invitation to the second substantive meeting dated 27 April 2018. Russia submitted that, owing to this failure, the Panel should not accept and consider these exhibits. In a communication to the parties dated 22 May 2018, the Panel declined Russia's request, observing that while the electronic versions of the exhibits were not provided to Russia or submitted to the Dispute Settlement Registry until 18 May 2018, Ukraine had previously served paper copies of Exhibits UKR-106 (BCI) to UKR-115 on Russia and on the Panel on 15 May 2018, at the second substantive meeting. The paper copies of those exhibits constitute the official versions of those exhibits for purposes of the record of the dispute under paragraph 25(b) of the Working Procedures.

1.21. During the second substantive meeting on 15 May 2018, Russia alleged that Ukraine had untimely filed Exhibit UKR-106 (BCI) in a manner inconsistent with paragraph 7 of the Working Procedures. Russia rejected Ukraine's assertion that Exhibit UKR-106 (BCI) was "necessary for purposes of rebuttal" and requested, in a letter dated 13 June 2018, that the Panel strike Exhibit UKR-106 (BCI) from the record. In a communication to the parties dated 23 July 2018, the Panel granted Russia's request, observing that, in the first round of arguments, Ukraine's arguments concerning the existence of the measures in question related to the legal existence of the measures in Russia's legal system without reference to any specific instances of application, i.e., Ukraine's arguments related to the existence of the measures "as such". At the second substantive meeting, Ukraine reiterated its "as such" argument while also submitting the contested exhibit concerning the application of the measure, in one instance, as evidence in support of its main argument. In the Panel's view, this did not make such evidence "necessary for the purposes of rebuttal" within paragraph 7 of the Working Procedures. The Panel's ruling is set out in Annex B-3.

2 FACTUAL ASPECTS

2.1. This dispute concerns various measures imposed by Russia on transit by road and rail through the territory of Russia, as well as the publication and administration of those measures. Additional information concerning the measures and the factual background against which they were adopted is set forth in Sections 7.3 and 7.7 of this Report.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Ukraine requests that the Panel find that the measures at issue are inconsistent with Russia's obligations under the first sentence of Article V:2, the second sentence of Article V:2, Article V:3, Article V:4 and Article V:5 of the GATT 1994, and with paragraph 2 of Part I of the Protocol of Accession of the Russian Federation (Russia's Accession Protocol)[13], which incorporates commitments in paragraph 1161 of the Report of the Working Party on the Accession of the Russian Federation to the WTO (Russia's Working Party Report)[14]; as well as Article X:1 of the GATT 1994 and commitments in paragraph 1426 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; Article X:2 of the GATT 1994 and commitments in paragraph 1428 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; commitments in paragraph 1427 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; and Article X:3(a) of the GATT 1994. Ukraine further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Russia bring its measures into conformity with its WTO obligations.

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3.2. Russia invokes Article XXI(b)(iii) of the GATT 1994 and requests the Panel, for lack of jurisdiction, to limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims. Russia considers that the Panel lacks jurisdiction to evaluate measures in respect of which Article XXI of the GATT 1994 is invoked.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1 and C-4). They are also reiterated where relevant in the Panel's analysis.

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, China, the European Union, Japan, Moldova, Singapore, Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 through D-10). Turkey made oral arguments to the Panel but did not submit written arguments. Bolivia, Chile, India, Korea, Norway, Paraguay and Saudi Arabia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 29 January 2019. Both parties submitted written requests for review of precise aspects of the Interim Report on 14 February 2019. Neither party requested an interim review meeting. On 28 February 2019, both parties submitted written comments on each other's written requests for review.

6.2. The parties' requests made at the interim stage, as well as the Panel's discussion and disposition of those requests, are set out in Annex E-1.

7 FINDINGS

7.1 Overview of Ukraine's complaints

7.1. Ukraine's main complaints may be succinctly stated as follows:

a. Since 1 January 2016, Ukraine has not been able to use road or rail transit routes across the Ukraine-Russia border for all traffic in transit destined for Kazakhstan. Rather, under Russian law, such traffic may only transit from Ukraine across Russia from the Belarus-Russia border, and is also subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border respectively. As of 1 July 2016, all traffic in transit destined for the Kyrgyz Republic has been subject to the same restrictions.

b. Since 1 July 2016, traffic in transit by road and rail from Ukraine, which is destined for Kazakhstan and the Kyrgyz Republic, is not permitted to transit across Russia at all (i.e. not even via the Belarus-Russia border) for particular categories of goods. The categories of goods are: (i) those subject to customs duties greater than zero according to the Common Customs Tariff of the Eurasian Economic Union (EaEU), and (ii) goods listed in an annex to Resolution No. 778 of the Government of the Russian Federation (Resolution No. 778)[15] and which originate in specific countries that have imposed economic sanctions on Russia.[16] Although there is a procedure which exceptionally permits transit of these goods from Ukraine to Kazakhstan and to the Kyrgyz Republic (through a derogation procedure involving a request by the Governments of Kazakhstan or the Kyrgyz Republic and an authorization granted by Russian authorities), it is unclear how this derogation procedure operates and to date, no such derogations have been granted.

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

c. The transit restrictions referred to in paragraph 7.1(a) above, and the transit bans referred to in paragraph 7.1(b) above, are also applied by Russian authorities to traffic in transit by road or rail from Ukraine which is destined not only for Kazakhstan and the Kyrgyz Republic, but also for Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

d. Finally, as of 30 November 2014, transit from Ukraine of goods subject to veterinary surveillance which are listed in Resolution No. 778 is not permitted through Belarus. Rather, such goods with a final destination of Kazakhstan and third countries may transit across Russia only from specific checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and pursuant to permits issued by the Russian Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*). Transit to third countries (including Kazakhstan) of plant goods which are listed in Resolution No. 778 shall also, as of 24 November 2014, take place exclusively through the checkpoints on the Russian state border.[17]

7.2. Ukraine claims that the above-referenced transit restrictions and bans are inconsistent with Russia's obligations under Article V of the GATT 1994 and related commitments in Russia's Accession Protocol. Ukraine also claims that Russia has failed to publish and administer various instruments through which these measures are implemented in the manner required by Article X of the GATT 1994 and by commitments in Russia's Accession Protocol.

7.2 Russia's response

7.3. Russia does not specifically address the factual evidence or legal arguments adduced by Ukraine in support of its substantive claims under the GATT 1994 and Russia's Accession Protocol. Rather, Russia argues that certain claims and measures are outside the Panel's terms of reference, on the bases that: (a) Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU, and (b) Ukraine has failed to establish the existence of one of the challenged measures.

7.4. Principally, however, Russia asserts that the measures are among those that Russia considers necessary for the protection of its essential security interests, which it took, "[i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[18] Russia invokes the provisions of Article XXI(b)(iii) of the GATT 1994, arguing that, as a result, the Panel lacks jurisdiction to further address the matter. Accordingly, Russia submits that the Panel should limit its findings in this dispute to a statement of the fact that Russia has invoked Article XXI(b)(iii), without further engaging on the substance of Ukraine's claims.[19]

7.3 Factual background

7.5. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014. Both parties have avoided referring directly to this change in government and to the events that followed it. It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events.

7.6. Ukraine had, since 18 October 2011, been a party to the Treaty on a Free Trade Area between the members of the Commonwealth of Independent States (CIS-FTA)[20], with Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Moldova and Armenia.[21] On 29 May 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Establishment of the Eurasian Economic Union (EaEU Treaty)[22], with Armenia and the Kyrgyz Republic joining in January and August of 2015, respectively. The EaEU Treaty entered into force on 1 January 2015.[23]

7.7. While it took part in the initial negotiations to establish the EaEU, Ukraine decided, following on the "*Euromaidan* events", not to join the EaEU Treaty. Instead, it elected to seek economic integration with the European Union.[24] Accordingly, on 21 March 2014, the newly sworn-in Ukrainian Government signed the political part of the "Association Agreement between the European Union and its Member States, of the one part, and Ukraine,

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of the other part" (EU-Ukraine Association Agreement).[25] The objectives of the EU-Ukraine Association Agreement are to facilitate Ukraine's closer political and economic integration with Europe.[26] The economic part of the EU-Ukraine Association Agreement provides for a Deep and Comprehensive Free Trade Area (DCFTA) between the European Union and Ukraine.[27] This part of the EU-Ukraine Association Agreement was signed on 27 June 2014.

7.8. In March 2014, Ukraine, along with certain other countries, introduced a resolution in the General Assembly of the United Nations (UN General Assembly), which welcomed the continued efforts by the UN Secretary-General and the Organization for Security and Cooperation in Europe, as well as other international and regional organizations, to support "de-escalation of the situation with respect to Ukraine".[28] The UN General Assembly recalled "the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means".[29] A subsequent UN General Assembly Resolution in December 2016 condemned the "temporary occupation of part of the territory of Ukraine", i.e. the "Autonomous Republic of Crimea and the city of Sevastopol" by the Russian Federation, and reaffirmed the non-recognition of its "annexation".[30] This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of declared war or other armed conflict between High Contracting Parties.[31]

7.9. The events in Ukraine in 2014 were followed by the imposition of economic sanctions against Russian entities and persons by certain countries.

7.10. On 7 August 2014, Russia imposed import bans on specified agricultural products, raw materials and food originating from countries that had imposed sanctions against it (initially, the United States, European Union Member States, Canada, Australia and Norway).[32] Russia also imposed certain restrictions in connection with the transit of goods subject to these import bans, prohibiting their transit through Belarus, and permitting their transit across Russia only through designated checkpoints on the Russian side of the external border of the EaEU. These 2014 transit restrictions are among those challenged by Ukraine in this dispute.[33]

7.11. In September 2014, following discussions with Russia, both the European Union and Ukraine agreed to postpone the application of the economic part of the EU-Ukraine Association Agreement until 31 December 2015.[34] Also in September 2014, the Russian Government adopted Resolution No. 959, which provided that Ukrainian goods would be subject to tariffs at the EaEU rates as of 10 days from the date on which the Russian Government was notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement.[35]

7.12. On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amended Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provided that the import bans would be applied from the effective date of Resolution No. 959 (referred to above), but no later than 1 January 2016.[36] Subsequent negotiations between the European Commission, Ukraine and Russia, aimed at achieving solutions to Russia's concerns about the DCFTA, had failed by December 2015.[37] On 21 December 2015, the Russian Government adopted Resolution No. 1397, which provided that the import bans in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016.[38] The European Union and Ukraine have provisionally applied the DCFTA as of 1 January 2016.[39]

7.13. In response to the provisional application by the European Union and Ukraine of the economic part of the EU-Ukraine Association Agreement, the Russian State *Duma* passed a law on 22 December 2015, effective as of 1 January 2016, purporting to suspend the CIS-FTA with respect to Ukraine.[40] The Russian State Legal Department stated that Russia's suspension of the CIS-FTA with respect to Ukraine was due to the entry into force of the economic part of the EU-Ukraine Association Agreement "without reaching a legally binding agreement that would meet the interests of Russia" and the fact that "such an act constitutes a fundamental change of circumstances, which were essential for Russia at the conclusion of the [CIS-FTA]."[41]

7.14. Russia is also alleged by Ukraine to have banned imports of various Ukrainian goods since 2013, according to a request for consultations filed by Ukraine in October 2017[42], in connection with the following alleged Russian measures:

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a. a general ban on the importation of Ukrainian juice products, including baby food (since July 2014);

b. a ban on the importation of alcoholic beverages, beer and beer beverages produced by three Ukrainian producers (since August 2014);

c. a ban on the importation of confectionary products produced by a specific confectionary producer (since July 2013) as well as a more general ban on imports of all Ukrainian confectionary products (since September 2014); and

d. a ban on the importation of wallpaper and wall coverings produced by four Ukrainian producers (since April 2015).[43]

7.15. In the same request for consultations, Ukraine also challenges what it refers to as transit bans on Ukrainian juice products and confectionary products, which are said to apply as a result of the import bans, "separately and in addition to" the transit bans at issue in this dispute, which also affect the same products.[44]

7.16. Also, as of 1 January 2016, Russia:

a. imposed customs duties at the EaEU rates on imports of goods from Ukraine[45];

b. included goods of Ukrainian origin within the import bans on agricultural products, raw materials and food that it had imposed since August 2014 under Resolution No. 778 in response to countries that had imposed sanctions against it[46]; and

c. imposed certain restrictions and bans on transit, namely: (i) restrictions on transit by road and rail from Ukraine, destined for Kazakhstan (and subsequently, for the Kyrgyz Republic), requiring that such transit from Ukraine across Russia may occur only from Belarus and subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specified control points on the Belarus-Russia border and the Russia-Kazakhstan border, respectively[47]; and (ii) "temporary" bans on transit by road and rail from Ukraine of:

   i. goods which are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and

   ii. goods which fall within the scope of the import bans on agricultural products, raw materials and food imposed pursuant to Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.

7.17. The 2016 transit restrictions and bans in item (c) above are among the measures that are challenged by Ukraine in this dispute.[48]

7.18. Russia, for its part, has separately alleged that Ukraine has imposed economic sanctions against Russia since 2015, as is evident from the following:

a. A request for consultations filed by Russia in May 2017[49], which alleges that Ukraine has imposed import bans on Russian food products, spirits and beer, cigarettes, railway and tram track equipment, diesel-electric locomotives, chemicals and certain plant products, which were allegedly adopted by Ukraine on 30 December 2015.[50] The consultations request also covers a number of other measures allegedly adopted by Ukraine in 2016, including: (i) restrictions on the importation or distribution of printed materials, motion pictures, TV programs and other video products originating from Russia[51]; (ii) the exclusion of Russian-used vehicles from an excise duty reduction on used vehicles[52]; (iii) a number of personal, economic, and other sanctions in respect of Russian persons (e.g. preventing movement of capital from Ukraine in respect of legal entities with Russian shareholding, blocking of assets, bans on doing business)[53]; and (iv) the suspension of accreditation of journalists and representatives of certain Russian mass media.[54]

b. Russia's contentions that Ukraine has restricted transit of banned Russian goods through designated checkpoints at the Russia-Belarus border.[55]

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c. Russia's contentions that sanctions imposed by Ukraine in respect of Russia have expanded in 2018, with Ukraine allegedly banning the exportation of certain Ukrainian civil aviation products, among other things.[56]

7.19. Russia also asserts that Ukraine suspended traffic through certain railway corridors on the Ukraine-Russia border in June 2014, and suspended traffic through certain checkpoints on the Ukraine-Russia border in May and July of 2014 and then in February 2015.[57]

7.4 ORDER OF ANALYSIS

7.20. This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 (or the equivalent provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)).[58]

7.21. Ukraine presents its case as an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT 1994 and commitments in Russia's Accession Protocol.

7.22. Russia, on the other hand, considers that the dispute involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO, an organization which is not designed or equipped to handle such matters. Russia cautions that involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system.

7.23. Consistent with this position, Russia does not present arguments or evidence to rebut Ukraine's specific claims of inconsistency with Articles V and X of the GATT 1994, or commitments in Russia's Accession Protocol. Russia's case is confined to arguments that certain measures and claims are outside the Panel's terms of reference, and its overarching argument that the Panel lacks jurisdiction to address any of the issues in this dispute owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994.

7.24. 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.[59] Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.

7.25. The Panel must therefore determine, first, whether it has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994.[60] 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.

7.26. As the Panel explains in greater detail in Section 7.5.3 below, Russia's argument that the Panel lacks jurisdiction to address the matter is based on its interpretation of Article XXI(b)(iii) of the GATT 1994, i.e. as being totally "self-judging". Consequently, in order to address Russia's jurisdictional objection, the Panel must first interpret Article XXI(b)(iii) of the GATT 1994.

7.5 RUSSIA'S INVOCATION OF ARTICLE XXI(B)(III) OF THE GATT 1994

7.5.1 Main arguments of the parties

7.27. Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist.[61] Russia asserts that this emergency presented threats to Russia's essential security interests.[62] 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.[63]

7.28. While Russia acknowledges that the Panel was established with standard terms of reference under Article 7.1 of the DSU[64], it argues that the Panel nevertheless lacks jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994.[65] 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

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pursuant to Article XXI.[66] 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:

> [T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.[67]

7.29. Russia regards Article XXI(b) of the GATT 1994 as preserving the "right" of each Member to react to wars and other emergencies in international relations in the way that the Member itself considers necessary. Any other interpretation of Article XXI(b) would "result in interference in [the] internal and external affairs of a sovereign state".[68] Accordingly, it is sufficient for a Member to state that the measures taken are actions that it considers necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations. A Member's subjective assessment cannot be "doubted or re-evaluated by any other party" or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.[69]

7.30. Russia therefore submits that the Panel should limit its findings to recognizing that Russia has invoked Article XXI of the GATT 1994, "without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT".[70]

7.31. Ukraine interprets Article XXI of the GATT 1994 as laying down an affirmative defence for measures that would otherwise be inconsistent with GATT obligations.[71] Ukraine rejects the notion that Article XXI provides for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU.[72] Ukraine considers that the Panel has jurisdiction to examine and make findings and recommendations with respect to each of the provisions of the covered agreements cited by either Ukraine or Russia, in keeping with the Panel's terms of reference under Article 7 of the DSU and the general standard of review under Article 11 of the DSU.[73] Ukraine also considers that, if Article XXI of the GATT 1994 were non-justiciable, it would imply that in a dispute involving a measure that is WTO-inconsistent, the invoking Member, rather than a panel, would decide the outcome of the dispute by determining that the WTO-inconsistent measure is nonetheless justified. In Ukraine's view, such unilateral determination by an invoking Member would be contrary to Article 23.1 of the DSU.[74]

7.32. Ukraine argues that Russia, by merely referring to an emergency in international relations that occurred in 2014, fails to discharge its burden to show the legal and factual elements of a defence under Article XXI(b)(iii) of the GATT 1994, namely, that there was a serious disruption in international relations constituting an emergency that is alike a war that is sufficiently connected to Russia so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify each and every measure at issue as being necessary to protect those interests.[75] Ukraine also argues that Russia's allegation that the basis for the measures and the original circumstances leading to their imposition were publicly available and known to Ukraine is of no consequence in determining whether Russia has satisfied its burden of proof.[76] Ukraine submits that the facts before the Panel show that Decree No. 1 was adopted due to the entry into force of the economic part of the EU-Ukraine Association Agreement, and that the text of the instruments implementing the 2014 measures shows that these were taken "[i]n view of detection of gross violations during the transit of such goods through the territory of the Republic of Belarus".[77] Finally, Ukraine argues that the determination of whether the action was taken in time of war or other emergency in international relations under subparagraph (iii) of Article XXI(b) is to be objectively made by the Panel.[78]

7.33. Ukraine argues that, although the text of Article XXI(b) expressly states that it is for the invoking Member to decide what action it considers necessary for the protection of its essential security interests, this does not mean that the Member enjoys "total discretion".[79] Had the standard been "total discretion", there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that is otherwise inconsistent with the GATT 1994.[80] Furthermore, a panel's objective assessment must include an examination of whether a Member invoking Article XXI has done so in good faith, notwithstanding the absence of an introductory paragraph similar to the chapeau to Article XX.[81]

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7.34. As to the standard of review under Article XXI(b)(iii), Ukraine argues that a panel's objective assessment must include an examination of whether the invoking Member has applied Article XXI in good faith and therefore has not abused the invocation "to pursue protectionist objectives or to apply a disguised restriction on trade".[82] Ukraine argues that, based on the ordinary meaning of the text of Article XXI(b) and similar to the analysis under the subparagraphs of Article XX, justification under Article XXI also requires that there be a rational relationship between the action and the protection of the essential security interest at issue.[83] This analysis involves a consideration of the structure, content and design of the challenged measures. The phrase "for the protection of its essential security interests" should be interpreted in the light of the case law on Article XX of the GATT 1994 (in particular, regarding Article XX(a) on the protection of public morals) to mean that "all WTO Members have the right to determine their own level of protection of essential security interests", from which it would follow that a panel must not second-guess that level of protection.[84] However, it is for panels rather than for Members to interpret the phrases "for the protection of its essential security interests" and "which it considers necessary" in accordance with customary rules of interpretation of public international law.[85] In light of those interpretations, a panel must then establish: (i) whether the interests or reasons advanced by a defendant in connection with the measures at issue can reasonably be considered as falling within the meaning of the phrase "its essential security interests" and (ii) whether the measures at issue are directed at safeguarding the defendant's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.[86] If a panel finds that the Member's measure is taken "for the protection of its essential security interests", a panel would then review whether, based on the facts available, the defendant "could reasonably arrive at the conclusion that the measures taken are necessary for protecting its essential security interests".[87]

7.5.2 Main arguments of the third parties

7.35. Australia argues that Article 7 of the DSU vests the Panel with jurisdiction to examine and make findings with respect to each of the relevant provisions in the covered agreements that Ukraine and Russia have cited.[88] Russia's invocation of Article XXI(b)(iii) of the GATT 1994, which Australia considers to be an exception to Members' obligations under the GATT 1994, places the provision squarely within the Panel's jurisdiction.[89]

7.36. Australia regards the language "which it considers necessary" in the first part of Article XXI(b) to indicate that it is for a Member to determine both its essential security interests and the actions it considers necessary for their protection. However, this deference to the determinations of a Member does not preclude a panel from undertaking any review of a Member's invocation of Article XXI(b).[90] Rather, in reviewing the "necessity" of an action under Article XXI(b), a panel is limited to determining whether the Member in fact considers the action necessary, for example, by reference to the Member's statements and conduct. Australia considers that although the nature and scope of review of the "necessity" aspect is limited, a panel does have a broader role in determining whether that (necessary) action was taken "*for the protection of*" a Member's essential security interests. In Australia's view, to arrive at such a determination, a panel should examine if there is a "sufficient nexus" between the action taken and the Member's essential security interests.[91]

7.37. Brazil argues that, by invoking Article XXI, Russia did the opposite of excluding the Panel's jurisdiction: it obliged the Panel to examine the provision by bringing it into the "matter" at hand.[92] Moreover, an exclusion of jurisdiction would deprive the complainant of its right to a decision and would be contrary to Article 3.3 of the DSU.[93] Brazil considers Article XXI to be an affirmative defence. Brazil interprets Article XXI(b) as containing both a "subjective" component, i.e. a judgment regarding the necessity of a measure, and an "objective component", which relates to the presence of at least one of the circumstances listed in subparagraphs (i) through (iii).[94] Although the language "which it considers" in the first part of Article XXI(b) confers a great deal of discretion on the Member regarding the necessity of the measure, a panel must nevertheless review the Member's motivation for invoking Article XXI(b)(iii) to ensure that there is some connection between the measure and the state of war or other emergency in international relations, and whether there is a "plausible link" between the measure and the purpose stated in the Member's motivation for imposing the measure.[95]

7.38. Brazil considers that, unlike the determination of whether an action relates to fissionable materials, traffic in arms, or war, in subparagraphs (i), (ii) and (iii) of Article XXI(b), the question of what constitutes an emergency in international relations is "quite subjective and quite difficult to discern without entering into a discussion on what

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constitutes a Member's national security interest".[96] Nevertheless, Brazil considers that the invoking Member bears the burden of adducing evidence that the challenged measures constitute action taken in time of war or other emergency in international relations.[97] An invoking Member must also demonstrate some degree of connection between the measure and the state of war or other emergency in international relations, and whether there is a plausible link between the measure that the Member wishes to justify and the purpose stated in its motivation.[98]

7.39. Canada argues that if Article XXI of the GATT 1994 is invoked by a Member in a dispute, then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference.[99] Canada further observes that the DSU provides that panels do not have the discretion to decline to exercise the jurisdiction conferred on them by their terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11 of the DSU.[100] While Canada considers that Article XXI is an exception which can be invoked by a Member to justify measures that would otherwise not be consistent with its WTO obligations, it also regards Article XXI as "structurally and textually different from Article XX".[101] It therefore cautions against importing tests developed in the jurisprudence to interpret provisions such as Article XX.[102]

7.40. Canada interprets Article XXI(b)(iii) as providing for a "subjective" standard, according to which the invoking Member determines the interests, actions and necessity of actions, as well as the satisfaction of the conditions in subparagraph (iii).[103] While Canada considers the subjective standard and the particularly sensitive nature of the subject matter of Article XXI to mean that an invoking Member must be accorded a "high level of deference" by a panel, it also considers that an invoking Member must substantiate (albeit at a low standard) its good faith belief that the elements for its invocation of Article XXI(b)(iii) exist.[104]

7.41. China argues that the Panel has jurisdiction to review Russia's invocation of Article XXI of the GATT 1994 on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[105] China considers that Russia has invoked Article XXI as a defence to Ukraine's claims of inconsistency.[106] China urges the Panel to exercise extreme caution in its assessment of Russia's invocation of Article XXI(b)(iii), in order to maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member's right to protect its essential security interests, including a Member's "sole discretion" regarding its own security interests, on the other hand.[107] China refers to the principle of good faith embodied in Article 26 of the Vienna Convention on the Law of Treaties and argues that Members invoking Article XXI(b) should adhere to the principle of good faith.[108]

7.42. The European Union argues that Article XXI of the GATT 1994 does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of the GATT 1994.[109]

7.43. Given the absence in Article XXI of an equivalent to the chapeau in Article XX, the analysis of Article XXI should consider whether a measure addresses the particular interest specified, and that there is a sufficient nexus between the measure and the interest protected.[110] The European Union argues that the terms "which it considers" in the first part of Article XXI(b) qualify only the term "necessary". Therefore, the existence of a war or other emergency in international relations in subparagraph (iii) should be interpreted to refer to objective factual circumstances which can be fully reviewed by panels.[111] While "essential security interests" should be interpreted so as to allow Members to identify their own security interests and their desired level of protection, a panel should, on the basis of the reasons provided by the invoking Member, review whether the interests at stake can "reasonably" or "plausibly" be considered essential security interests.[112] A panel must also review whether the action is "capable" of protecting a security interest from a threat. The European Union considers that the terms "which it considers" imply that "in principle" each Member may determine for itself whether a measure is "necessary" for the protection of its essential security interests.[113] A panel should nevertheless review this determination, albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is "applied" in good faith. This requires the invoking Member to provide the panel with an explanation as to why it considered the measure necessary.[114] Finally, the European Union argues that, when assessing the necessity of the measure and the existence of reasonably available alternatives, a panel should ascertain whether the interests of third parties which may be affected were properly taken into account.[115]

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7.44. Japan argues that consideration of Russia's invocation of Article XXI of the GATT 1994 is within the Panel's terms of reference.[116] However, Japan also considers that Article XXI of the GATT 1994 is an "extraordinary provision" in that it recognizes the vital importance of Members' essential security interests, and the fundamental nature of their sovereign right to pursue such vital interests. This is reflected in the "deferential language" used in the provision. This being so, it may impose an "undue burden" on the WTO dispute settlement system to require panels to review a Member's invocation of Article XXI. Japan therefore urges the parties to make every effort to seek a mutually acceptable solution "in order to maintain the effective functioning of the WTO".[117]

7.45. Japan also notes the critical importance of national security interests to Members' fundamental sovereignty and the risk of the Panel adopting any interpretation that could impair a Member's ability to decide on the need to adopt measures necessary to protect its national security.[118] Japan therefore urges the Panel to "grant appropriate deference to the Members' judgement as to the necessity of taking actions to protect their essential security interests".[119] At the same time, Japan acknowledges that subparagraph (b)(iii) carefully circumscribes the situations that would allow Members to invoke a defence based on each Member's essential security interests. In addition, in Japan's view, considering the object and purpose of the GATT 1994 and the preparatory work for the ITO Charter, the discretion accorded to Members in deciding upon the actions that are necessary to protect their essential security interests is "not unbounded and must be exercised with extreme caution".[120]

7.46. Moldova disagrees with Russia's argument that the mere invocation of Article XXI(b)(iii) prevents WTO panels from reviewing trade issues that would otherwise be WTO-inconsistent.[121] Moldova therefore considers that, while Members have the right to define for themselves their essential security interests, and declare the necessity of protecting those interests, WTO panels have the right to review whether such Members apply WTO-inconsistent measures in good faith and in accordance with the requirements of Article XXI.[122]

7.47. Moldova considers that the Panel needs to assess whether the invoking Member "genuinely believes" that the measure taken is necessary to protect such Member's essential security interests. Moldova argues that the jurisprudence concerning the "necessity" of a measure sought to be justified under Articles XX(a), (b) or (d) of the GATT 1994 could be relevant to a panel's assessment of the necessity of action under Article XXI(b). Accordingly, Moldova argues that a panel assessing whether an action is "necessary" for purposes of Article XXI(b) should undertake a "weighing and balancing exercise", which considers the importance of the essential security interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness, complemented by an analysis of whether the measure is "apt to make a material contribution to the achievement of its objective".[123] Such an exercise should also include a determination of whether a WTO-consistent alternative measure is reasonably available to the invoking Member.[124] A panel should also determine if the measures at issue protect "essential security interests", which must meet a higher standard than, and can be distinguished from, "non-essential security interests".[125] Moldova considers that the invoking Member should demonstrate to a panel that "in addition to establishing the objective prerequisites in Article XXI(b)[] regarding the existence of an essential security interest", the measure does not "intentionally serve protectionist purposes".[126]

7.48. Singapore argues that the Panel has jurisdiction to consider Russia's invocation of Article XXI, on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[127] Singapore considers that the language "it considers necessary" in the first part of Article XXI(b) indicates that the invoking Member is allowed to determine "with a significant degree of subjectivity" what action it considers necessary to protect its essential security interests.[128] Singapore contrasts this "self-judging" aspect of Article XXI(b) with the text of Article XX.[129] Singapore argues that the "key" phrase "it considers necessary" in the first part of Article XXI(b) has been deliberately drafted to give a Member wide latitude to determine both the action necessary for the protection of its essential security interests (including the nature, scope and duration of the measure) and the necessity of the measure.[130] Singapore argues that a "significant margin of appreciation" should be accorded to a Member's assessments of its chosen level of protection and risk, as well as the necessity of a measure taken for the protection of its essential security interests.[131]

7.49. On the other hand, Singapore considers that Members should exercise their discretion under Article XXI(b) in accordance with the principle of good faith and the doctrine of abuse of rights. Thus, a Member must, in good faith—albeit subjectively—consider that there is a threat to its essential security interest and that its chosen action is necessary for the protection of that essential security interest.[132] Singapore also argues that the

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determination of the existence of an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is "inherently subjective", with the sensitivities implicated in a Member's assessment of its security threats being equally applicable to a determination of whether an "emergency in international relations" exists.[133] Singapore submits that, even if the Panel were to conduct a "more intrusive" review of a Member's invocation of Article XXI(b), it should be limited to an examination of whether the disputed measure was implemented in a "non-capricious manner", rather than conducting an examination that "approximates an objective substantive review".[134]

7.50. Turkey argues that the text of Article XXI(b), especially the clause "which it considers necessary" means that "to a very large extent", it is left to the judgment of the invoking Member to determine which measures it considers necessary for the protection of its essential security interests. However, while the language of Article XXI leaves the determination of whether action is necessary for the protection of essential security interests to the Member taking the action, this discretion is not unqualified. Turkey regards the term "essential", which qualifies "security interests", to indicate an intention to draw a boundary to prevent abuses of power such as sheltering commercial measures behind the security exception.[135] Suggesting that the Panel should be guided by the general exception rules of the GATT 1994, Turkey considers that a complaining Member should make its *prima facie* case of inconsistency, and then the responding Member should put forward, *inter alia*, its argument that the measure can be justified under Article XXI. A panel, when reviewing the responding Member's invocation of Article XXI, should consider the "large margin of discretion" accorded to the invoking Member.[136]

7.51. The United States, in a letter to the Chair of the Panel submitted on the due date for third-party submissions, argues that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute".[137] The reason advanced is that every WTO Member retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as "reflected" in the text of Article XXI of the GATT 1994.[138] The United States describes this as an "inherent right" that has been repeatedly recognized by GATT contracting parties and WTO Members.[139]

7.52. In its subsequent submissions, the United States clarifies that it considers the Panel to have jurisdiction in the context of this dispute "in the sense that the DSB established it, and placed the matter raised in Ukraine's complaint within the Panel's terms of reference under Article 7.1 of the DSU".[140] However, it considers that the dispute is "non-justiciable" because there are no legal criteria by which the issue of a Member's consideration of its essential security interests can be judged.[141] The United States bases its position on its interpretation of the text of Article XXI, specifically, the "self-judging" language of the chapeau in Article XXI(b) "*which it considers necessary for* the protection of its essential security interests".[142] For the United States, the "self-judging" nature of Article XXI(b)(iii) establishes that its invocation by a Member is "non-justiciable", and "is therefore not capable of findings by a panel", obviating the possibility of making recommendations under Article 19.1 of the DSU in this dispute.[143]

7.5.3 Whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.53. The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[144] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.[145]

7.54. 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.

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7.55. 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.[146]

7.56. 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.

7.57. Russia argues, however, that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii). For Russia, the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel. Russia's argument is based on its interpretation of Article XXI(b)(iii) as "self-judging".[147] According to this argument, 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. Russia's jurisdictional plea is that, based on its interpretation of Article XXI(b)(iii), it has met the conditions for invoking the provision.

7.58. As previously noted, the 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.

7.5.3.1 Meaning of Article XXI(b)(iii) of the GATT 1994

7.59. The Panel begins by recalling that Article 3.2 of the DSU recognizes that interpretive issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well established—including in previous WTO disputes—that these rules cover those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.60. Article XXI(b)(iii) of the GATT 1994 is part of the "Security Exceptions" set forth in Article XXI, which provides:

> 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.

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7.61. The introduction to Article XXI states that "[n]othing in this Agreement shall be construed" followed by three paragraphs that are separated by the conjunction "or". Paragraph (a) of Article XXI describes action that may not be required of a Member, and paragraphs (b) and (c) describe action which a Member may not be prevented from taking, notwithstanding that Member's obligations under the GATT 1994.

7.5.3.1.1 Whether the clause in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that "which [the Member] considers necessary for the protection of its essential security interests".

7.63. 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.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. 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). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.[148]

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the 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?

7.66. 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.

7.67. As previously noted, the words of the chapeau of Article XXI(b) are followed by the three enumerated subparagraphs, which are relative clauses qualifying the sentence in the chapeau, separated from each other by semicolons. They provide that the action referred to in the chapeau must be:

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".

7.68. Given that these subject matters—i.e. the "fissionable materials . . .", "traffic in arms . . .", and situations of "war or other emergency in international relations" described in the enumerated subparagraphs—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).

7.69. 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

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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.[149] This is an objective relationship between the ends and the means, subject to objective determination.

7.70. 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.

7.71. 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 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.

7.72. 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). The dictionary definition of "emergency" includes a "situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action", and a "pressing need . . . a condition or danger or disaster throughout a region".[150]

7.73. "International relations" is defined generally to mean "world politics", or "global political interaction, primarily among sovereign states".[151]

7.74. The Panel also takes into account, as context for the interpretation of an "emergency in international relations" in subparagraph (iii), the matters addressed by subparagraphs (i) and (ii) of Article XXI(b), which cover fissionable materials, and traffic in arms, ammunition and implements of war, as well as traffic in goods and materials for the purpose of supplying a military establishment. While the enumerated subparagraphs of Article XXI(b) establish alternative requirements, the matters addressed by those subparagraphs give rise to similar or convergent concerns, which can be formulated in terms of the specific security interests that arise from the matters addressed in each of them. Those interests, like the interests that arise from a situation of war in subparagraph (iii) itself, are all defence and military interests, as well as maintenance of law and public order interests. An "emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b).

7.75. 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.

7.76. 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.[152] 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.[153]

7.77. 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.

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7.78. As a next step, the Panel considers whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).

7.79. 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.[154] 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 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.

7.80. In the Appendix to this Report, the Panel surveys the pronouncements of the GATT contracting parties and WTO Members to determine whether the conduct of the GATT contracting parties and the WTO Members regarding the application of Article XXI reveals a common understanding of the parties as to the meaning of this provision. The Panel's survey reveals differences in positions and the absence of a common understanding regarding the meaning of Article XXI. In the Panel's view, this record does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.[155]

7.81. 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).

7.82. 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.[156]

7.5.3.1.2 Negotiating history of Article XXI of the GATT 1947

7.83. This conclusion that the Panel has reached based on its textual and contextual interpretation of Article XXI (b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, is confirmed by the negotiating history of Article XXI of the GATT 1947.[157]

7.84. The Panel recalls that the GATT 1947 arose out of a proposal by the United States to establish an International Trade Organization (ITO), an organization through which the United States and other countries would harmonize policies in respect of international trade and employment.[158] The text of the ITO Charter was negotiated over four sessions between October 1946 and March 1948. Towards the end of the first negotiating session (held in London between October and November 1946), the Preparatory Committee decided to give prior effect to the tariff provisions of the ITO Charter by means of a general tariff agreement which would provisionally apply among a subset of ITO

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members until the ITO Charter entered into force.[159] The provisions of the general tariff agreement were to be taken from the provisions of the ITO Charter then being negotiated.[160] The texts of the ITO Charter and of the general tariff agreement were negotiated in parallel through the second negotiating session (held in New York between January and February 1947) and the third negotiating session (held in Geneva between April and October 1947).

7.85. The United States originally proposed, in a draft submitted to the Preparatory Committee in September 1946, the inclusion of a single general exceptions clause that would apply to the General Commercial Policy chapter of the ITO Charter.[161] The clause began with "[n]othing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures" followed by paragraphs that included a number of the general exceptions later appearing in Article XX of the GATT 1947, as well as others later reflected in Article XXI of the GATT 1947 (specifically paragraphs (c), (d), (e), and (k)).[162]

7.86. The draft of the ITO Charter prepared at the New York negotiating session in February 1947 (the New York Draft) similarly contained a single general exceptions clause in the chapter on General Commercial Policy.[163] Article 37 of the New York Draft provided that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) Necessary to protect public morals;
>
> (b) For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country;
>
> (c) Relating to fissionable materials;
>
> (d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;
>
> . . .
>
> (k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.[164]

7.87. The separation of these exceptions into two distinct clauses was first suggested during the third negotiating session in Geneva. In May 1947, the United States proposed that the security exceptions that appeared in the clause be moved to the end of the ITO Charter so that they would be general exceptions to the whole Charter and not just the chapter on General Commercial Policy.[165] The United States also proposed that this new provision contain the introductory language "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures", which would then be followed by the list of paragraphs transferred from Article 37.[166]

7.88. The specific language for the new security exceptions that would apply throughout the whole of the Charter was developed from a proposal submitted by the United States delegation at the Geneva negotiating session in July 1947.[167]

7.89. According to Vandevelde's study of the internal documents of the United States delegation negotiating the ITO Charter, the US delegation arrived at the language of this proposal after deliberating as to whether an ITO member should effectively be able to avoid any Charter obligation by the unilateral invocation of its essential security interests, or whether any element of the security exceptions should be subject to review by the Organization.[168] The members of the delegation were divided between those who wanted to preserve the United States' freedom of action in relation

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to its security interests by providing that each ITO member would have independent power to interpret the language of the exception[169], and those who believed that such a means for unilateral action would be abused by some countries and destroy the efficacy of the entire Charter.[170] At issue was whether the proposed draft should provide that nothing in the Charter would preclude any action "which [a member] may consider to be necessary and to relate to" the various enumerated topics, such as fissionable materials, traffic in arms or an emergency in international relations, or whether the original language from Article 37 of the New York Draft, which used the phrase "relating to" should be retained.[171]

7.90. Those favouring the position that some elements of the security exceptions should be subject to review by the Organization considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter.[172] One delegate advocating this position stated that "it would be far better to abandon all work on the Charter" than to place a provision in it that would, "under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter".[173]

7.91. After a vote, those favouring the above position prevailed.[174] Their position, that the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision, was reflected in the United States' proposal of 4 July 1947. The proposed Article 94 of the ITO Charter provided that:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> (a) Relating to fissionable materials or their source materials;
>
> (b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> (c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
>
> (d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[175]

7.92. The United States delegation's interpretation of its proposal for the security exception is reflected in discussions of the provision during the Geneva negotiating session on 24 July 1947. In response to a question from the delegate for the Netherlands as to the meaning of the term "essential security interests" and "emergency in international relations"[176], the delegate for the United States replied:

> I suppose I ought to try and answer that, because I think the provision [subparagraph (e) of Article 37 of the New York Draft] goes back to the original draft put forward by us and has not been changed since.
>
> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" because, that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same time, so far as we could, to limit the exception* so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.
>
> With regard to subparagraph (e), the limitation, I think, is primarily in the time. First, "in time of war". I think no one would question the need of a Member, or the right of a Member, to take

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> action relating to its security interests in time of war and to determine for itself—which I think we cannot deny—what its security interests are.
>
> As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.[177]

7.93. Ultimately, the delegate for the United States emphasized the importance of the draft security exceptions, which would allow ITO members to take measures for security reasons, but not as disguised restrictions on international trade:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.
>
> We have given considerable thought to it and this is the best we could produce to preserve that proper balance.[178]

7.94. During that same discussion, the delegate for Australia questioned the possible effect of moving the security exceptions to the end of the Charter, away from the provisions providing for consultations and dispute settlement. In particular, the delegate questioned whether this would mean that the security exceptions would not be subject to consultations and dispute settlement. The delegate for the United States responded as follows:

> . . . I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35 [predecessor to Articles XXII and XXIII of the GATT 1947]. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.[179]

7.95. The delegate for Australia stated that it should be clear that the terms of the proposed Article 94 would be subject to the provisions of paragraph 2 of Article 35 (predecessor to Article XXIII:1 of the GATT 1947) and on the basis of the assurance from the delegate for the United States that this was so, stated that Australia did not wish to make any reservation to Article 94.[180]

7.96. The version of Article 94 of the Geneva Draft of the ITO Charter, adopted on 22 August 1947, was entitled "General Exceptions" and contained wording nearly identical to that appearing in Article XXI of the GATT 1947:

> Nothing in this Charter shall be construed
>
> (a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or
>
> (b) to prevent any Member 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;

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

(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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[181]

7.97. By September 1947, these developments were also reflected in the draft text of the general tariff agreement in a separate provision entitled "Security Exceptions", which mirrored the language of Article 94 of the Geneva Draft of the ITO Charter.[182]

7.98. The Panel considers that the foregoing negotiating history demonstrates 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.

7.99. The Panel is also mindful that the negotiations on the ITO Charter and the GATT 1947 occurred very shortly after the end of the Second World War. The discussions of "security" issues throughout the negotiating history should therefore be understood in that context.

7.100. 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.

7.5.3.1.3 Conclusion on whether the clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.101. 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.

7.5.3.2 Conclusion on whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.102. 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.

7.103. 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 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.[183]

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7.104. Russia's invocation of Article XXI(b)(iii) being within the Panel's terms of reference under Article XXIII of the GATT 1994, as further elaborated and modified by the DSU, the Panel finds that it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

7.5.4 The measures at issue and their existence

7.105. In the preceding Section, the Panel found that it has jurisdiction to review Russia's invocation of Article XXI(b)(iii). The Panel recalls that Russia also argues that certain measures and claims are outside the Panel's terms of reference because Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU.

7.106. For presentational purposes, and in order not to interrupt the analysis of Article XXI, the Panel defers the exposition of its examination of the terms of reference to Section 7.7 of the Report. For the reasons provided in that Section, the Panel finds that the following measures are within its terms of reference (the measures at issue):

a. 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[184]

b. 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (ii) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.[185] Transit of such goods may only occur pursuant to a derogation requested by the Governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.[186]

7.107. Ukraine has presented evidence of the existence of the above-referenced measures, and the Panel is satisfied that these measures exist.[187] This being so, the next question is whether these measures are inconsistent with Russia's obligations under Articles V and X of the GATT 1994 and commitments in Russia's Accession Protocol, or whether there can be no such inconsistency in the circumstances, because the measures were "taken in time of war or other emergency in international relations", and meet the other possible conditions of the chapeau of Article XXI(b).

7.108. The Panel notes in this regard the particularity of the exception specified in Article XXI(b)(iii). This provision acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated. The Panel considers that an evaluation of whether measures are covered by Article XXI(b)(iii), as measures "taken in time of war or other emergency in international relations" (unlike measures covered by the exceptions under Article XX) does not necessitate a prior determination that they would be WTO-inconsistent if they had been taken in normal times, i.e. if they were not taken in time of war or other emergency in international relations. This is because, for the reasons explained in Section 7.5.6, 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, i.e. that there is no reasonably available alternative measure to achieve the protection of the legitimate interests covered by the exception which is not violative, or is less violative, of the prescribed norm.

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7.109. The Panel thus considers that, once it has found that the measures at issue are within its terms of reference and that Ukraine has demonstrated their existence, the most logical next step in its analysis is to determine whether the measures are covered by subparagraph (iii) of Article XXI(b), i.e. whether the measures were in fact taken during time of war or other emergency in international relations. Only if the Panel finds that the measures were not taken in time of war or other emergency in international relations would it become necessary to determine the consistency of the measures with the provisions of Articles V and X of the GATT 1994, which are the subject of Ukraine's claims.

7.110. Accordingly, the Panel next determines whether the measures at issue fall within the scope of subparagraph (iii) of Article XXI(b), as measures taken in time of war or other emergency in international relations.

7.5.5 Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

7.111. The Panel recalls its interpretation of "emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b) as 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.[188]

7.112. Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue.[189] Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security.[190] It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to "keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters".[191]

7.113. Ukraine argues that Russia has not adequately identified or described the 2014 emergency, and has therefore not discharged its burden of proof.[192]

7.114. In its opening statement at the second meeting of the Panel, Russia posed a "hypothetical question" as to whether circumstances similar to those listed would amount to an emergency in international relations under subparagraph (iii) of Article XXI(b).[193] These hypothetical circumstances, as formulated by Russia, are:

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.[194]

7.115. When asked by the Panel how closely the hypothetical situation described above reflected the actual situation on the ground, the Russian representative explained that Russia had referred to the hypothetical "in order not to introduce again some information that Russia cannot disclose".[195] The Russian representative then referred to a paragraph from Ukraine's 2016 Trade Policy Review Report[196] which, according to the Russian representative, explains, in Ukraine's words, "what is going on and how real these whole hypothetical questions are".[197] The paragraph refers to "the annexation of the Autonomous Republic of Crimea and the military conflict in the east" as factors that had adversely affected Ukraine's economic performance in 2014 and 2015.[198]

7.116. Ukraine objects to Russia's use of Ukraine's 2016 Trade Policy Review Report, noting that prior panels have refused to attach importance to the Trade Policy Review Mechanism (TPRM) of Members in considering the arguments of a party in dispute settlement proceedings.[199]

7.117. 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". In two prior disputes, panels have rejected a complainant's reference to the report drawn up by the WTO Secretariat as part of the

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respondent's Trade Policy Review. In both instances, the reference was used as the basis for an argument that a measure was WTO-inconsistent.[200]

7.118. The Panel notes that the Russian representative referred to the relevant paragraph from Ukraine's 2016 Trade Policy Review Report in order to show that the hypothetical situation put forward in Russia's opening statement at the second meeting of the Panel has been referred to by Ukraine—in another context, it is true—as being "the annexation of the Autonomous Republic of Crimea and the military conflict in the east". Russia therefore used the reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report solely to further identify the situation that it had presented in its first written submission in the following general terms: "the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[201] 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.[202] 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.

7.119. Accordingly, Russia has identified the situation that it considers 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.

7.120. Therefore, the Panel must determine whether this situation between Ukraine and Russia that has existed since 2014 constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b).

7.121. 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.

7.122. 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.[203] By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict.[204] 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.[205]

7.123. 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.

7.124. It thus remains for the Panel to determine whether the measures taken by Russia with respect to Ukraine were "taken in time of" the emergency in international relations. In this regard, the 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).

7.125. On the basis of the foregoing considerations, the Panel concludes that each of the measures at issue was "taken in time of" an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.5.1 Conclusion

7.126. The Panel finds as follows:

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a. As of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; and

b. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.6 Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

7.127. The Panel recalls that, in paragraph 7.63 above, it posited that the adjectival clause "which it considers" in the chapeau of Article XXI(b) can be read to qualify only the "necessity" of the measures for the protection of the invoking Member's essential security interests, or also the determination of these "essential security interests", or finally and maximally, to qualify as well the determination of the sets of circumstances described in each of the subparagraphs of Article XXI(b). In paragraph 7.101 above, the Panel rejected the last of these possible interpretations.

7.128. The Panel has yet to address the remaining two possible interpretations of Article XXI(b). In other words, the question remains whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking Member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.

7.129. Russia argues that the adjectival clause means that both the determination of a Member's essential security interests, and the determination of the necessity of the action taken for the protection of those interests, is left entirely to the discretion of the invoking Member. Several of the third parties also consider that Members have wide discretion to identify for themselves their essential security interests.[206] Ukraine argues that, while all Members have the right to determine their own level of protection of essential security interests, that does not mean that a Member may unilaterally define what are essential security interests.[207] According to Ukraine, it is for panels, rather than for Members, to interpret the term "essential security interests", which forms part of the WTO covered agreements, in accordance with customary rules of interpretation of public international law.[208] Consistent with its interpretation of Article XXI(b)(iii), Ukraine argues that Russia has failed to identify the essential security interests that are threatened by the 2014 emergency, and has not explained or demonstrated the connection between the measures and its essential security interests.[209] While Russia also argued that, pursuant to Article XXI(a) of the GATT 1994, it cannot be required to further explain its actions, beyond what it has declared in its first written submission and opening statement at the first meeting of the Panel, Ukraine considers that Russia cannot invoke Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI(b)(iii).[210]

7.130. "Essential security interests"[211], 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.

7.131. 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.

7.132. 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.[212]

7.133. 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

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multilateral trading system[213] 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.

7.134. 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.

7.135. 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.

7.136. 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.[214]

7.137. 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.[215] 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.

7.138. 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.

7.139. 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.

7.140. The Panel recalls that the 2016 measures (i.e. the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods): (a) restrict transit by road and rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic from transiting directly across the Ukraine-Russia border, requiring instead that such traffic detour through Belarus, and meet additional conditions relating to identification seals and registration cards at specific control points; and (b) prohibit altogether such transit for certain classes of goods unless such transit is exceptionally authorized.[216]

7.141. Ukraine characterizes the 2016 measures as retaliation by Russia for Ukraine's decision to pursue economic integration with the European Union (through the EU-Ukraine Association Agreement which includes a DCFTA) rather than with Russia through the EaEU. Ukraine does not indicate whether it considers that decision, and consequently the 2016 measures, to be related also to the emergency in international relations that had arisen in early 2014.[217] While the evidence presented by Ukraine establishes that the 2016 measures were direct or immediate responses to the entry into force of the DCFTA between the European Union and Ukraine, this is only a partial explanation of the background to Russia's adoption of the 2016 measures.

7.142. The Panel considers that there is a clear correlation between the change in government in Ukraine in early 2014, the newly sworn-in government's decision to sign the EU-Ukraine Association Agreement in March 2014, the deterioration in Ukraine's relations with Russia (as evidenced by the March 2014 UN General Assembly resolution

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concerning the territorial integrity of Ukraine), and the sanctions that have been imposed against Russia by several countries.[218] In other words, Ukraine's decision to pursue economic integration with the European Union rather than with the EaEU cannot reasonably be seen as unrelated to the events that followed, and led to the emergency in international relations, during which Russia took a number of actions in respect of Ukraine, including the adoption of the 2016 measures.

7.143. The 2014 measures (i.e. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods) operate to ban transit of goods subject to Russian sanctions from transiting across Russia from its border with Belarus.[219] These bans were imposed specifically to prevent circumvention of the import bans that Russia had imposed under Resolution No. 778.[220] The Resolution No. 778 import bans were responses taken by Russia in August 2014 to the sanctions that other countries had imposed against it earlier in 2014 in response to the emergency in international relations.

7.144. Moreover, all 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.

7.145. 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.[221]

7.146. 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.[222]

7.147. 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.[223] 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".[224] 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).

7.5.6.1 Conclusion

7.148. The Panel finds that Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.

7.5.7 Overall conclusion

7.149. Accordingly, the Panel finds that Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b)(iii) of the GATT 1994.

7.6 UKRAINE'S CLAIMS OF WTO-INCONSISTENCY OF THE MEASURES AT ISSUE

7.6.1 Introduction

7.150. In this Section, the Panel addresses Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and commitments in Russia's Working Party Report, as incorporated into its Accession Protocol by reference.

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

7.151. Russia does not present rebuttal arguments or evidence regarding Ukraine's claims, as it considers that the measures at issue are "consistent with the provisions of the WTO Agreement, including the GATT and the Accession Protocol" on the basis of its invocation of Article XXI(b)(iii) of the GATT 1994.[225]

7.152. The Panel recalls the statement of the Appellate Body in *US – Wool Shirts and Blouses* that nothing in the DSU requires panels to consider or decide issues that are not "absolutely necessary to dispose of the particular dispute" between the parties.[226] Indeed, the Appellate Body cautioned that to do so would "not be consistent with the aim of the WTO dispute settlement system" to secure a "positive solution to a dispute" under Article 3.7 of the DSU.[227]

7.153. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel does not consider it necessary to additionally examine their WTO-consistency in a different factual context and on a different legal basis, i.e. as if the measures at issue had not been taken in time of an "emergency in international relations".

7.154. However, the Panel is mindful that, should its findings on Russia's invocation of Article XXI(b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis. Accordingly, in Section 7.6.2, the Panel proceeds to analyse those aspects of Ukraine's claims which, were it not for the fact that the measures were taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), would enable the Appellate Body to complete the legal analysis.[228]

7.155. Additionally, Russia has invoked Article XXI(b)(iii) of the GATT 1994 in relation to all contested provisions of the WTO Agreement, including commitments in its Accession Protocol. Accordingly, in Section 7.6.4, the Panel addresses whether Article XXI(b)(iii) may be invoked by Russia in relation to commitments in its Accession Protocol.[229]

7.6.2 Article V:2 of the GATT 1994

7.6.2.1 Article V:2, first sentence

7.6.2.1.1 Main arguments of the parties

7.156. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods do not guarantee freedom of transit through the territory of Russia for traffic in transit coming from Ukraine and/or going to Kazakhstan or the Kyrgyz Republic, and therefore, that the measures are inconsistent with the first sentence of Article V:2.

7.157. Ukraine argues that the measures at issue violate the first sentence of Article V:2 of the GATT 1994 by restricting freedom of transit in an "absolute manner".[230] In Ukraine's view, where a Member completely prohibits traffic in transit from a neighbouring country from transiting through its territory, such a measure will "necessarily" be inconsistent with the first sentence of Article V:2.[231] Ukraine additionally contends that the 2016 Belarus Transit Requirements and 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of all routes across the Ukraine-Russia border, routes that are "direct" and therefore necessarily qualify as "routes most convenient for international transit".[232] Ukraine considers that the following factors may be relevant to the determination of which routes are most convenient for international transit: (a) the mode of transport; (b) the length of the transit route; (c) access to the transit route; (d) any administrative formalities and charges associated with the route; (e) the operator's right to choose a mode of transport; (f) the cost of using a transit route; and (g) the provenance, destination and characteristics of the goods.[233]

7.158. Ukraine also claims that the restriction on entry and exit through certain checkpoints along the Belarus-Russia border and the Russia-Kazakhstan border under the 2016 Belarus Transit Requirements is inconsistent with the first sentence of Article V:2. Ukraine argues that the restriction on entry and exit removes the "freedom to choose the most convenient route".[234] Ukraine also considers that the additional conditions related to identification seals and

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

registration cards that form part of the 2016 Belarus Transit Requirements "impose an additional burden" on traffic in transit and thereby do not guarantee freedom of transit as required by the first sentence of Article V:2.[235]

7.159. Ukraine similarly considers that the authorization requirement under the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit as required by the first sentence of Article V:2.[236] Ukraine considers that transit of the non-zero duty goods and Resolution No. 778 goods "is as good as prohibited" due to the burdensome nature of this requirement.[237] Ukraine also argues that the restriction on entry and exit through certain checkpoints along the Estonia-Russia, Finland-Russia and Latvia-Russia borders under the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods is inconsistent with the first sentence of Article V:2 because it makes "certain most convenient routes unavailable for traffic in transit".[238]

7.160. Finally, the Panel notes Ukraine's interpretive argument, developed at the first meeting of the Panel, that "where a measure is applied to goods transiting via the most convenient routes of passage and is found to violate other parts of Article V of the GATT 1994, including the second sentence of Article V:2, then such a measure is also inconsistent with the obligation of a Member to guarantee the freedom of transit via the most convenient routes" pursuant to the first sentence of Article V:2.[239] Ukraine has nonetheless advanced several independent arguments alleging inconsistency with the first sentence of Article V:2.

7.161. As previously noted[240], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the first sentence of Article V:2.

7.6.2.1.2 Main arguments of third parties

7.162. Brazil disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V of the GATT 1994.[241] For example, Brazil suggests that inconsistency with the obligation in Article V:4 to ensure that "[a]ll charges and regulations . . . shall be reasonable" will not necessarily entail inconsistency with the first sentence of Article V:2.[242] Brazil also does not believe that the imposition of certain procedural controls or restrictions on traffic in transit will automatically result in inconsistency with Article V:2.[243]

7.163. Canada agrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, as these other paragraphs "more precisely define the scope and limits of the right, and therefore the corresponding obligations embodied in that freedom".[244] Canada submits that Article V:2 does not prevent Members from imposing certain restrictions and burdens on traffic in transit, and does not equate to an unqualified right of free passage.[245] Canada also considers that it is at least "conceivable" that a transit route that involves entry and transit via the territory of a third country could nevertheless amount to a route that is the "most convenient" route.[246]

7.164. The European Union disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, and points to disparities in scope between the first sentence of Article V:2 and other paragraphs of Article V.[247] The European Union also considers that the Panel need not, and should not, decide this question in the abstract for the purpose of resolving this dispute.[248] The European Union considers that the following factors may be relevant to the determination of which routes are "most convenient for international transit": geography; the mode of transport (by road, rail, water, air, or pipelines); the specificity of the different types of goods that are in transit; the total number of transit routes; their varying convenience for international transit from the perspective of a reasonable trader; and criteria such as distance, time, safety, as well as road and infrastructure quality.[249] The European Union also states that the first sentence of Article V:2 not only requires the availability of the most convenient routes but also the absence of restrictions for using these routes.[250] Finally, the European Union considers it to be "hardly conceivable" that an indirect route requiring a detour through Belarus for Ukrainian carriers destined for Kazakhstan and the Kyrgyz Republic could qualify as a route "most convenient for international transit".[251]

7.165. Japan disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V.[252] However, Japan agrees with Ukraine that a measure that blocks all access into the territory of a Member would likely be inconsistent

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

with Article V:2 unless the measure could be justified on some basis other than Article V of the GATT 1994.[253] Japan clarifies, however, that the first sentence of Article V:2 does not require unqualified, unrestricted access, but only guarantees freedom of transit via those routes most convenient for international transit.[254] Japan also proposes that once a complaining Member makes a *prima facie* case that there are other routes that are more convenient than those designated by the respondent Member, the burden of proof should shift to the respondent Member to explain why it considers the designated routes "most convenient" for international transit.[255] Japan submits that whether a given route is "most convenient" must be determined having regard to objective factors such as "the means of transit, available routes, distances or costs".[256]

7.6.2.1.3 Analysis

7.166. The first sentence of Article V:2 of the GATT 1994 provides that:

> There shall be freedom of transit through the territory of each [Member], via the routes most convenient for international transit, for traffic in transit to or from the territory of other [Members].

7.167. Ukraine advances several arguments in support of its claims of inconsistency with the first sentence of Article V:2 of the GATT 1994.[257] The Panel will only address those arguments necessary to enable the Appellate Body to complete the analysis.[258] The Panel first examines Ukraine's argument that "where a WTO Member prohibits traffic in transit from the territory of another country with which it shares a border, such a measure necessarily does not guarantee freedom of transit" as required by the first sentence of Article V:2.[259]

7.168. The Panel notes that the first sentence of Article V:2 creates an obligation for each Member to guarantee freedom of transit "through the territory of each [Member] . . . for traffic in transit to *or* from the territory of other [Members]".[260] The use of the conjunction "or" logically creates two separate obligations under the first sentence of Article V:2. Namely, each Member is required to guarantee freedom of transit through its own territory for traffic in transit *to* the territory of any other Member, or *from* the territory of any other Member.

7.169. The immediate context provided by the other provisions of Article V also informs the interpretation of the first sentence of Article V:2. The Panel recalls that Article V:1 defines the term "traffic in transit" as any "goods . . . [whose] passage across such territory . . . is only a portion of a complete journey beginning and terminating beyond the frontier of the [Member] across whose territory the traffic passes". This informs the scope of Article V:2 by suggesting that each Member incurs obligations in relation to "traffic in transit" only during the portion of the journey when such traffic passes through that Member's territory.

7.170. Similar to Article V:2, Articles V:3, V:4 and V:5 also employ the terms "traffic in transit" and the terms "to" or "from" in relation to the territory of other Members.[261] However, Article V:6 distinctly creates an obligation to accord to "products which have been in transit" treatment no less favourable than that which would have been accorded had the products been transported "from their place of origin to their destination". The difference in terminology between Article V:6 and the other paragraphs of Article V suggests that the terms "from" and "to" as used in Articles V:2 through V:5 have a distinct meaning from the terms "from [the] place of origin" and "to [the place of] destination" as used in Article V:6. This is also supported by the text of the second sentence of Article V:2, which draws an explicit distinction between places of "origin", "departure", "entry", "exit" and "destination".

7.171. The text and context of Article V:2 thus suggest that the phrases "from the territory" and "to . . . the territory" in the first sentence of Article V:2 should be construed as referring to the place of *entry* and place of *exit* of the traffic in transit, and not the place of *origin* or *destination*.

7.172. Accordingly, under the first sentence of Article V:2:

a. Each Member is required to guarantee freedom of transit through its territory for any traffic in transit *entering from* any other Member, and

b. Each Member is required to guarantee freedom of transit through its territory for traffic in transit *to exit* to any other Member.

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7.173. To establish inconsistency with the first sentence of Article V:2, it will consequently be sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit.

7.174. As a result, where a measure prohibits traffic in transit from another Member from entering at *all point*s along a shared land border, the measure will necessarily be inconsistent with the first sentence of Article V:2.

7.175. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic shall be carried out exclusively from Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[262]

7.176. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778 of the Government of the Russian Federation, unless such transit is requested by Kazakh or Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.[263]

7.177. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints.[264]

7.178. For reasons explained in Section 7.7, the only aspect of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods within the Panel's terms of reference is the application of the bans to transit from Ukraine.[265] The Panel recalls that all transit departing from Ukraine and destined for Kazakhstan and the Kyrgyz Republic has, since 2016, been subject to the 2016 Belarus Transit Requirements. Nevertheless, the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods would still, according to the terms of the instruments implementing the measure, apply to transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.

7.179. Applying the aforementioned definition of "traffic in transit" as outlined in Article V:1[266], the goods covered by the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods qualify as "traffic in transit" for the purposes of Article V:2 of the GATT 1994.

7.180. Addressing next whether the measures prohibit traffic in transit from another Member from entering at *all point*s along a shared land border, the 2016 Belarus Transit Requirements, by mandating that traffic in transit may only enter Russia from Belarus, expressly prohibit traffic in transit from entering Russia from Ukraine.

7.181. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly prohibit traffic in transit from entering Russia from Ukraine. Additionally, even where transit is exceptionally authorized under the derogation procedure, such traffic in transit is still required to enter Russia exclusively from Belarus, and is therefore expressly prohibited from entering Russia from Ukraine.

7.182. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, prohibit traffic in transit from entering Russia from the territory of any Member other than those countries from which entry is exclusively permitted, as listed in the measure.[267]

7.6.2.1.4 Conclusions

7.183. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would

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have made a *prima facie* case that the following measures were inconsistent with the first sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures prohibit traffic in transit from entering Russia from Ukraine;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

7.184. The Panel declines to address Ukraine's additional arguments that the measures are inconsistent with the first sentence of Article V:2.

7.6.2.2 Article V:2, second sentence

7.6.2.2.1 Main arguments of the parties

7.185. Ukraine argues that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of "origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or other means of transport".[268] Ukraine argues that the 2016 Belarus Transit Requirements violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of departure and entry (the Ukraine-Russia border), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[269] Ukraine argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine, and goods that are subject to an import duty other than zero under the Common Customs Code of the EaEU), the place of departure and entry (the Belarus-Russia border, under the derogation procedure), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[270] Ukraine also considers that the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods violate the second sentence of Article V:2 because they make impermissible distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine)[271], the place of entry (a limited number of checkpoints on the external border of the EaEU), and the place of destination (imposing different permit requirements depending on whether the goods are destined for Kazakhstan or third countries) of the traffic in transit.[272]

7.186. As previously noted[273], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the second sentence of Article V:2.

7.6.2.2.2 Main arguments of third parties

7.187. Canada agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels, or other means of transport.[274] Canada additionally submits that the closed list in the second sentence of Article V:2 suggests that any measures that discriminate based on *other* criteria should instead be dealt with under Article V:5.[275]

7.188. Japan also agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels or other means of transport.[276] Japan also proposes that the objective structure, design and operation of the measure, and not the subjective judgment of the Member imposing the measure, should be examined to conclude whether any such distinctions have been made.[277]

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7.6.2.2.3 Analysis

7.189. The second sentence of Article V:2 provides that:

> No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.

7.190. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic must enter Russia exclusively from Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

7.191. The 2016 Belarus Transit Requirements expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination) and require that such traffic enter Russia only from Belarus (thereby making distinctions based on the place of entry). The additional conditions related to identification seals and registration cards apply only to traffic in transit that is subject to the 2016 Belarus Transit Requirements. These conditions also involve the same prohibited distinctions.

7.192. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, unless such transit is requested by Kazakh and Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.

7.193. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination). The 2016 Transit Bans apply to the transit of particular goods, namely, goods that are subject to customs duties on their importation to the EaEU and goods that originate in countries that are listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). Additionally, even if traders exceptionally receive authorization, such traffic in transit is still subject to the 2016 Belarus Transit Requirements and thus required to enter Russia exclusively from Belarus (thereby making distinctions based on the place of entry).

7.194. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods (to the extent that they fall within the Panel's terms of reference) apply to traffic in transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.[278]

7.195. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, require such traffic in transit to enter Russia from certain countries on the external border of the EaEU (thereby making distinctions based on the place of entry).[279] The measure applies to goods originating from countries listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). The additional conditions relating to entry through designated checkpoints and clearance apply only to traffic in transit subject to the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. These conditions also involve the same prohibited distinctions.

7.6.2.2.4 Conclusions

7.196. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would

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have made a *prima facie* case that the following measures were inconsistent with the second sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures make distinctions based on the place of entry (certain countries from which entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

7.6.3 Remaining claims under the GATT 1994 and Russia's Accession Protocol

7.6.3.1 Introduction

7.197. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel has not considered it necessary to examine the WTO-consistency of the measures as if they had been taken in a different factual context or on a different legal basis.[280] However, in the event of the Panel's findings on Article XXI(b)(iii) being reversed on appeal, the Panel has considered those aspects of Ukraine's claims which would enable the Appellate Body to complete the legal analysis.

7.198. In particular, the Panel has examined whether, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures at issue were inconsistent with the first and second sentences of Article V:2 of the GATT 1994. The Panel has outlined the key features of the measures at issue, and concluded that the measures would have been *prima facie* inconsistent with these provisions, for the reasons outlined in Section 7.6.2.

7.199. The Panel has already concluded that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Ukraine's claims under Articles V:3, V:4 and V:5 challenge the same aspects of the measures.[281] The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[282] in the event that the Appellate Body were to make findings of inconsistency with either the first or second sentence of Article V:2, or both.

7.200. In relation to Ukraine's remaining claims, the Panel recalls the statement of the Appellate Body in *Argentina – Import Measures* that it failed to see how a finding relating to "the publication of [a] WTO-inconsistent measure would contribute to securing a positive solution to this dispute".[283] Accordingly, where a measure is found to be WTO-inconsistent, findings relating to the publication or administration of the same measure are unlikely to be necessary or useful in resolving the matter.[284] Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994 challenge the same measures, or constituent legal instruments implementing aspects of these measures. The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[285] in the event that the Appellate Body were to make findings of inconsistency with the first or second sentence of Article V:2, or both. These considerations are equally applicable to Ukraine's claims under paragraphs 1426, 1427 and 1428 of Russia's Working Party Report, which all relate to the publication or administration of the same contested measures.

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7.201. As a result, the Panel does not consider it necessary to address Ukraine's remaining claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report. Accordingly, the Panel has only summarized the relevant arguments of the parties and third parties in the following Section of the Report.[286]

7.6.3.2 Article V:3

7.6.3.2.1 Main arguments of the parties

7.202. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods impose "unnecessary delays or restrictions" on traffic in transit, and therefore, that these measures are inconsistent with Article V:3.

7.203. In Ukraine's view, a measure will be inconsistent with Article V:3 whenever it subjects traffic in transit to any delays or restrictions which that are go beyond what is necessary "to put traffic in transit under a transit procedure in order to ensure that the goods move through the territory (and eventually leave the territory)".[287] Ukraine contends that, in examining whether such delays or restrictions are "unnecessary", the Panel should consider: (a) the trade restrictiveness of the measure, (b) the degree of contribution of the measure to the achievement of its objective, and (c) whether less restrictive alternative measures are reasonably available.[288]

7.204. Ukraine consequently argues that the following aspects of the measures at issue subject traffic in transit to "unnecessary delays or restrictions" in the sense of Article V:3.[289] First, Ukraine argues that the limitation to certain designated checkpoints under the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is unnecessary to ensure that goods are put under an appropriate transit procedure, as this objective could be equally achieved at other existing control points.[290] Second, Ukraine argues that the requirement of government authorization under the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is an "unnecessary" restriction because it has no clear relationship to the objective of ensuring that goods undergo an appropriate transit procedure.[291] Finally, Ukraine argues that the identification seals and registration card conditions attached to the 2016 Belarus Transit Requirements constitute "unnecessary" restrictions and delays because such traffic in transit must already undergo the identification procedures required by the EaEU.[292]

7.205. As previously noted[293], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with Articles V:3, V:4 and V:5 of the GATT 1994.

7.6.3.2.2 Main arguments of third parties

7.206. Brazil proposes that whether delays or restrictions are "necessary" under Article V:3 must be examined on a case-by-case basis, including assessing "the trade restrictiveness of the procedures, its degree of contribution to the public interest at stake and the risk of non-fulfilment".[294] Brazil also considers that restrictions or delays can be "necessary" to achieve legitimate objectives that are not exclusively related to transit regulation, such as in "force majeure" circumstances.[295]

7.207. Canada disagrees with Ukraine's interpretation of the scope of Article V:3.[296] Canada argues that the delays and restrictions covered under Article V:3 are those imposed as part of requiring "that traffic in transit be registered with [Members'] customs authorities", including "the formalities and documentation requirements that are part of entering the traffic at the proper customs house".[297]

7.208. The European Union also disagrees with Ukraine's interpretation of the scope of Article V:3. The European Union argues that the delays and restrictions covered under Article V:3 are those that specifically result from the application of customs laws and regulations.[298]

7.6.3.3 Article V:4

7.6.3.3.1 Main arguments of the parties

7.209. Ukraine's claims of inconsistency with Article V:4 are confined to one aspect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Specifically, Ukraine argues that the authorization requirement under

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the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods constitutes an "unreasonable regulation" imposed on traffic in the sense of Article V:4.[299]

7.210. In Ukraine's view, whether a regulation is "unreasonable" should involve an analysis of: (a) the rationale or purpose of the measure, and (b) whether the means used to achieve that rationale are "adequate and fair".[300] Ukraine consequently argues that: (a) it is unreasonable to make access for traffic in transit entirely dependent on the discretion of the government of the country of destination, (b) it is unreasonable to implement a measure that does not provide any information about what conditions need to be satisfied in order to secure authorization, and (c) the measure goes beyond what is required to ensure that goods move through and eventually leave the territory of the transit Member.[301]

7.6.3.4 Article V:5

7.6.3.4.1 Main arguments of the parties

7.211. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods accord less favourable treatment to traffic in transit from Ukraine compared to third countries, and therefore, that the measures are inconsistent with Article V:5.

7.212. Ukraine proposes that, to establish inconsistency with Article V:5, it must be shown that: (a) the measure is a "regulation" that is "related to or associated with" traffic in transit; (b) there has been differential treatment accorded to traffic in transit from or to any Member as compared to third countries; (c) there has been "less favourable treatment", or a detrimental impact on the conditions of competition, for traffic in transit from the contesting Member; and (d) there is a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities.[302]

7.213. Applying the foregoing analysis, Ukraine argues that each of the measures is inconsistent with Article V:5. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods accord differential treatment on the basis of whether the traffic in transit has come from Ukraine and is going to Kazakhstan and the Kyrgyz Republic.[303] Ukraine also argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods accord differential treatment on the basis of whether the traffic in transit has originated from a Resolution No. 778 country, as amended to include Ukraine, or is destined for Kazakhstan.[304] Ukraine argues that this differential treatment alters the conditions of competition for traffic in transit from Ukraine as compared to third countries, and therefore accords "less favourable treatment" by: (a) creating delays and additional costs related to rerouting, (b) imposing additional costs such as those related to identification and registration cards, and (c) impeding access to the export market for which the goods are destined.[305]

7.6.3.5 Article X of the GATT 1994

7.6.3.5.1 Main arguments of the parties

7.214. Ukraine's claims of inconsistency with Article X of the GATT 1994 are confined to certain instruments that implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these measures fall within the scope of Article X:1 because they affect the transportation of goods, and fall within the scope of Article X:2 because they have "regard to" or are "connected with" importation or exportation.[306]

7.215. More specifically, Ukraine claims that the following legal instruments implementing aspects of the measures above were not published promptly as required by Article X:1 of the GATT 1994:

a. Public Joint-Stock Company "Russian Railways" Order No. 529r of 28 March 2016 (PJSC Order)[307] and the Public Joint-Stock Company "Russian Railways" Notice of 17 May 2016 (PJSC Notice)[308], both of which implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit

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Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these legal instruments were inadequately published for the purposes of Article X:1, as they were only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[309]

b. Decree No. 319[310], which extended the geographical scope of the 2016 Belarus Transit Requirements to traffic in transit from Ukraine destined for the Kyrgyz Republic, and imposed the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was not published promptly for the purposes of Article X:1, as this instrument was brought into effect on 1 January 2016, while it was published only on 3 July 2016.[311]

7.216. Ukraine claims that the following legal instruments were enforced prior to their official publication, contrary to Article X:2 of the GATT 1994:

a. The PJSC Order[312], because this legal instrument was inadequately published for the purposes of Article X:2, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[313]

b. Decree No. 319[314], because this instrument was enforced on 1 January 2016, while it was officially published only on 3 July 2016.[315]

c. Decree No. 643[316], which amended Decree No. 1[317], so as to extend the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because this instrument was enforced on 30 December 2017, while it was only officially published on 4 January 2018.[318]

7.217. Ukraine claims that the following legal instruments are administered in an unreasonable manner, contrary to Article X:3(a) of the GATT 1994:

a. Decree No. 1, as amended by Decree No. 319 and Decree No. 643, which imposes the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because Russia has administered these instruments at the Belarus-Russia border without providing reasoned explanations to traders.[319]

b. Decree No. 319[320], because the derogation procedure under this instrument contains no criteria governing the exercise of Russia's discretion to permit derogations from the bans, thereby permitting the possibility of arbitrary administration.[321]

7.218. Russia argues that the scope of Article X is limited to "issues of importation, exportation, internal sale and transportation", and does not intersect with "the scope of Article V of the GATT which is limited to issues of transit".[322]

7.6.3.5.2 Main arguments of third parties

7.219. Brazil argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1.[323]

7.220. Canada argues that the term "affecting their . . . transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", as included in the phrase "classification or the valuation of products for customs purposes", not "imports or exports" as included in the preceding phrase "requirements, restrictions or prohibitions on imports or exports".[324] Canada argues that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is to promote transparency in relation to measures of general application relating to trade.[325]

7.221. The European Union also argues that the term "affecting their . . . transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", not "imports or exports".[326] The EU agrees that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is

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to promote transparency in relation to measures of general application relating to trade.[327] The European Union notes in support of this proposition the title of Article X, which reads "Publication and Administration of Trade Regulations".[328] The European Union additionally argues that, in the specific context of Article X, the term "imports" should be interpreted as "covering any goods that physically enter into the territory of the Member concerned", although conceding that in other provisions of the GATT, the term "imports" must be understood as excluding traffic in transit.[329]

7.222. Japan argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1, or alternately, as measures affecting the "distribution" or "transportation" of imports or exports.[330]

7.6.3.6 Russia's Accession Protocol

7.6.3.6.1 Paragraph 1161 of Russia's Working Party Report

7.6.3.6.1.1 Main arguments of the parties

7.223. Ukraine argues that the first sentence of paragraph 1161 of Russia's Working Party Report "confirms the application of Article V of the GATT 1994" to any Russian measures governing the transit of goods.[331] Consequently, Ukraine argues that it will be sufficient to establish that Russia has acted inconsistently with Article V to demonstrate inconsistency with paragraph 1161.[332]

7.224. Russia does not present any arguments in response to Ukraine's claims of inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.

7.6.3.6.2 Paragraph 1426 of Russia's Working Party Report

7.6.3.6.2.1 Main arguments of the parties

7.225. Ukraine argues that paragraph 1426 of Russia's Working Party Report applies to a broader category of legal instruments than Article X:1 of the GATT 1994 in that it applies to any measures "pertaining to or affecting trade in goods, services, or intellectual property rights".[333] Nonetheless, Ukraine submits that measures that fall within the scope of Articles V and X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1426.[334] Ukraine further argues that paragraph 1426 of Russia's Working Party Report and Article X:1 of the GATT 1994 "contain the same substantive obligation of prompt publication", and consequently that inconsistency with Article X:1 of the GATT 1994 will automatically imply inconsistency with paragraph 1426 of Russia's Working Party Report.[335]

7.6.3.6.3 Paragraph 1427 of Russia's Working Party Report

7.6.3.6.3.1 Main arguments of the parties

7.226. Ukraine argues that Russia has violated the commitments in paragraph 1427 of Russia's Working Party Report because it has failed to publish, prior to their adoption, 20 legal instruments that implement aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods.

7.227. More specifically, Ukraine claims that the following legal instruments were not published before adoption as required by paragraph 1427 of Russia's Working Party Report:

a. The PJSC Order[336], which implements aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was inadequately published for the purposes of paragraph 1427, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[337]

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b. Several resolutions implementing the measures at issue[338], as well as Decree No. 643.[339] These instruments implement various aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. Ukraine argues that each of these legal instruments was published either after or on the date of their adoption, which Ukraine defines as the date on which the finalized measures were approved within the territory of the Russian Federation.[340]

7.6.3.6.4 Paragraph 1428 of Russia's Working Party Report

7.6.3.6.4.1 Main arguments of the parties

7.228. Ukraine argues that, as with paragraph 1426 of Russia's Working Party Report, measures that fall within the scope of Article V and Article X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1428.[341] Ukraine further claims that paragraph 1428 "expands the scope of application and the substantive publication requirement of Article X:2 of the GATT 1994" because paragraph 1428 prohibits measures from becoming "effective" prior to publication while Article X:2 prohibits measures from being "enforced" prior to "official" publication.[342] As Ukraine considers that a measure can only be "enforced" once it has been made "effective", Ukraine consequently contends that "a violation of Article X:2 automatically implies a violation of paragraph 1428."[343] Ukraine proceeds to argue that the contested instruments are inconsistent with paragraph 1428 of Russia's Working Party Report for the same reasons that they are inconsistent with Article X:2 of the GATT 1994.[344]

7.6.4 Applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in Russia's Accession Protocol

7.6.4.1 Introduction

7.229. Ukraine makes several claims of inconsistency with Russia's Accession Protocol based on commitments contained in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.[345] The Panel has already concluded that the measures at issue are covered by Article XXI(b)(iii), and consequently that it is not necessary to address each of Ukraine's claims of inconsistency with Articles V and X of the GATT 1994. The applicability of Article XXI(b)(iii) to those provisions of the GATT 1994 is explicitly contemplated by the introduction to Article XXI, which provides that "[n]othing in this Agreement shall be construed".

7.230. Conversely, neither panels nor the Appellate Body have previously considered the applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in the Accession Protocol of any acceding Member.[346] Several disputes have, however, previously considered the applicability of Article XX of the GATT 1994 to individual commitments in China's Accession Protocol. The Panel considers these disputes to be relevant insofar as they inform its analysis of the relationship between a Member's Accession Protocol and provisions of the GATT 1994.

7.231. The Appellate Body has held that the relationship between provisions in China's Accession Protocol and provisions in the WTO Agreement must be determined on a case-by-case basis.[347] In some disputes, this analysis has led to a determination that Article XX of the GATT 1994 could be invoked to justify a breach of an independent obligation under China's Accession Protocol[348], while in others, the same analysis led to a determination that Article XX could not be invoked in relation to the contested provision.[349] In *China – Rare Earths,* the Appellate Body held that the specific relationship between individual provisions in China's Accession Protocol and provisions of the GATT 1994 must be ascertained "through scrutiny of the provisions concerned, read in the light of their context and object and purpose, *with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations*, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".[350] The Appellate Body also noted that such an assessment must be predicated on a "thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute".[351]

7.232. The Panel considers that the approach outlined by the Appellate Body in *China – Rare Earths* is equally applicable to the relationship between Russia's Accession Protocol and Article XXI(b)(iii) of the GATT 1994. In the

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Panel's view, the architecture of the WTO system confers a single package of rights and obligations upon Russia, of which the GATT 1994 and its Accession Protocol are constituent parts. In particular, where obligations under Russia's Accession Protocol are closely linked to obligations under the GATT 1994, the Panel considers that this constitutes a strong argument for the applicability of Article XXI(b)(iii) to such commitments.

7.233. The Panel proceeds to apply the analytical framework outlined by the Appellate Body to determine the applicability of Article XXI(b)(iii) to the commitments in individual provisions of Russia's Working Party Report.[352] In doing so, the Panel considers: (a) the text of each provision, as well as any express textual references, or lack thereof, to the GATT 1994 or other covered agreements; (b) the context provided by other relevant provisions in Russia's Accession Protocol and Working Party Report; (c) the content of each provision and its relationship to obligations under the GATT 1994; (d) the overall architecture of the WTO system as a single package of rights and obligations; and (e) the specific circumstances of this dispute.[353]

7.6.4.2 Paragraph 1161 of Russia's Working Party Report

7.6.4.2.1 Paragraph 1161 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.234. Paragraph 1161 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that the Russian Federation would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit by road, rail and air, as well as other charges and customs fees imposed in connection with transit, including those mentioned in paragraphs 1155 and 1156 in conformity with the provision of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement.

7.235. Paragraph 1161 requires Russia to apply certain measures in "conformity with the provisions of Article V of the GATT 1994 *and other relevant provisions of the WTO Agreement*".[354] The explicit textual reference to "other relevant provisions of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. Additionally, the ordinary meaning of the term "relevant" is whether such provisions have a "bearing on" or are "connected with" the matter, or are "legally pertinent or sufficient".[355] Applying this definition, the Panel considers that other provisions of the covered agreements will be "relevant" to paragraph 1161 provided that they have a demonstrable legal bearing upon Article V of the GATT 1994. Article XXI(b)(iii) clearly falls within this definition, as it is directly applicable to Article V of the GATT 1994 through the phrase "[n]othing in this Agreement shall be construed".

7.236. The immediate context provided by the other provisions of Russia's Working Party Report also informs the interpretation of paragraph 1161, particularly those discussions under the shared subheading "Regulation of Trade in Transit". The Panel observes that, for instance, in paragraph 1160 of Russia's Working Party Report, the representative for Russia confirmed that in relation to certain bans on transit, "in general, such provisions were applied for reasons of safety, health or *national security.*"[356] There is no record of any Members contesting or objecting to this assertion.

7.237. Finally, the content of paragraph 1161 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis.[357] The Panel observes that the commitments in paragraph 1161 and obligations under the GATT 1994 are closely linked in that paragraph 1161 requires Russia to apply measures governing transit of goods "in conformity" with Article V of the GATT 1994. If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

7.238. For these reasons, the Panel considers that Russia can rely on the phrase "other relevant provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1161 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

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7.6.4.2.2 Paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994

7.239. The Panel recalls its conclusion that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Based on the foregoing analysis, the Panel considers that paragraph 1161 of Russia's Working Party Report merely reiterates Russia's commitments under Article V of the GATT 1994. Moreover, the Panel recalls that Ukraine's claims under paragraph 1161 of Russia's Working Party Report are substantively identical to Ukraine's claims under Article V.[358]

7.240. The Panel therefore considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), the measures would have also been *prima facie* inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.6.4.3 Paragraph 1426 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.241. Paragraph 1426 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that from the date of accession, all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would be published promptly in a manner that fulfils applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994, WTO GATS Agreement, and the WTO TRIPS Agreement.

7.242. Paragraph 1426 requires Russia to publish certain measures promptly in a manner that "*fulfils applicable requirements of the WTO Agreement*, including those of Article X of the GATT 1994".[359] The explicit textual reference to "applicable requirements of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. The text of paragraph 1426 also explicitly refers to Article X of the GATT 1994 as an example of a provision containing such "applicable requirements". The ordinary meaning of the term "applicable" is whether such requirements are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[360] The ordinary meaning of the term "requirement" is "[s]omething called for or demanded", or "a condition which must be complied with".[361] In the Panel's view, just as Article X of the GATT 1994 is specified to contain "applicable requirements" to paragraph 1426, Article XXI(b)(iii) clearly contains "applicable requirements" to Article X of the GATT 1994. This follows from the fact that Article X is subject to Article XXI(b)(iii) through the phrase "[n]othing in this Agreement shall be construed".

7.243. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1426. In particular, the Panel contrasts the language used in paragraph 1426 with that used in paragraph 1427. Paragraphs 1426 and 1427 both create obligations relating to the publication of certain measures "pertaining to or affecting trade in goods, services, or intellectual property rights". However, unlike paragraphs 1161, 1426 and 1428, paragraph 1427 specifically omits any textual reference to "relevant provisions" or "applicable requirements" of the "WTO Agreement", and instead includes its own specific reference to "cases of emergency" and "measures involving national security". In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 further underpins the significance of the phrase "applicable requirements of the WTO Agreement" in paragraph 1426.

7.244. Finally, the content of paragraph 1426 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. The Panel observes that the commitments in paragraph 1426 and obligations under the GATT 1994 are closely linked in that paragraph 1426 contains the same requirement to ensure that measures relating to trade in goods are "published promptly" as that contained in Article X:1 of the GATT 1994.[362] If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

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7.245. For these reasons, the Panel considers that Russia can rely on the phrase "in a manner that fulfils applicable requirements of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1426 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.4 Paragraph 1427 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.246. Paragraph 1427 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation further confirmed that, except in cases of emergency, measures involving national security, specific measures setting monetary policy, measures the publication of which would impede law enforcement, or otherwise be contrary to the public interest, or prejudice the legitimate commercial interest of particular enterprises, public or private, the Russian Federation would publish all laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, prior to their adoption and would provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to the responsible authorities before the relevant measure was finalized or submitted to the competent CU bodies.

7.247. Paragraph 1427 omits any reference to "relevant provisions" or "applicable requirements" of "the WTO Agreement" or the GATT 1994, but instead refers specifically to exceptions to the obligations undertaken in that paragraph for "cases of emergency" and "measures involving national security".

7.248. The context provided by the other provisions of the Multilateral Trade Agreements informs the Panel's interpretation of paragraph 1427.[363] In particular, paragraph 1427 creates obligations relating to measures "pertaining to or affecting trade in goods, services, or intellectual property rights". Consequently, the Panel considers the use of the term "emergency" across those covered agreements relating to trade in goods, services and intellectual property rights to be material to its understanding of the phrase "cases of emergency" in paragraph 1427. In this respect, Panel notes that the only context in which the word "emergency" is consistently used across the GATT 1994, the GATS and the TRIPS Agreement is in creating a general exception for actions taken by a Member which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations".[364] This suggests that an "emergency in international relations" is the type of "emergency" contemplated in paragraph 1427 of Russia's Working Party Report.

7.249. The content of paragraph 1427 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1427 distinctly creates several commitments which have no direct counterpart in the GATT 1994.[365] The scope of the measures covered by paragraph 1427 also differs from Articles X:1 and X:2 of the GATT 1994.[366] However, the commitments in paragraph 1427 and obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.250. For these reasons, the Panel considers that Russia can rely on the phrase "except in cases of emergency" in order to justify any inconsistency with paragraph 1427 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.5 Paragraph 1428 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.251. Paragraph 1428 of Russia's Working Party Report provides that:

> The representative of the Russian Federation confirmed that, from the date of accession, no law, regulation, decree, decision or administrative ruling of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the [Customs Union (CU)], would become effective prior to publication, as provided for in the applicable provisions of the WTO Agreement, including the

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GATT 1994, the WTO GATS Agreement, and the WTO TRIPS Agreement. The Working Party took note of this commitment.

7.252. Paragraph 1428 requires Russia to ensure that certain measures do not become effective before publication "*as provided for in the applicable provisions of the WTO Agreement*, including the GATT 1994".[367] As mentioned above, the ordinary meaning of the term "applicable" is whether such provisions are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[368] The ordinary meaning of the term "provided" is "on the condition, supposition, or understanding that" or "it being stipulated, or arranged that".[369] Consequently, the Panel considers that the ordinary meaning of the text of paragraph 1428 could support two possible interpretations. First, the phrase "as provided for" could be construed as merely stating that obligations equivalent to paragraph 1428 are *also* stipulated in "applicable provisions of the WTO Agreement". Conversely, the phrase "as provided for" could be construed as specifying that other provisions of the WTO Agreement are "applicable" to the obligations in paragraph 1428.

7.253. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1428. In particular, the Panel has already examined the textual differences between paragraphs 1426 and 1427.[370] The Panel considers that this analysis is equally applicable to the differences between paragraphs 1427 and 1428. In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 underpins the significance of the phrase "the applicable provisions of the WTO Agreement" in paragraph 1428.

7.254. Finally, the content of paragraph 1428 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1428 distinctly commits Russia to ensure that the covered measures are not made effective before publication, which has no explicit counterpart in the GATT 1994. The scope of the measures covered by paragraph 1428 also differs from Articles X:1 and X:2 of the GATT 1994.[371] However, the commitments in paragraph 1428 of Russia's Working Party Report and the obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.255. For these reasons, the Panel considers that Russia can rely on the phrase "as provided for in the applicable provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.6 Conclusion

7.256. The Panel considers that Russia could justify any inconsistency with the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.257. The Panel also considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.258. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

7.7 PANEL'S TERMS OF REFERENCE AND THE EXISTENCE OF THE MEASURES

7.259. In this Section of the Report, the Panel addresses a number of issues related to its terms of reference and to the existence of the measures at issue.

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7.7.1 Identification of the measures and claims, and their relationship to each other

7.260. In its opening statement at the first meeting of the Panel, Russia argued that Ukraine's panel request fails to meet the requirements of Article 6.2 of the DSU in a number of respects:

a. Ukraine's panel request fails to make clear how the measures in each of the two distinct groups set forth in the panel request operate together.[372]

b. The panel request does not adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two distinct groups.[373]

c. Ukraine's first written submission presents the challenged measures in a completely different manner from the presentation in its panel request, i.e. "as four individual measures that are not connected and do not operate together". Russia considers that, as respondent, it was placed in an uncertain situation in presenting its defence because it was required to guess what the Panel would identify as the measures at issue on the basis of the Panel's interpretation of the substance of the alleged violation.[374]

7.261. Russia thus argued that Ukraine's panel request, both in general, and in particular with respect to the identification of the specific measures, fails to satisfy the requirements of Article 6.2 of the DSU.[375]

7.262. Ukraine responded that its presentation of the specific measures at issue in two separate sections of its panel request does not necessarily mean that the measures identified within each section must be presumed to operate together.[376] Nor is there any requirement in Article 6.2 of the DSU for a complainant to identify how all of the measures at issue operate together unless it is necessary in order to present the problem clearly.[377] In addition, Ukraine argued that Russia's complaint regarding the reorganization of the presentation of the measures in Ukraine's first written submission does not address why the descriptions of the measures in the panel request were not sufficiently clear. Ukraine argued that the measures as described in its first written submission correspond fully to the measures as identified in its panel request.[378] Finally, Ukraine argued that the panel request plainly connects the specific measures at issue with the relevant provisions of the covered agreements that Ukraine claims have been infringed.[379]

7.263. In what follows, the Panel first describes the presentation of the measures and claims in Ukraine's panel request, and in Ukraine's first written submission, respectively, before addressing Russia's arguments that the panel request does not satisfy the requirements of Article 6.2 of the DSU.

7.7.1.1 Presentation of the measures and claims in Ukraine's panel request

7.264. Ukraine's panel request refers separately to a "first group of measures" and the "legal basis for the complaint" in respect of those measures (section II of the panel request), and a "second group of measures" and the "legal basis for the complaint" in respect of those measures (section III of the panel request).

7.265. Section II.A. of Ukraine's panel request, which is entitled "First Group of Measures", states that Russia has imposed measures concerning traffic in transit from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia. These measures mandate that all international cargo transit by road and rail transport from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints. It is also noted in this section that the above-referenced measures apply as well to traffic in transit from Ukraine destined for the Kyrgyz Republic, as of 1 July 2016.[380]

7.266. Section II.A. of Ukraine's panel request further identifies as a measure a ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling under the 2014 import bans set forth in the list annexed to Resolution No. 778.[381]

7.267. Section II.A. of Ukraine's panel request then sets forth the legal instruments through which it understands the above-referenced measures to be imposed. These instruments include Russian Presidential Decrees (Decree No. 1 and Decree No. 319, which amends Decree No. 1), as well as a resolution of the Russian Government implementing Decree No. 1 (Resolution No. 1, also dated 1 January 2016).[382, 383]

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7.268. With respect to the "legal basis of the complaint", section II.B. of Ukraine's panel request states that the measures identified in section II.A. are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[384] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.269. Section III.A. of Ukraine's panel request identifies a second group of measures, which it describes as "other measures concerning traffic in transit from the territory of Ukraine through the territory of the Russian Federation". These other measures are further described in three sub-categories.

a. The first sub-category encompasses measures requiring that, from 30 November 2014, transit of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, dated 7 August 2014, and subsequent amendments, be generally prohibited through checkpoints of the Republic of Belarus.[385] Additionally, transit of such goods destined for Kazakhstan may only take place upon permits issued by the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of the Republic of Kazakhstan (indicating the Russian checkpoints on the external border of the EaEU), while transit of the same goods destined for third countries can take place only upon permits issued by the *Rosselkhoznadzor*.[386] Ukraine's panel request then provides a list of the various legal instruments by which it understands Russia to impose the measures in this first sub-category.[387]

b. The second sub-category is described as "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[388]

c. The third sub-category refers to "any other related measures adopted and/or applied by the Russian Federation concerning traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation, including measures that implement, complement, add to, apply, amend or replace any of the measures mentioned in section II. A. or section III.A".[389] The introductory words to this sub-category of the panel request indicate that this sub-category is necessitated by Russia's alleged "fundamental lack of transparency concerning some of the measures at issue" and "failure to observe the transparency and publication obligations" under the GATT 1994 and its Accession Protocol.[390]

7.270. With respect to the "legal basis of the complaint" for the second group of measures so identified, section III.B of Ukraine's panel request states that these measures are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with various paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[391] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.7.1.2 Presentation of the measures and claims in Ukraine's first written submission

7.271. In section IV of its first written submission, Ukraine presents four "categories" of measures, as opposed to the arrangement under two "groups of measures" in its panel request.[392] The four categories of measures in section IV of Ukraine's first written submission (and the terminology chosen by the Panel to describe these categories of measures) are:

a. "2016 general transit ban and other transit restrictions" (the 2016 Belarus Transit Requirements);

b. "2016 product-specific transit ban and other transit restrictions" (the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods);

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

c. "De facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" (the *de facto* measure*); and*

d. "2014 transit bans and other transit restrictions" (the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods).[393]

7.272. Ukraine considers that the first category of measures, which the Panel refers to as the 2016 Belarus Transit Requirements, corresponds fully to the measures identified in section II.A. of Ukraine's panel request as the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan and the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.[394]

7.273. The second category of measures, which the Panel refers to as the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, Ukraine considers to correspond fully to the measures identified in section II.A. of Ukraine's panel request as the ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, including the exceptional derogation procedure for such goods.[395]

7.274. The third category of measures, the *de facto* measure, Ukraine considers to correspond to the measures identified in the second sub-category of the second group of measures in section III.A. of Ukraine's panel request, namely, "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[396]

7.275. The fourth category of measures, which the Panel refers to as the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, Ukraine considers to correspond to the measures identified in the first sub-category of the second group of measures in section III.A of Ukraine's panel request, namely, the 2014 prohibitions on the "transit of goods subject to veterinary and phytosanitary surveillance and which are included in the list approved by Resolution ... No. 778 ... through the checkpoints of the Republic of Belarus", along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[397]

7.276. In section V of its first written submission, Ukraine presents its arguments of WTO-inconsistency of each of the categories of measures.[398] This discussion is arranged on the basis of the claims of inconsistency with: (a) Article V of the GATT 1994 and paragraph 1161 of Russia's Working Party Report; (b) Articles X:1 and X:2 of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report; and (c) Article X:3(a) of the GATT 1994.[399] Within the discussion of the claims of inconsistency with the specific provisions (and subparagraphs of those provisions), Ukraine discusses serially the relevant categories of measures alleged to infringe the specific provisions.[400]

7.7.2 Whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.277. The relevant portion of Article 6.2 of the DSU reads:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.278. Article 6.2 of the DSU has two distinct requirements, namely: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint.[401] Article 6.2 defines the scope of the dispute between the parties, thereby establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent, and the third parties, of the nature of the case.[402] Moreover, in order to "present the problem clearly", within the meaning of Article 6.2, a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can "know

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what case it has to answer, and . . . begin preparing its defence".[403] Compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. Consequently, defects in the panel request cannot be cured by the subsequent submissions of the parties.[404]

7.279. In what follows, for each of the measures identified in Ukraine's panel request in the first and second groups of measures, the Panel determines whether the identification of the measures and claims satisfies the requirements of Article 6.2.

7.7.2.1 First group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.280. Section II.A. of Ukraine's panel request identifies the following measures:

a. Requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan or the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.

b. A ban on all road and rail transit of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (ii) goods that fall within the scope of the import ban imposed by Resolution No. 778.

7.281. The specific measures within this group appear to be connected by the fact that they are implemented through a common set of legal instruments, namely, Decree No. 1, and Decree No. 319, which amended Decree No. 1 in material respects.[405]

7.282. The Panel considers that the identification of each of the measures within the first group of measures in section II.A. satisfies the requirements of Article 6.2 of the DSU.

7.283. Russia contends that the legal basis for the complaint in respect of the above-mentioned measures is provided only in respect of the group of measures, rather than for each of the measures within the group.[406] Russia does not explain why it reads Ukraine's panel request in this manner and the Panel does not share that reading. The opening words of section II.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section II.A. are inconsistent with the following WTO provisions". Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the first group of measures identified in section II.A. of Ukraine's panel request.

7.284. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B. of Ukraine's panel request.

7.7.2.2 Second group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.285. As previously noted[407], the measures identified in the second group of measures in section III.A. of Ukraine's panel request comprise:

a. 2014 prohibitions on transit, from Ukraine across the territory of Russia and through checkpoints of the Republic of Belarus, of goods that are subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778, along with requirements that the transit of any such goods destined for Kazakhstan and other third countries occur on the basis of permits issued by the appropriate Kazakh or Russian veterinary and phytosanitary surveillance authorities and through designated checkpoints;

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

b. the "de facto application of Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic"; and

c. related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request, of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.

7.286. The Panel agrees with Russia that it is difficult to discern a relationship among the measures within this second group that would warrant them being grouped together, especially since the third sub-category of measures (in item c. above) also covers measures related to those within the first group of measures in section II.A. of the panel request. However, Ukraine's decision to group these measures together in its panel request does not of itself render the identification of the measures unclear.

7.287. The Panel next considers whether the identification of the measures within each sub-category of the second group of measures in section III.A. of Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU.

7.7.2.2.1 First sub-category of measures

7.288. The first sub-category of the second group of measures (item a. in paragraph 7.285 above) are prohibitions, put in place in November 2014, on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and that are subject to the import ban implemented by Resolution No. 778, along with related requirements that the transit of any such goods destined for Kazakhstan or other third countries occur through designated Russian checkpoints and that all such goods be subject to clearance and on the basis of permits issued by the appropriate Russian or Kazakh veterinary and phytosanitary surveillance authorities. Specifically, Ukraine challenges these measures *as they affect transit from the territory of Ukraine* through the territory of Russia.[408]

7.289. The Panel concludes that Ukraine's panel request clearly identifies the first sub-category of the second group of measures.

7.7.2.2.2 Second sub-category of measures

7.290. In its panel request, Ukraine describes the measure in item b. in paragraph 7.285 above as the de facto application of "Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The Panel refers to this measure as the "*de facto* measure" in the remainder of this discussion.

7.291. At the Panel's request, the parties engaged specifically on whether the identification of the *de facto* measure in Ukraine's panel request satisfied the requirements of Article 6.2 of the DSU.[409] Therefore, although the Panel is addressing this issue in the context of evaluating Russia's more general objection that none of the measures or claims was sufficiently precisely identified, it is necessary to refer to arguments that the parties made more specifically about the *de facto* measure.

7.7.2.2.2.1 Arguments of Russia

7.292. Russia argues that Ukraine's description of the *de facto* measure in its panel request is insufficiently clear for purposes of Article 6.2 of the DSU.[410] Russia considers that it is not possible to determine the geographical scope of application of the *de facto* measure from the reference in the panel request to "countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan", taking into account the number of countries covered by such a description.[411] In addition, the description of the *de facto* measure in the second sub-category of the second group of measures (set forth in paragraph 7.269.b above), in combination with the third sub-category of the second group of measures (set forth in paragraph 7.269.c above) does not enable the respondent to discern whether the measure is written or unwritten, or whether it is being challenged on an "as such" or "as applied"

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basis.[412] Russia considers that the measure in question constitutes "an imprecise open-ended list with the possibility for the claimant to put any new element on the table".[413]

7.7.2.2.2.2 Arguments of Ukraine

7.293. Ukraine argues that the measure that it challenges, which it describes in its first written submission as the "de facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" was identified in its panel request in a manner that satisfies the requirements of Article 6.2 of the DSU.[414] Ukraine argues that there is no requirement under Article 6.2 of the DSU to identify in a panel request whether a measure is written or unwritten, or is challenged on an "as such" or "as applied" basis.[415] Moreover, the measure as described in the second sub-category of the second group of measures (in section III.A. of the panel request) is clearly distinct from the general and product-specific transit bans and other restrictions identified in the first group of measures in section II.A. of the panel request.[416] According to Ukraine, the measure described in the second sub-category of the second group of measures in section III.A. of the panel request, through the phrase "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic" was clearly identified as a distinct measure comprising "the application in fact of the measures introduced by Decree No. 1 and Resolution No. 1 to traffic in transit destined for territories other than those covered by Decree No. 1 and Resolution No. 1".[417]

7.294. Ukraine also rejects the argument that the reference in the panel request to the legal instruments in question being applied to transit destined for territories in "Central and Eastern Asia and the Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic" amounts to an "open-ended list" of measures that fails to meet the requirements of Article 6.2 of the DSU.[418] In Ukraine's view, on the basis of the United Nation's definitions of the regions in question, the geographical specification in the second sub-category of the second group of measures identified in section III.A. of the panel request clearly referred to traffic destined for "Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia".[419] This is not an open-ended list, and the fact that Ukraine elected, in its first written submission, to demonstrate the *existence* of the measure with respect to transit destined for a subset of those destinations, does not affect the conclusion that the geographical specification in the panel request was not open ended.[420]

7.7.2.2.2.3 Analysis

7.295. Section III.A. of Ukraine's panel request identifies the *de facto* measure in the following manner:

> [R]estrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic.[421]

7.296. This identification refers explicitly to transit restrictions that arise out of the application of Decree No. 1 and Resolution No. 1. The transit restrictions effected through Decree No. 1 and Resolution No. 1 are described in the first three paragraphs of section II.A. of Ukraine's panel request, and concern the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territory of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points.

7.297. Before evaluating the description of the *de facto* measure in Ukraine's panel request, the Panel recalls the level of scrutiny that panels must apply in determining whether a panel request meets the specificity requirement under Article 6.2 of the DSU. The Appellate Body has stated that the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures, which would require that a complainant present relevant arguments and evidence in its submissions.[422] While a measure

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cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need only be framed "with sufficient particularity so as to indicate *the nature of the measure* and *the gist of what is at issue*".[423] Thus, according to the Appellate Body, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement.[424]

7.298. The standard outlined above was developed by the Appellate Body in *US – Continued Zeroing* in the process of reversing the panel's finding in that dispute that an examination of the specificity of a panel request *would* entail a consideration of the types of measures susceptible to WTO dispute settlement. The panel had found that the panel request did not satisfy the requirement in Article 6.2 to identify the specific measures at issue because it failed to "demonstrate the existence and the precise content of the purported measure" and because "the continued application" of anti-dumping duties resulting from 18 anti-dumping duty orders did not constitute a measure for the purposes of WTO dispute settlement proceedings.[425] The Appellate Body considered that the panel request had sufficiently linked together the following three elements in seeking to identify the measures at issue[426]:

a. The panel request made "explicit reference" to the duties at issue, imposed through 18 anti-dumping duty orders, each on a "specific product" exported from "a specific country"[427];

b. The panel request indicated that the complainant was challenging the "continued application" of the anti-dumping duties pursuant to certain administrative proceedings[428]; and

c. The panel request stated that the duties at issue were calculated at levels "in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement". The complainant stated specifically in its panel request that the respondent's investigating authority "systematically" used the zeroing methodology in all types of reviews pertaining to anti-dumping duties and relied on margins calculated with the zeroing methodology in sunset reviews.[429]

7.299. The Appellate Body concluded that, with these three elements, taken together, the respondent could reasonably have been expected to understand that the complainant was challenging the continued application of the zeroing methodology in successive proceedings, through each of the 18 anti-dumping duty orders.[430]

7.300. Given these facts, the Panel understands the panel request in *US – Continued Zeroing* to have identified the measures at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue" because it explicitly: (a) provided an indication that the measure was applied to determine the duties imposed on products from "specific countr[ies]"; (b) identified the unwritten measure at issue (i.e. the zeroing methodology); (c) specified the basis on which the measure was challenged (i.e. "the continued application of . . . anti-dumping duties" according to the zeroing methodology and the "systematic[]" use of the zeroing methodology); and (d) identified the legal instruments in which that methodology was used (i.e. "18 anti-dumping duty orders").

7.301. Reading the standard developed by the Appellate Body in *US – Continued Zeroing* as tied to the precise aspects of the panel request in that dispute, the Panel does not consider that Ukraine's identification of the *de facto* measure in its panel request satisfies Article 6.2 of the DSU. As the Panel will explain further below, the panel request in this dispute does not identify with sufficient precision: (a) *the destinations of the goods* that are subject to the *de facto* measure, (b) the nature of the *de facto* measure as an *unwritten* measure, (c) the nature of the *de facto* measure as a *single* measure, (d) the "*as such*" character of its challenge concerning the *de facto* measure, and (e) the *legal instruments* underpinning the *de facto* measure. These aspects of Ukraine's panel request, taken together, lead to the conclusion that Ukraine has not identified the *de facto* measure with requisite sufficient particularity.

7.302. In the present dispute, the *de facto* measure is described as involving the application of the restrictions in Decree No. 1 and Resolution No. 1, to traffic in transit from Ukraine, for third-country destinations in Central and Eastern Asia and Caucasus, other than Kazakhstan and the Kyrgyz Republic. Ukraine considers that the regions of Central Asia, Eastern Asia and the Caucasus cover the following countries: Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[431] In support, Ukraine submits: (a) a UN map of Central Asia that identifies the countries of Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan

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as "Central Asia"[432]; (b) a map of "the Caucasus and Central Asia" produced by the U.S. Central Intelligence Agency that identifies, in addition to the Central Asian countries identified in the UN map, the countries of Georgia, Armenia and Azerbaijan[433]; and (c) excerpts from a publication of the Population Division of the UN Department of Economic and Social Affairs that classifies countries by region, income group and sub region. In that publication, the region of "Eastern Asia" is classified to cover China; "China, Hong Kong [special administrative region]"; "China, Macao [special administrative region]"; "China, Taiwan Province of China"; "the Democratic People's Republic of Korea"; "Japan"; "Mongolia" and the "Republic of Korea".[434] That publication also identifies Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan as being part of "Central Asia", which is classified, along with countries in "Southern Asia", as part of "South-Central Asia".[435] However, there is no reference in this publication to the region referred to as "the Caucasus". Rather, the countries of Armenia, Azerbaijan and Georgia are presented as part of "Western Asia", along with Turkey, Cyprus, Iraq and the various Gulf States and countries of the Middle East.

7.303. On the basis of the maps submitted by Ukraine, it appears that the countries included within the regions of "Central Asia, Eastern Asia and the Caucasus" cover those that share land borders with Russia to the Southeast (Georgia and Azerbaijan), and to the East (China, Mongolia and North Korea), as well as those that share land borders with Kazakhstan. Indeed, aside from Ukraine and Belarus, the only countries with which Russia shares land borders that would be specifically excluded from the geographical scope of the *de facto* measure, as identified in Ukraine's panel request, are the European Union (Estonia, Finland, Latvia, Lithuania and Poland) and Norway.

7.304. Transit measures by their nature apply to goods that fall within the definition of "traffic in transit" under Article V:1 of the GATT 1994.[436] Owing to the requirement that the passage of such traffic in transit across the territory of a Member begin and end in a territory other than the territory of that Member, the destination of the goods in question is ordinarily an important component of a transit measure.[437] Moreover, when a Member alleges that a transit measure is *in fact* being applied to traffic in transit destined for countries other than those set forth in the measure itself, and that this application constitutes a separate, unwritten transit measure, it is even more important that the destinations in question be precisely identified.[438]

7.305. Given the nature of the measure as a transit measure, which is unwritten and consists of the *de facto* application of a written measure that applies to transit destined for two countries, to what appears to be potentially as many as 15 countries in regions as large and diverse as "Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic", the Panel has serious doubts as to whether Russia would have been able to understand the nature of the measure and the gist of what was at issue.[439]

7.306. Ukraine argues that the reference in its panel request to the countries in Central and Eastern Asia and Caucasus other than those of the Republic of Kazakhstan and the Kyrgyz Republic is not an "open-ended list", but a clear reference to Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[440] Ukraine states that Mongolia, Tajikistan, Turkmenistan and Uzbekistan are part of the "countries in Central and Eastern Asia and Caucasus", and that the reference to these countries in its first written submission thus confirms the wording used in its panel request.[441] The Panel agrees with Ukraine that it was free, in its first written submission, to elect to show the *existence* of the *de facto* measure with respect to transit destined for only a *subset* of countries that it had previously clearly identified in its panel request. However, the present issue involves the question of whether the superset of destination countries that comprises the *de facto* measure was sufficiently clearly identified in the panel request in the first place. The reference to "countries in Central and Eastern Asia and Caucasus" in Ukraine's panel request operates more like a placeholder for countries that Ukraine would later specify in its first written submission. This vagueness in the description of the destination countries in the panel request renders the identification of the *de facto* measure insufficiently precise to meet the requirements of Article 6.2 of the DSU.

7.307. Additionally, the Panel notes that Ukraine's panel request does not explicitly state whether the *de facto* measure identified in the second sub-category of the second group of measures in section III.A. of its panel request is: (a) an unwritten measure, (b) a single measure (as opposed to multiple measures), or (c) being challenged on an "as such" basis. Those aspects of the measure and the way it is being challenged are not clarified until Ukraine's first written submission. Ukraine's panel request identifies the *de facto* measure by noting that Russia "imposes restrictions" on traffic in transit "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory

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of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The use of the terms "restrictions" and "de facto applying" could reasonably be interpreted to mean that Ukraine challenges individual instances of the *de facto* application of Decree No. 1 and Resolution No. 1. It is not until Ukraine's first written submission that it becomes apparent that Ukraine challenges a single, unwritten measure (consisting of the *de facto* application of Decree No. 1 as amended, beyond the scope of its explicit terms) on an "as such" basis.

7.308. The omission of the "as such" character of Ukraine's challenge concerning the *de facto* measure is particularly important considering the Appellate Body's statements in *US – Oil Country Tubular Goods Sunset Reviews*. In that dispute, the Appellate Body urged complainants to be "*especially diligent*" in setting out "as such" claims in their panel requests "as clearly as possible".[442] The Appellate Body added that it would expect that "as such" claims "state unambiguously" the specific measures of municipal law challenged by the complainant and the legal basis for the allegation that those measures are WTO-inconsistent. Through "such straightforward presentations of 'as such' claims", panel requests should leave respondents "in little doubt" that another Member intends to challenge those measures "as such".[443]

7.309. Although the Appellate Body upheld the panel's finding in that dispute that the measure at issue was identified with sufficient precision pursuant to Article 6.2 of the DSU, the Appellate Body did so on the specific basis that: (a) the panel request explicitly stated that it was challenging the "irrefutable presumption" found in "US law *as such*"[444]; (b) the wording and logic of the panel request demonstrated that the complainant would establish the WTO-inconsistency of the specific US legal provisions embodying the "irrefutable presumption"[445]; and (c) the relevant measure was listed under a shared heading with other "as such" claims, so such a heading could not have been limited to "as applied" claims.[446]

7.310. In the present dispute, the panel request does not specify the "as such" challenge concerning the *de facto* measure in such a manner. First, as stated above, the panel request does not specify the "as such" nature of Ukraine's challenge concerning the *de facto* measure. Second, the wording of the relevant section of Ukraine's panel request, as reproduced in paragraph 7.295 above, does not suggest whether Ukraine aims to establish the WTO-inconsistency of the *de facto* measure as a measure of general and prospective application or as individual instances of application. Third, the heading for section III.A. of the panel request, entitled "The Measures at Issue", and the descriptions of the measures above and below the *de facto* measure, do not indicate whether Ukraine intended to challenge any other measures on an "as such" basis.

7.311. Finally, the Panel observes that the *de facto* measure is identified in Ukraine's panel request as comprising the *de facto* application of one set of legal instruments (Decree No. 1 and Resolution No. 1), while it is described in Ukraine's first written submission as comprising the *de facto* application of a different set of legal instruments (Decree No. 1, *as amended*). Decree No. 1 "as amended" can be understood to mean Decree No. 1 *as amended by Decree No. 319*. Decree No. 319 introduced amendments to Decree No. 1, effective as of 1 July 2016, to (a) extend the requirement that all international cargo transit by road and rail from Ukraine destined for Kazakhstan enter Russia via Belarus and be subject to additional conditions related to identification seals and registration cards, to international cargo transit by road and rail destined for the Kyrgyz Republic; and (b) impose a ban on road and rail transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, as well as goods falling within the scope of the import bans imposed by Resolution No. 778.

7.312. Ukraine did not refer to Decree No. 319 in the section of its panel request that identifies the *de facto* measure. The Panel considers that the failure to refer specifically to Decree No. 319 in the identification of the *de facto* measure in the second group of measures in section III.A. of Ukraine's panel request could reasonably have led Russia to conclude that Ukraine was only challenging the *de facto* application of restrictions on transit effected by Decree No. 1 and Resolution No. 1. This is reinforced by the fact that Ukraine's panel request *did* explicitly refer to Decree No. 319 in the first group of measures in section II.A. In the circumstances, Russia could reasonably have inferred that the absence of a reference to Decree No. 319 in the identification of the second group of measures in section III.A. of the panel request was deliberate.[447]

7.313. This is further supported by the fact that the identification of the *de facto* measure in the second sub-category of the second group of measures in section III.A. of the panel request uses the term "restrictions"

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rather than "bans". The reference to Decree No. 319 in section II.A. of the panel request, by contrast, describes this instrument as involving a "ban". The use of the word "restrictions" rather than "bans" to describe the *de facto* measure could also reasonably have led Russia to conclude that the *de facto* measure was concerned with the *de facto* application of the *restrictions* on transit (i.e. the restrictive conditions requiring that transit from Ukraine occur exclusively through Belarus and the "additional restrictive conditions" such as the application of identification seals and the use of registration cards, all of which are referred to in Decree No. 1), rather than the ban on transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling within the scope of the import ban imposed by Resolution No. 778.

7.314. The Panel recognizes that Ukraine's apparent expansion of the scope of the *de facto* measure in its first written submission, to include the *de facto* application of Decree No. 319 in addition to Decree No. 1, does not strictly affect the question of whether the measure was described with the requisite clarity in Ukraine's panel request. As previously noted, compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. The Panel makes the observations above only to indicate that, even if it had concluded that Ukraine's panel request identified the *de facto* measure with sufficient specificity to meet the requirements of Article 6.2 of the DSU, the Panel considers that the *de facto* measure Ukraine describes in its first written submission is different from the measure it identifies in its panel request.

7.315. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

7.7.2.2.3 Third sub-category of measures

7.316. The third sub-category of the second group of measures (item c. in paragraph 7.285 above) covers any related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.[448] The legal instruments listed in Ukraine's panel request and of which Ukraine clearly was aware (for example, Decree No. 319, which amended Decree No. 1), would not fall within this sub-category.

7.317. The Panel concludes that Ukraine's panel request clearly identifies the third sub-category of the second group of measures.

7.7.2.2.4 Identification of the legal basis of the complaint

7.318. Russia also contends that the legal basis for the complaint in respect of the measures comprising the second group of measures is provided only in respect of the group, rather than for each of the measures within the group.[449] The opening words of section III.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section III.A. are inconsistent with the following WTO provisions". As with the similar objection made by Russia in respect of the first group of measures, Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the second group of measures identified in section III.A. of Ukraine's panel request.[450]

7.319. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B. of Ukraine's panel request.

7.7.2.3 Conclusions on whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.320. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

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7.321. The Panel finds that the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

7.322. The Panel finds that Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

7.323. The Panel finds that Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU, because, in Russia's view, the panel request does not make clear how the measures that comprise each of the two distinct "groups of measures" set forth in the panel request operate together, or adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two groups of measures.

7.7.3 Whether the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are within the Panel's terms of reference

7.324. In this Section, the Panel addresses Russia's additional argument that the category of measures described in Ukraine's first written submission as the "2014 transit bans and other transit restrictions", and by the Panel as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods" (2014 Belarus-Russia Border Bans)[451], are outside the Panel's terms of reference because these measures were no longer in existence at the time of Ukraine's panel request.

7.325. The 2014 Belarus-Russia Border Bans are the alleged bans identified in the first sub-category of the second group of measures in section III.A. of Ukraine's panel request[452], namely, the 2014 prohibitions on transit from Ukraine across Russia, of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, through checkpoints of the Republic of Belarus, along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[453]

7.326. To recall, in August 2014, the Russian Government passed Resolution No. 778, which temporarily bans the importation into Russia of various agricultural products, raw materials and foodstuffs set forth in a list annexed to the Resolution that originate from certain countries, including the United States, EU Member States, Canada, Australia and Norway, that had imposed sanctions against Russia.[454] The list of products to which the import ban applies has also been modified several times.[455]

7.327. The 2014 Belarus-Russia Border Bans provide that veterinary and plant goods subject to the import bans under Resolution No. 778 may only transit through designated checkpoints located on the Russian side of the external border of the EaEU.[456] The 2014 Belarus-Russia Border Bans are implemented by instructions contained in two letters issued by the *Rosselkhoznadzor*: Instruction No. FS-NV-7/22886, dated 21 November 2014, (the Veterinary Instruction), which applies to veterinary goods covered by Resolution No. 778 as of 30 November 2014[457]; and Instruction No. FS-AS-3/22903, dated 21 November 2014, (the Plant Instruction), which applies to plant goods covered by Resolution No. 778 as of 24 November 2014.[458]

7.328. Russia, in its first written submission, requested a preliminary ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference.[459] Russia considers that these alleged bans did not exist at the date of Ukraine's request for consultations (21 September 2016), or at the date of its request for establishment of a panel (10 February 2017).[460] Russia argues that the Veterinary Instruction and the Plant Instruction were "superseded" by Decree No. 1, dated 1 January 2016, and by Resolution No. 1, also dated 1 January 2016.[461] According to Russia, Decree No. 1 therefore "effectively abolished any requirements that were set out in the Letters of *Rosselkhoznadzor* in question in respect of Ukraine".[462] In its opening statement at the first substantive meeting of the Panel, Russia clarified its argument as follows:

a. When the Veterinary Instruction and Plant Instruction were adopted, Ukraine was not included in the list of countries whose goods were subject to Resolution No. 778. Therefore, the 2014 measures "could not [apply] and were not applied to the goods from Ukraine".[463]

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b. Resolution No. 778 was amended on 1 January 2016 to add Ukraine to the list of countries whose goods were subject to Resolution No. 778. However, also on 1 January 2016, Decree No. 1 and Resolution No. 1 were adopted to permit the transit of goods from Ukraine across Russian territory only through "the checkpoint situated on the state border of the Russian Federation inside its Russia-Belarus sector".[464]

c. Decree No. 1 and Resolution No. 1, as measures adopted by the Government of the Russian Federation, are superior in the Russian legal hierarchy to the instructions issued by the *Rosselkhoznadzor*, which is a Federal Service reporting to the Government of the Russian Federation.[465]

7.329. Accordingly, Russia argues that there has "not been a single day when the measures contained in the Letters of *Rosselkhoznadzor* were applied to the transit of goods from Ukraine".[466]

7.330. Ukraine, in its first written submission, acknowledges that the Veterinary Instruction was formally amended by Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor* on 10 October 2016, to provide that "traffic in transit of goods that are subject to control by the state veterinary surveillance, from the territory of Ukraine into the territor[ies] of the Republic of Kazakhstan and the Kyrgyz Republic must be carried out according to [Resolution No. 1]".[467] While conceding that veterinary goods covered by Resolution No. 778 "moving specifically from" the territory of Ukraine to the territories of Kazakhstan and the Kyrgyz Republic are accordingly no longer subject to the Veterinary Instruction, Ukraine argues that the Veterinary Instruction continues to apply to traffic in transit *not* covered by Resolution No. 1.[468] Ukraine further argues that if neither instruction ever applied with respect to Ukraine, there would have been no need to adopt Instruction No. FS-EN-7/19132, providing that the traffic in transit of veterinary goods from the territory of Ukraine into the territories of Kazakhstan and the Kyrgyz Republic must be carried out in accordance with Resolution No. 1.[469] Consequently, according to Ukraine, (a) veterinary goods covered by Resolution No. 778 transiting from countries *other than* Ukraine, and (b) veterinary goods covered by Resolution No. 778 transiting from Ukraine but to destinations *other than Kazakhstan and the Kyrgyz Republic*, remain subject to the Veterinary Instruction.[470]

7.7.3.1 Whether the existence of the 2014 Belarus-Russia Border Bans goes to the Panel's terms of reference

7.331. Russia argues that the 2014 Belarus-Russia Border Bans do not have any legal effect with respect to transit from Ukraine, and therefore that the measures do not exist, and are accordingly outside the Panel's terms of reference. Russia's request for a ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference relies on what it considers to be a "general rule" in WTO jurisprudence, according to which "the measure covered by a panel's terms of reference must be a measure in existence at the time of the establishment of the panel."[471] It refers to the Appellate Body Report in *EC –Chicken Cuts* in support of this proposition.[472]

7.332. The *EC – Chicken Cuts* dispute involved two original measures that had been explicitly identified in the complaining parties' panel requests. The issue for the panel and Appellate Body was whether two subsequent measures, which had come into existence after the date of the panel requests and therefore had not been explicitly identified in the panel requests, were nevertheless within the panel's terms of reference. In this specific context, the Appellate Body stated that the term "specific measures at issue" in Article 6.2 of the DSU suggests that:

> [A]s a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However, measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference.[473]

7.333. In other words, in *EC – Chicken Cuts*, the terms of reference issue arose because the two subsequent measures had not been explicitly identified in the complainants' panel requests (owing to the fact that they did not then exist). The question was whether they were nevertheless sufficiently identified in the panel requests for purposes of Article 6.2 of the DSU on account of their relationship to two original measures that had been explicitly identified in the panel requests.

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7.334. The situation before this Panel is therefore different from the situation in *EC – Chicken Cuts*. The 2014 Belarus-Russia Border Bans *are* identified in Ukraine's panel request.[474] The issue is whether these measures *in fact existed* at the relevant time.

7.335. It is clearly established that the issue of the existence of a measure goes to the merits of a case. It is not a jurisdictional issue. In *EC and certain member States – Large Civil Aircraft*, the European Communities sought a preliminary ruling that alleged launch aid / member State financing (LA/MSF) subsidies to support the development of the Airbus A350 aircraft (A350) were outside the panel's terms of reference because the subsidies did not exist at the time of the United States' panel request for the establishment of a panel. The panel noted that the dispute between the parties concerned the factual question of whether there were any LA/MSF measures in existence with respect to the A350 at the time of the panel request. The panel stated that, where the existence or non-existence of a challenged measure is a disputed question of fact, it is not an appropriate matter for determination in a preliminary ruling. The panel therefore addressed this issue in its evaluation of the United States' substantive claims.[475]

7.336. In *US – Continued Zeroing*, the Appellate Body rejected the panel's view that, in order to successfully raise claims against a measure, the complaining Member must first demonstrate the existence and the precise content of the measure, according to the requirements of Article 6.2 of the DSU.[476] The Appellate Body explained that the identification of the specific measures at issue, pursuant to Article 6.2 of the DSU, is different from a demonstration of the existence of such measures. Only in respect of the latter would the complaining party be expected to present relevant arguments and evidence during the panel proceedings to show the existence of the measures.[477]

7.337. The Appellate Body's approach in *US – Continued Zeroing* was followed by the panel in *US – Orange Juice (Brazil*), which rejected the United States' request for a ruling that Brazil's alleged "continued zeroing" measure was outside the panel's terms of reference because the measure as described in the panel request did not satisfy the requirements of Article 6.2. The panel considered that it was reasonably clear from the description of the measure in its panel request that the complainant challenged the United States' "continued use" of "zeroing procedures" as "ongoing conduct". The panel noted that, in order for it to rule on the United States' request for a preliminary ruling, there was no need for it to go further, and pronounce on whether such "ongoing conduct" was susceptible to challenge in WTO dispute settlement, or decide whether the alleged "ongoing conduct" measure actually existed.[478]

7.338. In *Russia – Tariff Treatment*, Russia sought a preliminary ruling that one of the measures, concerning a particular tariff line, did not exist at the time of the establishment of the panel. The panel quoted the Appellate Body's statement in *US – Continued Zeroing*, adding that a complaining party is not required to establish the existence of a specific measure at issue in its panel request. Rather, such demonstration is to be made in the complaining party's written submissions and at a panel's meetings with the parties.[479]

7.339. In conclusion, the existence of the 2014 Belarus-Russia Border Bans is an issue that goes to the merits of the case, rather than to the delimitation of the scope of the terms of reference.

7.7.3.2 Whether Ukraine has established the existence of the 2014 Belarus-Russia Border Bans in its panel request

7.340. The Panel next considers whether Ukraine has established that the 2014 Belarus-Russia Border Bans in fact existed at the time of its panel request. The answer to this question depends on whether Ukraine has established that the 2014 Belarus-Russia Border Bans continue to have legal effect with respect to transit from Ukraine, notwithstanding the promulgation of Decree No. 1 and Resolution No. 1 on 1 January 2016. In this respect, Ukraine argues that there is no evidence before the Panel expressly or implicitly of the repeal of the 2014 Belarus-Russia Border Bans, and that, to demonstrate the existence of these measures at the time of the establishment of the Panel, Ukraine is not required to provide evidence of actual application of these transit measures.[480]

7.341. As noted previously, the 2014 Belarus-Russia Border Bans are implemented by two *Rosselkhoznadzor* instruction letters of November 2014.[481] The Veterinary Instruction prohibits, as of 30 November 2014, the transit of veterinary goods covered by Resolution No. 778 and destined for Kazakhstan or third countries across Russian territory through checkpoints in the territory of Belarus. Rather, transit of such goods must take place

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

through specific checkpoints located on the Russian side of the external border of the EaEU.[482] The Plant Instruction does not, on its face, prohibit the transit of plant goods covered by Resolution No. 778 across Russian territory from checkpoints in the territory of Belarus, but instead requires that, as of 24 November 2014, transit of such goods destined for third countries, including Kazakhstan, occur exclusively through "the checkpoints across the state border of the Russian Federation".[483]

7.342. The parties agree that *goods of Ukrainian origin* were not originally subject to Resolution No. 778 and thus, that neither the Veterinary Instruction nor the Plant Instruction originally applied to transit of goods of *Ukrainian origin*. However, the Veterinary Instruction and Plant Instruction by their terms nevertheless applied to the *transit from Ukraine of goods covered by Resolution No. 778* (i.e. specified veterinary and plant goods originating from countries listed in Resolution No. 778).

7.343. The Russian Government subsequently amended Resolution No. 778 so that it also applied to the specified veterinary and plant *goods of Ukrainian origin*, as of 1 January 2016.[484] At the same time, the Russian President promulgated Decree No. 1, which is entitled "On the measures ensuring economic security and national interests of the Russian Federation in the cases of international transit cargo transportation from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation". Decree No. 1 requires that, as of 1 January 2016, *transit from Ukraine* destined for Kazakhstan could only enter Russian territory from the territory of Belarus, and subject to additional conditions related to identification seals and registration cards as well as control points to be established by the Russian Government.[485]

7.344. The parties agree that, to the extent that there is any inconsistency between the Veterinary and Plant Instructions, on the one hand, and Decree No. 1, on the other, the latter would prevail, owing to the fact that it is superior in the Russian legal hierarchy.[486]

7.345. The Veterinary and Plant Instructions concern the transit of goods subject to Resolution No. 778 that are destined for Kazakhstan and other third countries. The requirements in those instructions (i.e. that such goods may not enter Russia through Belarus and can only enter through certain designated checkpoints situated on the Russian state border) would be superseded, as regards *transit from Ukraine* of such goods, by the requirement in Decree No. 1 that *all transit from Ukraine* (which would include goods covered by Resolution No. 778 transiting across Russia from Ukraine) that is destined for Kazakhstan (and from 1 July 2016, the Kyrgyz Republic), be carried out exclusively from the territory of Belarus, and comply with the additional conditions related to identification seals and registration cards, at specific control points, as set out in Decree No. 1.

7.346. Therefore, it is clear that, as of 1 January 2016, the 2014 Belarus-Russia Border Bans did not apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic. The question is whether the 2014 Belarus-Russia Border Bans continued to apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries other than Kazakhstan or the Kyrgyz Republic. The Panel considers that the answer to that question depends on the scope of application of the amendment to Decree No. 1 effected by Decree No. 319, namely, the temporary prohibition on the transit of goods covered by Resolution No. 778.

7.347. Decree No. 319 not only expanded the restrictions applying to transit from Ukraine destined for Kazakhstan to apply to transit from Ukraine destined for the Kyrgyz Republic. It also introduced what is referred to as a "temporary" prohibition on the transit of goods covered by Resolution No. 778.[487] The terms of this amendment to Decree No. 1, introduced by Decree No. 319, are as follows:

> To introduce a temporary prohibition for motor road and railroad transportation of goods covered in the Russian Federation by the rates of import customs duties specified in the Common Customs Tariff of the [EaEU] different from zero and the goods included into the list of agricultural produce, raw materials and foodstuffs endorsed by the Government of the Russian Federation in pursuance of Decree of the President of the Russian Federation No. 560 of August 6, 2014 on the Application of Individual Specific Economic Measures for the Purposes of Security of the Russian Federation.[488]

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7.348. The prohibition introduced by Decree No. 319 is not, by its express terms, confined to transit *from Ukraine* of goods covered by Resolution No. 778, or to the transit of goods covered by Resolution No. 778 that are destined for any particular countries. If the prohibition applied to the transit of goods covered by Resolution No. 778 regardless of the country from which the goods entered Russia, or the country of destination, the 2014 Belarus-Russia Border Bans would, since 1 July 2016, have been entirely superseded by Decree No. 1, as amended by Decree No. 319.

7.349. However, the title to Decree No. 1 (as amended by Decree No. 319) expressly states that it applies to transit *from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic*. Therefore, the Panel considers that the scope of the prohibition on the transit of goods covered by Resolution No. 778, effected by Decree No. 319 above, is limited to transit *from Ukraine* of such goods where the destination of the goods is either Kazakhstan or the Kyrgyz Republic, and not other destinations.

7.350. This being so, it appears that Decree No. 1, as amended by Decree No. 319, does not entirely supersede the legal operation of the 2014 Belarus-Russia Border Bans with respect to the transit from Ukraine of goods covered by Resolution No. 778. The 2014 Belarus-Russia Border Bans would continue to apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic.

7.351. The Panel's conclusion that the 2014 Belarus-Russia Border Bans have some residual legal effect as regards transit from Ukraine of goods covered by Resolution No. 778, notwithstanding the promulgation of Decree No. 1 and Decree No. 319, is complicated somewhat by Ukraine's allegation that the Russian authorities are *de facto* applying the measures implemented by Decree No. 1, as amended, to traffic in transit from Ukraine which is destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Clearly, if this were the case, the scope of operation of the 2014 Belarus-Russia Border Bans would, in fact, be even more limited owing to the corresponding expansion in the scope of operation of Decree No. 1, as a factual matter.

7.352. However, the Panel has ruled that the *de facto* measure is outside its terms of reference.[489] Therefore, the Panel does not reach any conclusion as to whether Ukraine has established, as an evidentiary matter, that Decree No. 1 is in fact being applied to transit from Ukraine of goods destined for these other countries.

7.353. The Panel therefore concludes that, while Decree No. 1 (as amended by Decree No. 319) supersedes the 2014 Belarus-Russia Border Bans as they apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic, Decree No. 1, as amended, does not by its terms affect the legal operation of the 2014 Belarus-Russia Border Bans as they apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic. Accordingly, the Panel finds that Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319), in that they had legal effect with respect to transit from Ukraine of goods covered by Resolution No. 778 destined for countries other than Kazakhstan or the Kyrgyz Republic.

7.354. For the sake of clarification, the Panel would add that it is aware that the 2014 Belarus-Russia Border Bans also apply to transit, from countries other than Ukraine, of goods covered by Resolution No. 778. However, Ukraine's panel request confines its challenge to the transit restrictions in the 2014 Belarus-Russia Border Bans to those that apply to "traffic in transit from the territory of Ukraine through the territory of the Russian Federation". This limitation is clear from the underscored paragraph that summarizes the effect of the instruments that implement the first sub-category of the second group of measures in section III.A.:

> As a result of the restrictions imposed by these Instructions combined with the restrictions imposed by Decree No. 1, the goods falling within the scope of these Instructions are prohibited for transit *from the territory of Ukraine* through the territory of the Russian Federation to the territory of the Republic of Kazakhstan and the Kyrgyz Republic.[490]

7.355. Owing to this limitation in Ukraine's panel request, the only aspects of the 2014 Belarus-Russia Border Bans that are within the Panel's terms of reference are those that apply to transit *from Ukraine*.

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7.7.4 Summary of the Panel's findings on the measures that are within its terms of reference

7.356. In this Section of the Report, the Panel finds that the *de facto* measure, i.e. the measure referred to in the second sub-category of the second group of measures in section III.A. of Ukraine's panel request as "de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic", is outside its terms of reference.

7.357. The Panel finds that the following measures are within its terms of reference:

a. The 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

b. The 2016 Transit Bans on Non-Zero Duty Goods and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to the Panel's jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

   i. it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

b. With respect to the measures and claims within the Panel's terms of reference, the Panel finds that:

   i. the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

   ii. the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

   iii. Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section

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II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

iv. Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU.

c. With respect to the existence of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as of the date of Ukraine's panel request, the Panel finds that:

i. Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319).

d. With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

i. as of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI (b) of the GATT 1994;

ii. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;

iii. Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994; and

iv. accordingly, Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered by Article XXI(b)(iii) of the GATT 1994.

8.2. The Panel also concludes as follows:

a. With respect to Ukraine's claims under the first sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

i. the 2016 Belarus Transit Requirements were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine;

ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

b. With respect to Ukraine's claims under the second sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

i. the 2016 Belarus Transit Requirements were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

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ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of entry (certain countries where entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

c. With respect to Ukraine's remaining claims under the GATT 1994, the Panel does not consider it necessary to address Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994.

d. With respect to Ukraine's claims under Russia's Working Party Report, as incorporated into its Accession Protocol by reference, the Panel considers that:

i. Russia could justify any inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994; and

ii. With respect to Ukraine's claims under paragraph 1161 of Russia's Working Party Report, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both; and

iii. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

8.3. Having found that Russia has not acted inconsistently with its obligations under the GATT 1994 or with commitments in Russia's Accession Protocol, the Panel makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.

ENDNOTES

1 WT/DS512/1 and WT/DS512/1/Corr.1.

2 WT/DS512/3.

3 Ibid.

4 See WT/DSB/M/394.

5 WT/DS512/4.

6 Ibid.

7 The Panel's Working Procedures were revised on 11 January 2018. See the Panel's Working Procedures, adopted on 12 July 2017, as revised on 11 January 2018, in Annex A-1.

8 The timetable for the Panel proceedings was revised on 31 January 2018 and on 17 January 2019.

9 See the Panel's additional Working Procedures concerning BCI in Annex A-2.

10 Russia's first written submission, para. 31.

11 Communication of the Panel to the parties, dated 13 March 2018.

12 Russia's letter to the Chair of the Panel, dated 14 March 2018.

13 WT/MIN(11)/24 and WT/L/839, dated 17 December 2011.

14 WT/ACC/RUS/70 and WT/MIN(11)/2, dated 17 November 2011.

15 Resolution No. 778 of the Government of the Russian Federation bans the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution, which originate from the United States, EU Member States, Canada, Australia and Norway, which had imposed economic sanctions on Russia. (Resolution of the Government of the Russian Federation No. 778, "On measures for

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implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014, (Resolution No. 778), (Exhibits UKR-10, RUS-7).)

16 On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015, (Resolution No. 842), (Exhibit UKR-13).) On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amends Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provides that the import bans shall be applied as of 10 days from the date on which the Russian Government is notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement (referred to in Resolution of the Russian Federation No. 959 "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014, (Resolution No. 959), (Exhibit RUS-24)), but by no later than 1 January 2016. Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016. (See Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015, (Resolution No. 1397), (Exhibit UKR-15).) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import bans until 31 December 2018. (See Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017, (Resolution No. 790), (Exhibit UKR-70).) For other amendments to Resolution No. 778, see fn 385 below.

17 For an explanation of the measures as identified by Ukraine in its panel request and as subsequently identified in its first written submission, see paras. 7.264–7.275 below.

18 Russia's first written submission, paras. 16, 19, 33 and 74; and closing statement at the first meeting of the Panel, para. 6.

19 Russia's opening statement at the first meeting of the Panel, paras. 45–47.

20 Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx.

21 Ukraine's first written submission, para. 19. The CIS-FTA entered into force on 20 September 2012. (Ibid.)

22 Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf, (Exhibit UKR-58).

23 Ukraine's first written submission, para. 21.

24 Ibid. paras. 16, 20 and 24.

25 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677, (EU-Ukraine Association Agreement), (Exhibit UKR-111), p. 170. See also Ukraine's first written submission, para. 24.

26 EU-Ukraine Association Agreement, (Exhibit UKR-111), p. 6.

27 The DCFTA is contained in Title IV of the EU-Ukraine Association Agreement. (EU-Ukraine Association Agreement, (Exhibit UKR-111), pp. 13–137.) This part of the EU-Ukraine Association Agreement provides for the progressive formation of a free trade area covering goods and services. (Ibid. Article 25, p. 13.) In its opening statement at the second meeting of the Panel, Ukraine explains that the "economic part" of the EU-Ukraine Association Agreement contains a "free trade agreement establishing the Deep and Comprehensive Free Trade Area (DCFTA)". (Ukraine's opening statement at the second meeting of the Panel, para. 60.) The Panel refers to the DCFTA unless it specifically means the economic part of the EU-Ukraine Association Agreement.

28 UN General Assembly Resolution No. 68/262 "Territorial Integrity of Ukraine", 27 March 2014, A/RES/68/262, (UN General Assembly Resolution No. 68/262, 27 March 2014), (Exhibit UKR-89), p. 2. This Resolution—introduced by Ukraine, Germany, Poland, Lithuania, Canada and Costa Rica—was supported by 100 UN Member States, with 11 voting against (including Russia), 58 abstentions and 24 absent. (UN General Assembly Official Records, A/68/PV.80, 80th meeting, 27 March 2014, p. 17.)

29 UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89), p. 1.

30 UN General Assembly Resolution No. 71/205 "Situation of Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205, (UN General Assembly Resolution No. 71/205, 19 December 2016), (Exhibit UKR-91). This Resolution received 70 votes in favour, 26 against (including Russia) and 77 abstentions. (UN General Assembly Official Records, A/71/PV.65, 19 December 2016, pp. 40–41.)

31 Ibid. p. 2. The specific reference is to the prohibitions on the occupying Power compelling protected persons to serve in its armed or auxiliary forces. (See Article 130 of the Convention relative to the Treatment of Prisoners of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 135; and Article 147 of the Convention relative to the Protection of Civilian Persons in Time of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 287.)

32 These import bans are imposed by Resolution No. 778, (Exhibits UKR-10, RUS-7). The import bans had been authorized by the President of the Russian Federation the previous day through Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure the security of the Russian Federation", dated 6 August 2014, (Decree No. 560), (Exhibits UKR-9, RUS-3). Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the countries that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293 of 30 June 2017. Decree No.

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560 was in force until 31 December 2018. (Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017, (Decree No. 293), (Exhibit UKR-71).) Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

33 See para. 7.1.d above.

34 RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4, (RBK article), (Exhibit UKR-80); and Press Release, "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press- release_IP-15-6398_en.htm (European Commission Press Release), (Exhibit UKR-53). As stated above in fn 27, the "economic part" of the EU-Ukraine Association Agreement contains a free trade agreement establishing the DCFTA. (See Ukraine's opening statement at the second meeting of the Panel, para. 60.) The EU-Ukraine Association Agreement entered into force on 1 September 2017, following the deposit of the last instrument of ratification or approval. (See Official Journal of the European Union L 193/1, 25 July 2017.) In October 2015, the Russian Prime Minister was reported as stating that Russia's position was that Ukraine could not simultaneously participate in free trade areas with both Russia and the European Union. Russia considered that this situation would pose a threat of re-export of European goods in the guise of Ukrainian goods. (RBK article, (Exhibit UKR-80).)

35 Resolution No. 959, (Exhibit RUS-24), p. 2. A Ukrainian news agency report in December 2015 also referred to statements by the Russian Prime Minister that, if Ukraine chose to belong to a trade zone different from the CIS-FTA, it would lose the zero-tariff benefits of the FTA with Russia and that, as of 1 January 2016, tariffs on imports into Russia of Ukrainian goods would be 6% on average. (UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin-podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html, (UNIAN Information Agency Article), (Exhibit UKR-78).)

36 Resolution No. 842, (Exhibit UKR-13).

37 RBK article, (Exhibit UKR-80); and UNIAN Information Agency Article, (Exhibit UKR-78).

38 Resolution No. 1397, (Exhibit UKR-15).

39 Ukraine's first written submission, para. 25. Ukraine refers to the European Commission Press Release, (Exhibit UKR-53). The political part of the EU-Ukraine Association Agreement, which was signed on 21 March 2014, has been provisionally applied since 1 November 2014. (Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014, (Exhibit UKR-112).)

40 Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015, (Exhibit UKR-47); and Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015, (Exhibit UKR-76). See also UNIAN Information Agency Article, (Exhibit UKR-78).

41 Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA Agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091, (Exhibit UKR-84). See also fn 34 above.

42 WT/DS532/1, dated 19 October 2017. The Panel refers to Ukraine's request for consultations in WT/DS532/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU).

43 See WT/DS532/1, dated 19 October 2017, paras. 1, 13, 16, 23, 34, 48 and 55. The alleged WTO-inconsistencies include Articles I:1, V, X and XI:1 of the GATT 1994, various provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), provisions of Russia's Accession Protocol, and the Agreement on Trade Facilitation. (Ibid. paras. 13, 15, 22, 31, 33, 43, 45, 47, 54, 65 and 67.)

44 WT/DS532/1, dated 19 October 2017, paras. 17 and 49.

45 Resolution No. 959, (Exhibit RUS-24).

46 Resolution No. 1397, (Exhibit UKR-15).

47 See para. 7.1.a above.

48 See para. 7.1.b above.

49 WT/DS525/1, dated 1 June 2017. The alleged WTO-inconsistencies include Articles I:1, III:4, X and XI:1 of the GATT 1994; Articles II, III, XI, XVI and XVII of the General Agreement on Trade in Services (GATS); and various provisions of the Agreement on Import Licensing Procedures (Import Licensing Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the TBT Agreement as well as aspects of Ukraine's WTO Accession Protocol. (Ibid. paras. 2 and 4–8.) The Panel refers to Russia's request for consultations in WT/DS525/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU.)

50 WT/DS525/1, p. 1. Russia refers in its consultations request to Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015, (Exhibit RUS-19), as amended; and Resolution No. 28 of 20 January 2016 "On Amendments to the List of Goods Originating in the Russian Federation and Prohibited for Imports into Ukraine", which has not been submitted as an exhibit in this dispute. (Ibid. p. 1.)

51 Ibid. pp. 2 and 7. Russia's consultations request refers to Law No. 1780-VII of 8 December 2016, "On Amendments to Certain Laws of Ukraine in relation to Restricting Access to Foreign Printed Materials with Anti-Ukrainian Content to the Ukrainian Market" and Law No. 159-VIII of Ukraine, dated 5 February 2015 and Law No. 1046-VIII of Ukraine, dated 29 March 2016 "On Amendments to Article 15-1 of Law of Ukraine "On Cinematography"". (Ibid.)

52 Ibid. pp. 3–4. Russia's consultations request refers to Law No. 1389-VIII of 31 May 2016, "On Amendments to Subsection 5 of Section XX "Transitional Provisions" of the Tax Code of

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Ukraine regarding the Promotion of Development of the Used Vehicles Market". (Ibid. p. 3.)

53 Ibid. pp. 4–7. Russia's consultations request refers to (a) Resolution No. 829-R of the Cabinet of Ministers of Ukraine, dated 11 September 2014, "On Proposals for application of Personal Special and Other Restrictive Measures"; (b) Law No. 1005-VIII of 16 February 2016 "On Enactment of Certain Laws of Ukraine Aimed at the Improvement of the Privatization Process"; (c) Decree No. 756 of the Ministry of Economic Development and Trade of Ukraine, dated 28 April 2016, "On Application of Special Economic Sanctions – Temporary Suspension of Foreign Economic Activity within the Territory of Ukraine – In Respect of Foreign Economic Entities"; (d) Decree No. 63/2017 of the President of Ukraine, dated 16 March 2017, "On Decision of the National Security and Defence Council of Ukraine of 15 March 2017 'On Application of Personal Special Economic and other Restrictive Measures (Sanctions)'"; (e) Resolution No. 12 of the Board of the National Bank of Ukraine, dated 21 February 2017, "On Amendments to Certain Regulations of the National Bank of Ukraine"; (f) Resolution No. 25 of the National Bank of Ukraine, dated 21 March 2017, "On Amendments to Resolution of the National Bank of Ukraine of 1 October 2015 No. 654"; and (g) Resolution No. 399 of the National Bank of Ukraine, dated 1 November 2016, "On Amendments to Resolution [of] the National Bank of Ukraine of 1 October 2015 No. 654". Russia's consultations request also refers to Decree No. 133/2017 of the President of Ukraine, dated 15 May 2017, "On Decision of the National Security and Defence Council of Ukraine of 28 April 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"". (WT/DS525/1, pp. 4–7.) In its second written submission in this dispute, Russia refers to Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017, (Exhibit RUS-20). Russia states that this Decree contains a consolidated list of special economic measures (i.e. sanctions) applied by Ukraine in respect of Russian legal and natural persons. (Russia's second written submission, para. 28.)

54 WT/DS525/1, dated 1 June 2017, p. 7. Russia's consultations request refers to Resolution No. 185-VIII of the Verhovna Rada, "On the Temporary Accreditation Suspension of Journalists and Representatives of Certain Russian Mass Media by Public Authorities", dated 12 February 2015. (Ibid.)

55 Russia's second written submission, para. 27 (referring to Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016, (Exhibit RUS-16).)

56 Ibid. para. 29 (referring to Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018, (Exhibit RUS-22); and Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018, (Exhibit RUS-23)).

57 Ibid. para. 25. Ukraine suspended traffic through railway corridor 8 "Chervona Mohyla" (or "Krasnaya Mogila") by way of a telegram from the Ukrainian railway company *Ukrzaliznytsia*, in which the latter invoked Article 29 of the Railway Code of Ukraine, on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946", dated 6 June 2014, (Exhibit RUS-14).) Ukraine suspended traffic through the Izvaryne checkpoint by the Ministry of Revenue and Duties of Ukraine. (Ibid. (referring to "Print-screen of the website of the State Border Guard Service of Ukraine", retrieved from: https://dpsu.gov.ua/ua/news/na-lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/, (Exhibit RUS-15).) Ukraine suspended traffic through the checkpoint Uspenskaya-Kvashino in accordance with the telegram of *Ukrzaliznytsia*, also on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of 'Ukrzaliznytsia' (Ukrainian Railways) No. CZM-14/1134", dated 8 July 2014, (Exhibit RUS-18).) Finally, the Cabinet of Ministers of Ukraine suspended traffic through 23 checkpoints on the Ukraine-Russia border. (Ibid. (referring to Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015, (Exhibit RUS-17).)

58 See Article XIV*bis* of the GATS and Article 73 of the TRIPS Agreement.

59 The Appellate Body has stated that panels are free to structure the order of their analysis as they see fit, unless there is a "mandatory sequence of analysis which, if not followed, would amount to an error of law" or would "affect the substance of the analysis itself". (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5.)

60 See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

61 Russia's first written submission, para. 16; and opening statement at the second meeting of the Panel, para. 26.

62 Russia's first written submission, para. 16. Russia characterizes the situation that gave rise to the need to impose the transit measures at issue in this dispute as an internationally wrongful act, or an unfriendly act of a foreign state or its bodies and officials, which involved unilateral actions applied in respect of Russia, particularly by the European Union and Ukraine "in violation of the UN Charter and that are impairing the authority of the UN Security Council". (Russia's second written submission, paras. 19 and 21.) Russia also maintains that the original circumstances that led to the imposition of the challenged measures "were publicly available and known to Ukraine". (Russia's opening statement at the first meeting of the Panel, para. 30. See also Russia's second written submission, para. 18.)

63 Russia's first written submission, para. 47; and closing statement at the first meeting of the Panel, para. 16. See also Russia's opening statement at the second meeting of the Panel, paras. 22–23; and response to Panel question No. 1 after the second meeting of the Panel, paras. 1–3.

64 Russia's opening statement at the first meeting of the Panel, para. 45. Moreover, Russia alleges that certain measures and claims are outside the Panel's terms of reference owing to alleged defects in Ukraine's panel request and in Ukraine's demonstration of the existence of certain measures. (See ibid. paras. 6–28.)

65 Russia's opening statement at the first meeting of the Panel, para. 46. See also Russia's first written submission, para. 7.

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66 Russia's opening statement at the first meeting of the Panel, para. 46.

67 Russia's closing statement at the first meeting of the Panel, para. 6. Russia also argues that the Panel, and the WTO more generally, "being trade mechanisms are not in a position to determine whether sovereign states are at war. Similar logic applies to 'other emergency in international relations'. Only sovereign states may declare the status of their relations with other sovereign states." (Ibid. para. 13.)

68 Ibid. para. 12.

69 Russia's opening statement at the second meeting of the Panel, para. 23. See also Russia's second integrated executive summary, para. 31. Russia therefore considers that Article XXI(b) of the GATT 1994, as well as Article XXI(a) are "self-judging". (Russia's closing statement at the first meeting of the Panel, para. 11.)

70 Ibid. para. 20.

71 Ukraine's opening statement at the first meeting of the Panel, para. 95. Ukraine points to the fact that the phrase "[n]othing in this Agreement", which introduces Article XXI, is the same phrase that introduces the general exceptions provision in Article XX. (Ibid.)

72 Ibid. para. 96. Ukraine also notes that the DSU does not contain a provision providing for a security exception, nor does any other provision of the GATT 1994 or of the other WTO covered agreements offer a basis for excluding Article XXI from the jurisdiction of WTO panels and the Appellate Body. (Ibid.)

73 Ibid. paras. 98–99.

74 Ibid. paras. 103–107.

75 Ukraine's opening statement at the first meeting of the Panel, paras. 150 and 158; and opening statement at the second meeting of the Panel, para. 64. See also Ukraine's second written submission, paras. 133–136 and 138.

76 Ukraine's closing statement at the first meeting of the Panel, para. 6; and second written submission, para. 137. Moreover, Ukraine argues that Russia may not rely on Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI (b)(iii) of the GATT 1994. (See Ukraine's closing statement at the first meeting of the Panel, para. 11; and second written submission, paras. 159–163.)

77 Instruction No. FS-NV-7/22886 of the *Rosselkhoznadzor*, dated 21 November 2014, (Veterinary Instruction), (Exhibits UKR-21, RUS-10). See also Ukraine's first written submission, paras. 27, 32–33, and 58; and second written submission, para. 138.

78 Ukraine's opening statement at the first meeting of the Panel, paras. 148–149.

79 Ibid. para. 135.

80 Ibid. paras. 109–110; and Ukraine's response to Panel question No. 1 after the second meeting, para. 5.

81 Ukraine's opening statement at the first meeting of the Panel, paras. 122–123.

82 Ibid. paras. 122 and 125. (fn omitted)

83 Ibid. paras. 137–139.

84 Ibid. para. 141. Ukraine submits that it is "not contested in these proceedings that it is for each WTO Member to define what matters affect its national security and what level of protection it pursues. Each WTO Member's position might be different and may evolve over time. Both matters fall outside the scope of review of a panel." (Ukraine's response to Panel question No. 2 following the second meeting of the Panel, para. 78.)

85 Ukraine considers that not every security interest will be an "essential" security interest. (Ukraine's opening statement at the first meeting of the Panel. paras. 143–145.)

86 Ukraine's response to Panel question No. 2 following the first meeting of the Panel, paras. 76–80. See also Ukraine's response to Panel question No. 1 following the second meeting of the Panel, paras. 8 and 10.

87 Ukraine's response to Panel question No. 2 following the first meeting of the Panel, para. 81. Ukraine submits that the wording of the phrase "which it considers necessary" suggests that the standard of review cannot be the same as the standard of review with respect to the necessity test under Article XX of the GATT 1994. (Ibid.) In its closing statement at the second meeting of the Panel (at para. 5) and in its response to Panel question No. 1 following the second meeting of the Panel (at para. 11), Ukraine uses the term "plausibly" (rather than reasonably) to describe this standard of review.

88 Australia's third-party submission, paras. 8–10.

89 Australia's third-party statement, paras. 2 and 9.

90 Ibid. para. 11.

91 Ibid. paras. 15 and 17. (emphasis original) Australia submits that, if action taken by a Member is not capable of making some contribution to protecting its essential security interests, it would be reasonable for a panel to determine that the action was *not in fact* taken for such a purpose under Article XXI(b). (Ibid. para. 18.)

92 Brazil's third-party statement, para. 8.

93 Ibid. para. 9. Brazil refers to "the negotiation history" of Article XXI of the GATT 1994 and state practice to argue that it was never the intention of the Members that the WTO in general or the WTO dispute settlement mechanism in particular would be the proper venue to "discuss security matters". (Brazil's third-party submission, para. 5.) However, Brazil notes that Members were at the same time mindful that Article XXI could be "improperly used to prevent measures of a strictly commercial nature from being challenged in the dispute settlement mechanism". (Ibid. para. 6.) Brazil concludes that, in order to strike a balance, "there was an option to limit the circumstances in which Article XXI may be invoked, which seems to indicate that it was a common understanding that differences regarding the application of Article XXI would not necessarily fall outside the purview of a Panel, should a Member consider that those circumstances were not in place." (Ibid.)

94 Brazil's third-party statement, para. 16. Brazil argues that a panel should begin its analysis by determining whether one or more of the circumstances in subparagraphs (i) through (iii) are present. If none are present, then the panel need not proceed with the rest of the analysis. (Ibid. para. 17.)

95 Brazil's third-party submission, paras. 28–30.

96 Ibid. para. 8. For this reason, and in light of the absence of a common understanding of the scope of rights and obligations under Article XXI, Brazil cautions the Panel against "any interpretation that could impair a Member's ability to decide on the need to adopt the measures necessary to protect its national security". (Ibid. para. 9.)

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97 Brazil submits that Article XXI(a) of the GATT 1994 should not be interpreted as precluding the need for a Member to motivate its recourse to the exceptions of Article XXI(b). (Brazil's third-party statement, para. 26.)

98 Ibid. paras. 28–29.

99 Canada's third-party statement, para. 4.

100 Canada's letter to the Chairman of the Panel, dated 14 November 2017.

101 Canada's third-party statement, para. 6.

102 Ibid. para. 5.

103 Ibid. para. 6.

104 Ibid. para. 8.

105 China's third-party statement, paras. 3–5.

106 Ibid. para. 6.

107 China's third-party statement, para. 18.

108 China's third-party statement, para. 19.

109 European Union's third-party submission, para. 14; and third-party statement, para. 4. The European Union argues that the "matter" before the Panel in this case includes the defence under Article XXI invoked by Russia, as the Panel does not have special terms of reference. (European Union's third-party statement, para. 4.) The European Union further argues that it would be contrary to the objectives of the DSU reflected in Articles 3.2 and 23 to interpret Article XXI of the GATT 1994 as being non-justiciable because it would mean that the invoking Member would unilaterally decide the outcome of a dispute. (Ibid. para. 5.)

110 Ibid. para. 11.

111 Ibid. para. 14.

112 Ibid. para. 17.

113 Ibid. para. 21. The European Union submits that the term "necessary" in Article XXI(b) should be given the same meaning as in Article XX. (Ibid.)

114 Ibid.

115 Ibid. para. 23. The European Union argues that this is required by the preamble of the Decision Concerning Article XXI of the General Agreement (1982 Decision). (Ibid.)

116 Japan's third-party submission, para. 30.

117 Japan's third-party statement, paras. 7–8.

118 Ibid. para. 10 (referring to Australia's third-party submission, para. 25; and Brazil's third-party submission, para. 9).

119 Japan's third-party statement, para. 10.

120 Ibid. para. 11.

121 Moldova's third-party submission, para. 18.

122 Ibid. para. 21. Moldova points to the creation of the WTO as an international organization with a binding dispute settlement system administered by the DSB and the fact that the only mechanism for "opting-out" of the application of the obligations under the covered agreements is through the mechanism envisaged in Article XIII:1 of the WTO Agreement, which Russia did not invoke when it acceded to the WTO. (Ibid. paras. 23–24.)

123 Moldova's third-party statement, para. 19.

124 Ibid. para. 22.

125 Ibid. para. 20.

126 Ibid. para. 21.

127 Singapore's third-party statement, paras. 8–11.

128 Ibid. paras. 13–14. Singapore argues that WTO provisions which involve some margin of appreciation for a Member, such as the determination of the appropriate level of protection under the SPS Agreement, are not "anywhere close" to being as express and definitive regarding their "self-judging" nature as Article XXI(b). Therefore, a higher level of deference—i.e. a "significant margin of appreciation"—should be accorded to a Member's chosen level of protection, assessment of risk and the necessity of the measure taken for the protection of its essential security interests. (Ibid. paras. 18–19.)

129 Given the textual differences between Articles XX and XXI, Singapore does *not* agree with an interpretation of Article XXI(b) which seeks to apply to that provision the analytical framework or necessity test developed under Article XX. (Singapore's third-party statement, para. 15.)

130 Singapore's third-party statement, para. 13.

131 Ibid. para. 19.

132 Ibid. para. 21. Singapore also argues that responses to threats to essential security interests involve the subjective judgment of a Member and depend on the particular context and circumstances involved. (Ibid. paras. 16–17.)

133 Ibid. para. 23.

134 Ibid. para. 22.

135 Turkey's third-party statement, para. 7.

136 Ibid. para. 8.

137 Letter from the United States to the Chair of the Panel, dated 7 November 2017, para. 4.

138 Ibid. para. 2.

139 In addition, the United States asserts that "[i]ssues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement." (Ibid.)

140 United States' third-party statement, para. 4; and response to Panel question No. 1, para. 17. The United States distinguishes between "jurisdiction"—meaning, in the present context, the "extent of power of the Panel under the DSU to make legal decisions in this dispute"—and "justiciability", in the sense of whether an issue may be subject to findings by the Panel under the DSU. The United States also defines "justiciability" as whether a matter is capable of being adjudicated, or suitable for adjudication. (United States' third-party statement, para. 3; and response to Panel question No. 1, paras. 16–19.)

141 United States' response to Panel question No. 1, paras. 18 and 22.

142 United States' third-party statement, paras. 5, 11–12 and 34–36. (emphasis original) Additionally, in response to a question from the Panel, the United States argues that Members agreed to remove the invocation of the essential security exception from multilateral judgment *when they agreed to the "self-judging" text included in Article XXI*. (United States' response to Panel question No. 1, para. 22; and General US Answer to questions from the Panel and the Russian Federation, paras. 1–15.)

143 United States' response to Panel question No. 1, para. 17. See also United States' third-party statement, paras. 2–3, 5 and 7.

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144 See International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case* (Australia v. France) (1974) ICJ Reports, pp. 259–260; and International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (1963) ICJ Reports, pp. 29–31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function. (See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.)

145 This is known as the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French. The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, *US – 1916 Act*, fn 30 to para. 54; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

146 See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. The Appellate Body has also stated that, as a matter of due process and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

147 See Russia's first written submission, paras. 5–6 and 40–48; opening statement at the first meeting of the Panel, para. 46; and closing statement at the first meeting of the Panel, paras. 8 and 12.

148 See Section 7.5.6 below.

149 Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355; and *China – Rare Earths*, para. 5.90.

150 *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press 2007), Vol. 2, p. 819. The Panel observes that in the GATT 1994, the term "emergency" is used in only two places. First, the term is employed in Article XXI(b)(iii) as part of the phrase "other emergency in international relations". Second, the term appears in the title of Article XIX, which refers to "emergency action on imports of particular products". The word "emergency" is not, however, used in the text of Article XIX itself.

151 *Black's Law Dictionary*, 8th edn, B.A. Garner (ed.) (West Group 2004), p. 836. The same concept is used in Article 2 (4) of the UN Charter, which provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." (Charter of the United Nations, done at San Francisco, 26 June 1945, 1 UN Treaty Series XVI, available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.)

152 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.

153 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 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.)

154 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.

155 It is to be noted that statements of position of individual GATT contracting parties made prior to April 1989 should be understood in the context of the positive consensus rule that then applied to the establishment of dispute settlement panels, the setting of their terms of reference, and the adoption of panel reports. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989, section F(a) (the April 1989 Decision). See also ibid. section F(b) on the establishment of panels and working parties with standard terms of reference.) For the application of the April 1989 Decision to a 1991 request by Yugoslavia for the establishment of a panel to examine certain measures imposed by the European Communities, see paras. 1.63–1.66 of the Appendix to this Report.

156 The Panel notes that Ukraine and Russia both referred to the interpretations of the International Court of Justice (ICJ) of security exceptions in bilateral treaties between Nicaragua and the United States (in *Case of Military and Paramilitary Activities in and Against Nicaragua*), and between the Islamic Republic of Iran and the United States (in *Case Concerning Oil Platforms*) in the course of their arguments. (Ukraine's second written submission, paras. 81–91; and Russia's opening statement at the second meeting of the Panel, paras. 28–40.) The Panel considers that the conclusions of the Court in both cases were limited to the specific provisions of the bilateral treaties under consideration. In *Case of Military and Paramilitary Activities in and Against Nicaragua,* the Court did not purport to interpret Article XXI of the GATT 1947, but merely referred to the provision *a contrario* in order to highlight the absence of the adjectival clause "which it considers" from the security exception at issue (International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 116.) Similarly, in *Case Concerning Oil Platforms,* the Court's conclusions were limited to a security exception lacking the same adjectival clause. (International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 183.) Consequently, the Panel does not consider these cases to be material to its interpretation of Article XXI(b)(iii) of the GATT 1994.

157 The Appellate Body has previously had recourse to the preparatory work of the ITO Charter as a supplementary means of treaty interpretation in order to confirm the meaning of corresponding provisions in the GATT 1994. (See, e.g. Appellate Body Reports, *Japan –Alcoholic Beverages II,* fn 52, DSR

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1996:I, 97, p. 104; *Canada – Periodicals,* p. 34, DSR 1997:I, p. 449; and *US – Line Pipe,* para. 175.)

158 Preparatory work on the ITO Charter began in November 1945 with the issuance by the United States of a document entitled "Proposals for Expansion of World Trade and Employment". (See United States, Department of State, "Proposals for Expansion of World Trade and Employment", Publication 2411, Commercial Policy Series 79, November 1945, p. 1.) In February 1946, the Economic and Social Council of the United Nations adopted a resolution calling for an international conference on trade and employment, and established a Preparatory Committee of 19 countries to prepare a draft charter of the ITO. (See United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946, foreword (US Draft Charter).)

159 See, e.g. Preparatory Committee on the International Conference on Trade and Employment, Procedures for Giving Effect to Certain Provisions of the Proposed ITO Charter by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee, Report of the Sub-Committee on Procedure to Committee II, E/PC/T/C.II/58, pp. 12–14.

160 Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", section B, p. 48 and section K, p. 51. According to the Report, the General Agreement on Tariffs and Trade "should conform in every way to the principles laid down in the Charter and should not contain any provision which would prevent the operation of any provision of the Charter". (Ibid.)

161 Article 32 of the US Draft Charter. (US Draft Charter, Chapter IV "General Commercial Policy", section I "General Exceptions", "General Exceptions to Chapter IV", Article 32, p. 24.)

162 Ibid. The US Draft Charter also included a clause in Chapter VI "Intergovernmental Commodity Arrangements" providing that any "justiciable issue" arising specifically from any ruling of the Conference interpreting Article 32, paragraphs (c), (d), (e) or (k), dealing with security, could be referred as a dispute to the ICJ. (Ibid. Article 76, pp. 45–46.)

163 The first draft of the ITO Charter resulting from the London round of negotiations in November 1946, the London Draft, merely included a placeholder for a general exceptions clause to Chapter V on General Commercial Policy, Article 37, which was "[t]o be considered and drafted at a later stage". (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Appendix "Charter of the International Trade Organization of the United Nations", p. 33.) The London Draft did, however, contain a general security exception clause in Chapter VII on Inter-Governmental Commodity Arrangements, as well as a clause providing for referral to the ICJ on the security paragraphs of Article 37 specifically. (Ibid. Article 59, p. 37 and Article 86, p. 41.) The partial draft of the general tariff agreement concluded at this stage also included a placeholder envisaging the possibility of a general exceptions clause modelled after Article 37 of the ITO Charter. (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", Article IV, p. 52.)

164 Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34, pp. 31–32. The New York Draft also retained a slightly modified version of the security exception to the chapter on Inter-Governmental Commodity Arrangements, as well as the clause providing for referral to the ICJ on a provisional basis. (Ibid. Article 59, pp. 43–44 and Article 86, pp. 51–52.) The draft of the general tariff agreement concluded at this stage contained substantially the same general exceptions clause in relation to the chapter on General Commercial Policy. (Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft General Agreement on Tariffs and Trade, E/PC/T/C.6/85, Article XX, pp. 31–32.) The draft of the general tariff agreement did not, however, contain a clause providing for referral of security issues to the ICJ. (Ibid. Article XXIV, p. 34.)

165 United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5; and United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/153, Article XIX, p. 9.

166 United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5. The draft of the general tariff agreement concluded as of 24 July 1947 reflected these developments, including a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX of the GATT 1947) and the other containing those justifications later reflected in Article XXI of the GATT 1947 and preceded by the new introductory language proposed by the United States. (Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135, Article XIX, pp. 53–54.)

167 United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5.

168 See K. Vandevelde, *The First Bilateral Investment Treaties: U. S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 145–154. Vandevelde's study of the history of US postwar FCN Treaties includes a chapter on the ITO Charter. As stated in the introduction to his book, Vandevelde's research relied on materials on the negotiating histories of US postwar FCN Treaties and of the ITO Charter which are maintained in the US National Archives and Research Administration (NARA) facility in College Park, Maryland, USA. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 5–9.)

169 Vandevelde recounts that the US delegation considered and rejected a proposal drafted by the US War Department's representative on the US delegation to add a new paragraph to the proposed security exception. The new paragraph would have

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provided that each ITO member would have independent power of interpretation of the language of the exception, and that the provisions of Article 86 of the Charter relating to disputes concerning the interpretation and application of the Charter would not apply to the security exception. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

170 Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

171 The language, "and to relate to", was considered to make clear that the invoking member could take unilateral action, while the original language from Article 37 of the New York Draft, which used the phrase "relating to", was considered to indicate that the determination to be made by an ITO member was limited to whether a measure it adopted was necessary, and not also whether the measure related to the enumerated topics. (Ibid. p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

172 Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

173 Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

174 Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947"). Vandevelde records that some members of the US delegation reasoned that, as a practical matter, the United States would not need a right to engage in unfettered unilateral action. (Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

175 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/236, Annex A, p. 13. The United States proposed that this new article replace the national security exceptions applicable to both the chapter on General Commercial Policy and the chapter on Inter-Governmental Commodity Arrangements. (Ibid.)

176 The delegate's specific questions were:

> What do we mean—"emergency in international relations"? Is that "immediate", through a war?—or what is the "emergency in international relations"?
>
> The second point that is troubling me here is, what are the "essential security interests" of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.
>
> For instance, I might say that at present we have a time of emergency as a number of Peace Treaties have not yet been signed and that therefore it might still be essential to have as much food in my country as possible. This would then force us to do everything to develop our agriculture, notwithstanding all of the provisions of this Charter. This example might be a little far fetched, but I only give it here to prove what is really worrying me about this subparagraph of which I still cannot get the proper meaning. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 19 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2).)

177 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20–21 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, pp. 20–21). (emphasis added) See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.1; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2.

178 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 21.

179 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 26–27. See also ibid. p. 30; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, p. 1 (referring to p. 29 of the Verbatim Report).

180 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim

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Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 28; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 33rd Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/SR/33, pp. 4–5. Later in July 1947, the Sub-Committee on Chapters I, II and VII also deleted the clause providing for referral to the ICJ on the security subparagraphs. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Part A – Introduction), E/PC/T/139, pp. 23–34.) Throughout August 1947, the proposed text was subject to several additional amendments by a Legal Drafting Committee and then by Commission A, including restructuring the provision to introduce the three subparagraphs to paragraph (b), as well as adding the words "directly or indirectly" to subparagraph (b)(ii). (See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Including Noting and Membership of the Executive Board), E/PC/T/159, pp. 41–42; Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the Thirty-Sixth Meeting of Commission A Held on Tuesday, 12 August 1947, E/PC/T/A/PV/36, pp. 16–21; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 40th (2) Meeting of Commission A Held on Friday, 15th August 1947, E/PC/T/A/SR/40(2), pp. 9–11.)

181 Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/186, p. 56.

182 The draft of the general tariff agreement prepared as of 30 August 1947 included a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX) and the other containing language identical to that in Article 94 of the Geneva Draft of the ITO Charter. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee of the Tariff Agreement Committee on Part II of the General Agreement, E/PC/T/189, Article XIX, pp. 47–49.) In September 1947, these subsections were separated into Articles XX and XXI, and entitled "General Exceptions" and "Security Exceptions", respectively. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Tariff Agreement Committee, Redraft of the Final Act, General Agreement on Tariffs and Trade and Protocols in Light of Discussions Which Have Taken Place in the Committee, E/PC/T/196, pp. 50–53. See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting of the Tariff Agreement Committee, E/PC/T/TAC/PV/11, pp. 23–26.)

183 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.)

184 See para. 7.357.a below.

185 See para. 7.357.b below.

186 See para. 7.357.c below.

187 See fns 381–383, 385 and 387 below, and paras. 7.265–7.267, 7.269.a and 7.353 below.

188 See para. 7.76 above.

189 Russia's first written submission, para. 16.

190 See, e.g. Russia's closing statement at the first meeting of the Panel, para. 6; and closing statement at the second meeting of the Panel, para. 3.

191 Russia's closing statement at the second meeting of the Panel, para. 5.

192 Ukraine professes not to know what Russia means when it refers to an emergency in international relations that arose in 2014, stating that Ukraine and the Panel "are still left in the dark as to what particular emergency in international relations causes the Russian Federation to adopt the measures at issue in order to protect its essential security interests". (Ukraine's second written submission, para. 142. See also Ukraine's opening statement at the second meeting of the Panel, para. 64.) Russia, on the other hand, insists that Ukraine knows very well what emergency it is referring to. (Russia's opening statement at the first meeting of the Panel, para. 30; and closing statement at the second meeting of the Panel, para. 4.)

193 Russia's opening statement at the second meeting of the Panel, para. 24.

194 Ibid.

195 Russian representative's oral response to the second question at the second meeting of the Panel.

196 Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334. Trade Policy Reviews are conducted by the Trade Policy Review Body based on two documents: a policy statement (report) by the Member under review and a comprehensive report drawn up by the WTO Secretariat on its own responsibility.

197 Russian representative's oral response to the second question at the second meeting of the Panel.

198 Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334, para. 1.13.

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199 Ukrainian representative's oral comments on Russian representative's oral response to the Panel's second question at the second meeting of the Panel; and Ukraine's combined response to Panel question Nos. 2 and 3 after the second meeting, para. 16 (referring, in particular, to paragraph A(i) of Annex 3 to the WTO Agreement).

200 In *Canada – Aircraft*, the complainant referred to the report drawn up by the WTO Secretariat in connection with Canada's Trade Policy Review to argue that *Investissement-Québec* assistance to the regional aircraft industry conferred a "benefit" by "provid[ing] export guarantees for projects considered too risky by private financial institutions". Recounting the objective in paragraph A(i) of the TPRM, the panel "attach[ed] no importance to the [TPR] of Canada in considering [the complainant's] arguments concerning *Investissement-Québec* assistance to the regional aircraft industry". (Panel Report, *Canada – Aircraft*, paras. 9.267 (quoting Trade Policy Review Body, Trade Policy Review, Canada, Report by the Secretariat, WT/TPR/S/53, p. 59), and 9.274–9.275). In *Chile – Price Band System*, the complainant argued that the Price Band System at issue was in the nature of a variable tariff, and for this purpose, referred to the report drawn up by the WTO Secretariat in connection with Chile's Trade Policy Review, which stated that "[t]he price stabilization mechanism works as a variable levy since the duty imposed on these goods varies according to their import price." (Panel Report, *Chile – Price Band System*, para. 4.47.) The panel stated that, in the light of paragraph A(i) of the TPRM, "such a Report should not be taken into account in the context of dispute settlement proceedings." (Ibid. fn 664 to para. 7.95.)

201 Russia's first written submission, para. 16.

202 Russia's opening statement at the first meeting of the Panel, para. 30.

203 UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89).

204 UN General Assembly Resolution No. 71/205, 19 December 2016, (Exhibit UKR-91). This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of *declared war or other armed conflict* between High Contracting Parties. (Ibid. p. 2.)

205 Russia responded to these actions on 7 August 2014 by passing Resolution No. 778 and imposing sanctions on countries that had imposed sanctions against Russia. (Resolution No. 778, (Exhibits UKR-10, RUS-7).) Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the states that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. (Decree No. 560, (Exhibits UKR-9, RUS-3).) Resolution No. 778 originally imposed import bans on listed agricultural products, raw materials and food originating from the United States, EU Member States, Canada, Australia and Norway. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293, (Exhibit UKR-71). It was in force until 31 December 2018. Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

206 See Australia's third-party statement, paras. 9–21; Brazil's third-party submission, paras. 4–5 and 8–9; third-party statement, paras. 21–30; and response to Panel question No. 6; Canada's third-party statement, paras. 6–8; and response to Panel question No. 6, para. 8; China's third-party statement, paras. 18–19; and response to Panel question No. 6, para. 6; Japan's third-party submission, paras. 32–38; Singapore's third-party statement, paras. 14–19; United States' third-party statement, paras. 1, 11–12, 34–35; and response to Panel question No. 6, para. 31.

207 Ukraine's opening statement at the first meeting of the Panel, paras. 141–142.

208 Ibid. para. 142. For similar views expressed by third parties, see European Union's third-party submission, paras. 49–55 and 61–63; and third-party statement, paras. 17–23; Moldova's third-party submission, paras. 21, 27–35 and 37–41; third-party statement, paras. 10–18 and 20–22; and response to Panel question No. 6, paras. 18 and 20–24.

209 Ukraine's second written submission, para. 156. Ukraine argues that it is not enough for Russia to assert that, as measures affecting transit rather than imports, there is no protectionist motive behind the measures. According to Ukraine, Russia must show that the issues are designed to protect Russia's essential security interests. (Ukraine's second written submission, para. 158.)

210 See Russia's opening statement at the first meeting of the Panel, paras. 43–44; closing statement at the first meeting of the Panel, paras. 6, 10–11 and 18; and opening statement at the second meeting of the Panel, paras. 21–23. See also Ukraine's second written submission, para. 161. Ukraine notes also that none of the measures which Russia seeks to justify under Article XXI(b)(iii) was notified to Members in accordance with paragraph 1 of the 1982 Decision. (Ibid. para. 162.) The 1982 Decision is discussed in para. 1.28 of the Appendix to this Report.

211 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.

212 See generally, Appellate Body Reports, *US – Shrimp*, para. 158; *US – FSC*, para. 166; *US – Cotton Yarn*, para. 81; and *US – Hot-Rolled Steel*, para. 101. The Appellate Body has provided specific examples of the reflection of the principle of good faith, for example, in the chapeau to Article XX of the GATT 1994 (Appellate Body Report, *US - Shrimp*, para. 158); in the exercise of a Member's judgment in good faith under Articles 3.7 and 3.10 of the DSU (Appellate Body Reports, *Peru – Agricultural Products*, paras. 5.15–5.28; and *US – FSC*, para. 166); in the concept of reasonableness in paragraph 2 of Annex II of the Anti-Dumping Agreement (Appellate Body Report, *US – Hot-Rolled Steel*, para. 101); and in the general applicability of Article 26 of the Vienna Convention to all WTO obligations (Appellate Body Report, *US – Cotton Yarn*, para. 81).

213 See the third recital of the preamble of the WTO Agreement and the second recital of the preamble of the GATT 1994.

214 See para. 7.114 above.

215 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

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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.

216 See paras. 7.1.a, 7.1.b, 7.16.c, 7.106.a and 7.106.b above.

217 Ukraine's first written submission, paras. 24 and 26–31.

218 See paras. 7.7–7.12 above.

219 For a description of the 2014 measures, see para. 7.106.c. above and paras. 7.326–7.327 below.

220 For an explanation of the relationship between the sanctions imposed against Russia and the Resolution No. 778 import bans, see paras. 7.9–7.12 and 7.16.b and fns 15, 16 and 32 above.

221 See, e.g. Ukraine's opening statement at the second meeting of the Panel, para. 36; and response to Panel question No. 4 after the second meeting of the Panel, para. 27.

222 This is also confirmed by the negotiating history of Article XXI. (See para. 7.92 above.)

223 Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*. See Ukraine's opening statement at the first meeting of the Panel, para. 133; and second written submission, para. 168; European Union's third-party submission, paras. 62–64; and third-party statement, paras. 21–22; and United States' third-party statement, para. 16.

224 See Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 52.

225 Russia's first written submission, paras. 9 and 76. See ibid. paras. 33, 37, 48 and 74.

226 Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1996:I, 323, p. 339.

227 Ibid.

228 See, e.g. Appellate Body Reports, *US – Shrimp*, para. 124; and *EC – Asbestos*, para. 78.

229 In this Section, when referring to Ukraine's claims of inconsistency with particular commitments in Russia's Accession Protocol, the Panel will, for ease of reference, refer to such claims according to the paragraph of Russia's Working Party Report which sets forth the commitment. Paragraph 2 of Part I of Russia's Accession Protocol incorporates by reference the paragraphs of Russia's Working Party Report that are listed in paragraph 1450 of that Report, including paragraphs 1161, 1426, 1427 and 1428.

230 Ukraine's first written submission, para. 236.

231 Ibid. paras. 237 and 240.

232 Ibid. paras. 237–238; and Ukraine's opening statement at the first meeting of the Panel, para. 77. Ukraine recalls Canada's statement that what constitutes the most convenient route(s) "can . . . only be determined having regard to all of the circumstances relevant to the traffic in transit, including, for example, the 'conditions of the traffic'". (Ukraine's opening statement at the first meeting of the Panel, para. 78.)

233 Ibid.

234 Ukraine's first written submission, para. 249.

235 Ibid. para. 252.

236 Ibid. paras. 253–255.

237 Ibid. para. 254.

238 Ibid. para. 246.

239 Ukraine's second written submission, para. 32. See also Ukraine's opening statement at the first meeting of the Panel, para. 72; and first written submission, para. 191.

240 See paras. 7.3 and 7.22–7.23 above.

241 Brazil's response to Panel question No. 8, p. 5.

242 Ibid.

243 Brazil's third-party submission, paras. 13–14.

244 Canada's third-party submission, paras. 10 and 17; and response to Panel question No. 8, para. 10.

245 Canada's third-party submission, para. 21.

246 Canada's third-party statement, para. 12. Canada additionally stated that a determination of which route constitutes the "most convenient" route should have regard to all of the circumstances, such as the means of transit, the products in transit, differentials in the distances using different routes, any resulting differentials in cost and time, and any other "conditions of traffic". (Ibid. para. 11 (referring to Japan's third-party submission, para. 12).)

247 European Union's response to Panel question No. 8, paras. 25–28.

248 Ibid. para. 29.

249 European Union's third-party statement, paras. 31–38.

250 Ibid. para. 37.

251 Ibid. para. 38.

252 Japan's response to Panel question No. 8, para. 17.

253 Japan's third-party submission, para. 4.

254 Ibid. para. 5.

255 Ibid. para. 9.

256 Ibid. para. 12.

257 Ukraine advances the following alternative arguments:

(a) inconsistency with any other paragraph of Article V of the GATT 1994 will necessarily result in inconsistency with Article V:2 (Ukraine's first written submission, paras. 198 and 224);

(b) the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of the "direct" and therefore "most convenient" routes (Ukraine's first written submission, paras. 230, 232 and 236–238);

(c) the cumulative effect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of

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Resolution No. 778 Goods is to block all transit over the Belarus-Russia border (Ukraine's first written submission, para. 238);

(d) the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods are, in effect, bans on all traffic in transit because the scope of the bans and the government authorization requirement are so burdensome as to render such transit near impossible (Ukraine's first written submission, paras. 253–255);

(e) the requirement to enter via certain checkpoints under each measure makes certain "most convenient routes" unavailable for traffic in transit (Ukraine's first written submission, paras. 246 and 249);

(f) the additional conditions related to identification seals and registration cards attached to the 2016 Belarus Transit Requirements impose an additional "burden" on traffic in transit and thereby do not guarantee freedom of transit (Ukraine's first written submission, paras. 251–252); and

(g) the authorization requirement attached to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit. (Ukraine's first written submission, para. 254.)

258 The Panel recalls that a panel has the "discretion to address only those *arguments* it deems necessary to resolve a particular claim". (Appellate Body Report, *EC – Poultry*, para. 135. (emphasis original) See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 124–125; and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 134–135.)

259 Ukraine's first written submission, para. 237.

260 Emphasis added.

261 See Article V:3 ("traffic coming from or going to the territory" of other Members), Article V:4 ("traffic in transit to or from the territories" of other Members) and Article V:5 ("traffic in transit to or from the territory" of other Members) of the GATT 1994.

262 See para. 7.357.a below. For additional information regarding these measures, see paras. 7.265–7.267 below. The primary legal instruments implementing these measures are Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016, (Decree No. 1), (Exhibits UKR-1, RUS-1) as amended by Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016, (Decree No. 319), (Exhibits UKR-2, RUS-2). Section 1(a) of Decree No. 1, as amended by Decree No. 319, applies to road and rail cargo transportation "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation". The Panel construes section 1(a) of Decree No. 1 as applying to both (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic, and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic.

263 See para. 7.357.b below. For additional information regarding these measures, see paras. 7.266–7.267 and paras. 7.347–7.349 below. As the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods also apply to road and rail transit "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic", the Panel similarly construes this measure as applying to both: (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic; and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic. (See fn 262 above.)

264 See para. 7.357.c below. For additional information regarding these measures, see paras. 7.269.a, 7.326–7.328 and 7.341–7.354 below, as well as fns 385, 387, 456, 458 and 482 below.

265 See paras. 7.354–7.355 and 7.357.c below.

266 See para. 7.169 above.

267 Under the Veterinary Instruction, (Exhibits UKR-21, RUS-10), entry for such goods is exclusively permitted at nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. For more detail, see paras. 7.269.a and 7.341–7.354 below and fns 456 and 458 below.

268 Ukraine's first written submission, para. 259.

269 Ibid. paras. 281–282.

270 Ukraine's first written submission, paras. 283–284.

271 Ukraine's first written submission, paras. 275 and 280.

272 Ibid. paras. 276–279; and response to Panel question No. 12 after the first meeting of the Panel, para. 135.

273 See paras. 7.3 and 7.22–7.23 above.

274 See Canada's third-party submission, para. 24.

275 Ibid. para. 25.

276 Japan's third-party submission, paras. 18–19.

277 Ibid. para. 19.

278 See paras. 7.177–7.178 above. For more detail, see paras. 7.341–7.353 below.

279 See fn 267 above.

280 See paras. 7.153–7.154 above.

281 See summary of Ukraine's arguments below.

282 Appellate Body Report, *Australia – Salmon,* para. 223 (quoted in Appellate Body Reports, *US – Wheat Gluten,* para. 180; and *US – Lamb,* para. 191). See also Appellate Body Report, *Argentina – Footwear (EC),* para. 98.

283 Appellate Body Reports, *Argentina – Import Measures*, para. 5.200. The panel in *Argentina – Import Measures* elected to exercise judicial economy in respect of Japan's claims under Article X:1 of the GATT 1994 in circumstances where it had already determined that the challenged measures were inconsistent with Articles III:4 and XI:1 of the GATT 1994, reasoning that it did not consider additional findings of inconsistency

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in relation to the same measure under Article X:1 "necessary or useful in resolving the matter at issue". (See ibid. para. 5.188.) The Appellate Body upheld the panel's exercise of judicial economy and the panel's reasoning, noting that as Argentina would "have to modify or withdraw the TRRs measures to comply with the recommendations under Articles III:4 and XI:1, the TRRs measure—in its current form and with its current content—will cease to exist". (Ibid. para. 5.200.)

284 Since *Argentina – Import Measures,* several panels have exercised judicial economy over claims under Article X:3(a) where a measure has already been held to violate other substantive provisions of the GATT 1994. (See, e.g. Panel Reports, *Peru – Agricultural Products,* para. 7.501; and *Russia – Railway Equipment,* para. 7.939.)

285 See fn 282 above.

286 The Panel has, however, addressed the relationship between paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994 in Section 7.6.4.2.2. Nonetheless, the relevant arguments of the parties and third parties in relation to this paragraph are summarized in the following section.

287 Ukraine's first written submission, para. 303. See also Ukraine's second written submission, para. 46.

288 Ukraine's first written submission, para. 319.

289 Ukraine argues that each of the measures place "restrictions" on transit and cause "delays" related to re-routing. (Ibid. paras. 342–344.)

290 Ibid. paras. 345–349.

291 Ibid. para. 350.

292 Ibid. paras. 351–364. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

293 See paras. 7.3 and 7.22–7.23 above.

294 Brazil's third-party submission, paras. 14–15.

295 Brazil's third-party submission, para. 14; and response to Panel question No. 10.

296 Canada's third-party submission, paras. 31–32.

297 Ibid. paras. 33 and 36. (footnotes omitted)

298 European Union's response to Panel question No. 10, para. 32.

299 Ukraine's first written submission, paras. 366 and 393.

300 Ibid. paras. 384–385.

301 Ibid. paras. 400–404.

302 See ibid. paras. 409–431.

303 Ukraine's first written submission, paras. 444 and 448–449.

304 Ukraine's first written submission, paras. 445–447 and 449.

305 Ibid. paras. 451 and 453–454. The Panel also notes that Ukraine initially proposed that any inconsistency with the second sentence of Article V:2 would necessarily demonstrate "less favourable treatment" for the purposes of Article V:5; however, Ukraine later appears to have withdrawn this argument. (See Ukraine's second written submission, para. 61.)

306 Ukraine's first written submission, paras. 521, 523–524 and 564.

307 Order of PJSC "Russian Railways" No. 529, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016, (PJSC Order), (Exhibit UKR-7). The PJSC Order implements the requirements of the 2016 Belarus Transit Requirements (set forth in paragraph 1(b) of Decree No. 1) to affix identification seals on road and railway transport of traffic in transit from Ukraine destined for Kazakhstan (and the Kyrgyz Republic) on entry into Russia and to remove such seals on exit from Russia, as elaborated by Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016, (Resolution No. 276), (Exhibits UKR-8, RUS-6) (as amended by Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016, (Resolution No. 732), (Exhibit UKR-4)). (Ukraine's first written submission, para. 107.) See also Decree No. 1, (Exhibits UKR-1, RUS-1).

308 This notice sets forth the fee for the placement and removal of the GLONASS identification seals, as required by the instruments listed in fn 307 above. (Ukraine's first written submission, para. 105.)

309 See ibid. paras. 530–539.

310 Decree No. 319, (Exhibits UKR-2, RUS-2).

311 See Ukraine's first written submission. paras. 541–543. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

312 PJSC Order, (Exhibit UKR-7).

313 Ukraine's first written submission, para. 581.

314 Decree No. 319, (Exhibits UKR-2, RUS-2).

315 Ukraine's first written submission, paras. 583–584.

316 Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017, (Decree No. 643), (Exhibits UKR-98, RUS-13). Decree No. 643 extended the duration of Decree No. 1, and therefore the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods.

317 Decree No. 1, (Exhibits UKR-1, RUS-1).

318 Ukraine's opening statement at the first meeting of the Panel, paras. 61–63; and second written submission, para. 64. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

319 Ukraine's first written submission, paras. 643–647.

320 Decree No. 319, (Exhibits UKR-2, RUS-2).

321 Ukraine's first written submission, paras. 648–650 and 653–654. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

322 Russia's response to Panel question No. 11 after the first meeting of the Panel, p. 4.

323 Brazil's response to Panel question No. 14, p. 7.

324 Canada's response to Panel question No. 14, paras. 22–23.

325 Ibid. para. 24.

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326 European Union's response to Panel question No. 14, para. 42.

327 Ibid. paras. 37 and 40.

328 Ibid. para. 39.

329 Ibid. para. 43.

330 Japan's response to Panel question No. 14, para. 33.

331 Ukraine's first written submission, para. 164.

332 Ibid.

333 Ibid. paras. 490–491 and 517.

334 Ukraine's first written submission, para. 518; and response to Panel question No. 11 after the first meeting of the Panel, para. 127.

335 Ukraine's first written submission, paras. 499 and 516–518.

336 PJSC Order, (Exhibit UKR-7).

337 Ukraine's first written submission, paras. 603 and 605.

338 These resolutions are:

(a) Resolution No. 778, (Exhibits UKR-10, RUS-7);

(b) Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014, (Resolution No. 830), (Exhibit UKR-11);

(c) Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015, (Resolution No. 625), (Exhibit UKR-12);

(d) Resolution No. 842, (Exhibit UKR-13);

(e) Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015, (Resolution No. 981), (Exhibit UKR-14); (f) Resolution No. 1397, (Exhibit UKR-15);

(f) Resolution of the Government of the Russian Federation No. 1 "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016" , dated 1 January 2016, (Resolution No. 1), (Exhibits UKR-3, RUS-4);

(g) Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (Seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016, (Resolution No. 147), (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4);

(h) Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016, (Resolution No. 157), (Exhibit UKR-16); (j) Resolution No. 276, (Exhibits UKR-8, RUS-6);

(i) Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016, (Resolution No. 388), (Exhibit UKR-5);

(j) Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016, (Resolution No. 472), (Exhibit UKR-17);

(k) Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016, (Resolution No. 608), (Exhibit UKR-18);

(l) Resolution No. 732, (Exhibit UKR-4);

(m) Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016, (Resolution No. 897), (Exhibit UKR-19);

(n) Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016, (Resolution No. 1086), (Exhibit UKR-20);

(o) Resolution No. 790, (Exhibit UKR-70); and

(p) Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017, (Resolution No. 1292), (Exhibit UKR-94).

339 Decree No. 643, (Exhibits UKR-98, RUS-13). (Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.)

340 Ukraine's first written submission, paras. 595 and 604–606; and opening statement at the first meeting of the Panel, para. 63.

341 Ukraine's first written submission, para. 548.

342 Ukraine's first written submission, paras. 569–570.

343 Ibid. para. 571.

344 Ibid. para. 585.

345 As noted in footnote 229, these paragraphs are incorporated into Russia's Accession Protocol by reference. (See Russia's Accession Protocol, para. 2 of Part I; and Working Party Report, para. 1450.)

346 The Panel recalls that in prior disputes involving the interpretation of China's Accession Protocol, panels and the Appellate Body proceeded on the assumption that paragraph 1.2 of that Protocol served to make certain obligations enforceable under the DSU where this issue was not contested by the parties. (Appellate Body Reports, *China – Rare Earths,* fn 422. See also Appellate Body Reports, *China – Auto Parts,* paras. 213–214; and Panel Reports, *China – Rare Earths,* para. 7.85.) The Panel observes that paragraph 2 of Part I of Russia's Accession Protocol is identical in all relevant respects to paragraph 1.2 of China's Accession Protocol. Both paragraphs provide that the WTO Agreement to which each Member accedes

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"shall be the WTO Agreement" as "rectified, amended or otherwise modified by such legal instruments as may have entered into force" before the relevant date of accession, and also provide that the Protocol "shall be an integral part of the WTO Agreement". Moreover, neither Ukraine nor Russia has contested the enforceability of the provisions of Russia's Accession Protocol and Working Party Report under the DSU. Consequently, the Panel proceeds on the premise that the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report are enforceable under the DSU.

347 Appellate Body Reports, *China – Rare Earths,* paras. 5.50 and 5.57.

348 For instance, in *China – Publications and Audiovisual Products,* the Appellate Body addressed whether Article XX(a) of the GATT 1994 applied to a provision on trading rights in paragraph 5.1 of China's Accession Protocol. (Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 214–215.) The Appellate Body concluded that China could rely upon the introductory clause of paragraph 5.1 of its Accession Protocol to justify any violation as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. (Ibid. para. 233.) For the analysis of the Appellate Body on this issue, see ibid. paras. 216–233.

349 For instance, in *China – Raw Materials,* the Appellate Body examined whether Articles XX(b) and XX(g) of the GATT 1994 applied to paragraph 11.3 of China's Accession Protocol, which obliged China to eliminate export taxes and charges. (Appellate Body Reports, *China – Raw Materials*, para. 278.) The Appellate Body concluded that China could not rely on Articles XX(b) and XX(g) in relation to paragraph 11.3. (Appellate Body Reports, *China – Raw Materials*, para. 307.) For the analysis of the Appellate Body on this issue, see ibid. paras. 279–306.

350 Appellate Body Reports, *China – Rare Earths,* para. 5.55. (emphasis added)

351 Ibid. para. 5.57.

352 Ibid. paras. 5.50 and 5.57.

353 Ibid. para. 5.74.

354 Emphasis added.

355 *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.), (Oxford University Press, 2003), Vol. 2, p. 2522.

356 Emphasis added.

357 The Panel recalls that in *China – Publications and Audiovisual Products*, the Appellate Body observed the close interlinkage between the obligations assumed under paragraph 5.1 of China's Accession Protocol and the GATT 1994, given that paragraph 5.1 was "clearly concerned with trade in *goods*". (Appellate Body Report, *China – Publications and Audiovisual Products,* para. 226. (emphasis original)) The Appellate Body additionally noted that paragraph 5.1 should not "be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures". (Ibid. para. 229.) This was material to the Appellate Body's conclusion that China could rely on Article XX(a) as a defence to its obligations under paragraph 5.1 of its Accession Protocol. (Ibid. para. 233.)

358 Ukraine's only argument of inconsistency with paragraph 1161 of Russia's Working Party Report is that a demonstration of inconsistency with Article V of the GATT 1994 will also demonstrate inconsistency with paragraph 1161. (See Ukraine's first written submission, para. 164.)

359 Emphasis added.

360 *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 1, p. 102. (emphasis original)

361 Ibid. Vol. 2, p. 2542.

362 Paragraph 1426 creates a commitment to publish promptly "all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:1 of the GATT 1994 creates an obligation to publish promptly "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use". While the scope of the provisions differs, both impose obligations on Russia relating to the publication of measures concerning trade in goods.

363 The Panel recalls that, in *China – Rare Earths,* the Appellate Body concluded that paragraph 1.2 of China's Accession Protocol served to make that Protocol and the Multilateral Trade Agreements part of "a single package of rights and obligations with respect to China as a WTO Member". (Appellate Body Reports, *China – Rare Earths,* para. 5.72.) The Appellate Body consequently noted that any analysis of the individual provisions in China's Accession Protocol should take into account "the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements". (Ibid. para. 5.74.)

364 See Article XXI(b)(iii) of the GATT 1994 ("taken in time of war or other emergency in international relations"); Article 31(b) of the TRIPS Agreement ("in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use"), and Article 73(b)(iii) of the TRIPS Agreement ("taken in time of war or other emergency in international relations"); and Article III:1 of the GATS ("except in emergency situations"), Article X:1 of the GATS ("on the question of emergency safeguard measures"), and Article XIVbis:1(b)(iii) of the GATS ("taken in time of war or other emergency in international relations").

365 The text of paragraph 1427 creates at least three separate obligations to: (a) publish the covered measures prior to their adoption; (b) provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to responsible authorities before such measures are finalized or submitted to the competent CU bodies; and (c) take any such comments into account. However, in the specific circumstances of this dispute, Ukraine has only argued that Russia has acted inconsistently with its obligation to publish certain legal instruments prior to their adoption. (See Section 7.6.3.6.3 above.)

366 Paragraph 1427 concerns any "laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:2 of the GATT 1994 only concerns any measures

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of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1 of the GATT 1994, see fn 362 above.)

367 Emphasis added.

368 See para. 7.242 and fn 360 above.

369 *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 2, p. 2382.

370 See para. 7.243 above.

371 Paragraph 1428 concerns any "laws, regulations, decrees, decisions or administrative rulings of general application pertaining to or affecting trade in goods, services or intellectual property rights", whereas Article X:2 of the GATT 1994 concerns any measures of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1, see fn 362 above.)

372 Russia's opening statement at the first meeting of the Panel, paras. 15–16. More specifically, Russia argues that Ukraine's panel request fails to establish the "nexus" between the measures within each distinct group. (Ibid. para. 21. See also Russia's opening statement at the second meeting of the Panel, paras. 7–8.)

373 Russia's opening statement at the first meeting of the Panel, paras. 15–16. See also Russia's opening statement at the second meeting of the Panel, para. 8.

374 Russia's opening statement at the first meeting of the Panel, paras. 19–20 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 136). See also Russia's opening statement at the second meeting of the Panel, para. 9.

375 See Russia's opening statement at the first meeting of the Panel, para. 23.

376 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42; and opening statement at the second meeting of the Panel, para. 18.

377 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42.

378 Ibid. para. 63.

379 Ibid. paras. 65–68.

380 Request for the establishment of a panel by Ukraine, WT/DS512/3 (Ukraine's panel request), section II.A., p. 2.

381 Resolution No. 778 imposes bans on the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution and originating from the United States, EU Member States, Canada, Australia, and Norway. (See Resolution No. 778, (Exhibits UKR-10, RUS-7).) On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution No. 842, (Exhibit UKR-13).) Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would be applied to Ukraine as of 1 January 2016. (See Resolution No. 1397, (Exhibit UKR-15). See also Russia's opening statement at the first meeting of the Panel, para. 6.) On 1 January 2016, the date of the amendment of Resolution No. 778, the European Union and Ukraine had agreed to apply provisions of the DCFTA that are part of the EU-Ukraine Association Agreement. (Ukraine's first written submission, para. 25.) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import ban until 31 December 2018. (See Resolution No. 790, (Exhibit UKR-70).)

382 Decree No. 1, (Exhibits UKR-1, RUS-1); Decree No. 319, (Exhibits UKR-2, RUS-2); Resolution No. 1, (Exhibits UKR-3, RUS-4) (as amended by Resolution No. 388, (Exhibit UKR-5); and Resolution No. 732, (Exhibit UKR-4)).

383 Section II.A. of Ukraine's panel request also identifies the following legal instruments through which the measures identified in section II.A. are imposed: Decree No. 560, (Exhibits UKR-9, RUS-3), (as subsequently extended by Decree No. 320 of 24 June 2015 and Decree No. 305 of 29 June 2016); Resolution No. 147, (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4)); PJSC Order, (Exhibit UKR-7); and Resolution No. 276, (Exhibits UKR-8, RUS-6) (as amended by Resolution No. 732, (Exhibit UKR-4)). Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018. Section II.A also identifies Resolution No. 778, (Exhibits UKR-10, RUS-7) and its amendments. (See fn 385 below for a full list of amendments to Resolution No. 778.)

384 Ukraine's panel request, section II.B., pp. 3–4.

385 Resolution No. 778 is amended by the following resolutions of the Government of the Russian Federation: (a) Resolution No. 830, (Exhibit UKR-11); (b) Resolution No. 625, (Exhibit UKR-12); (c) Resolution No. 842, (Exhibit UKR-13); (d) Resolution No. 981, (Exhibit UKR-14); (e) Resolution No. 1397, (Exhibit UKR-15); (f) Resolution No. 157, (Exhibit UKR-16); (g) Resolution No. 472, (Exhibit UKR-17); (h) Resolution No. 608, (Exhibit UKR-18); (i) Resolution No. 897, (Exhibit UKR-19); (j) Resolution No. 1086, (Exhibit UKR-20); and (k) Resolution No. 790, (Exhibit UKR-70).

386 Ukraine's panel request, section III.A., p. 4.

387 Ibid. p. 5. Ukraine's panel request identifies the following legal instruments through which Russia imposes these measures: Veterinary Instruction, (Exhibits UKR-21, RUS-10); Instruction No. FS-AS-3/22903 of the *Rosselkhoznadzor* dated 21 November 2014, (Plant Instruction), (Exhibits UKR-22, RUS-11); and any additional measures that prolong, replace, amend, implement, extend or apply these measures, as well as other related measures. (Ukraine's panel request, section III.A., p. 5.)

388 Ibid.

389 Ukraine's panel request, section III.A., p. 5.

390 Ibid.

391 Ibid. section III.B., pp. 5–6.

392 Ukraine's first written submission, section IV, entitled "The measures at issue".

393 Ibid. para. 54.

394 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.

395 Ibid.

396 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 43 and 63.

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397 Ibid. para. 63.

398 Ukraine's first written submission, section V, entitled "WTO-inconsistency of the measures at issue".

399 Ukraine did not pursue its claims under Article XI:1 of the GATT 1994 in its first written submission.

400 Ukraine's first written submission, para. 156 *et seq*.

401 As the Appellate Body has held in previous disputes, these two requirements constitute the "matter referred to the DSB", which forms the basis of a panel's terms of reference under Article 7.1 of the DSU. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.)

402 Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.

403 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162. (fns omitted)

404 Nevertheless, subsequent submissions, such as the complainant's first written submission, may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *Argentina – Import Measures*, para. 5.42; and *US – Carbon Steel*, para. 127.)

405 See para. 7.267 above.

406 Russia's second written submission, para. 10.

407 See para. 7.269 above.

408 See the first sentence in section III.A. of Ukraine's panel request, and the underscored sentence prior to the paragraph beginning "Second" in section III.A. of Ukraine's panel request. (Ukraine's panel request, pp. 4–5.)

409 The Panel raised this issue on its own motion, through a question that it posed to the parties in advance of the first meeting. (See Communication to the parties, "Request for discussion of specific issues to be included in the parties' oral statements", dated 12 January 2018, Question No. 2.) The Appellate Body has previously referred to the widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any dispute that comes before it. (Appellate Body Reports, *US – 1916 Act*, para. 54 and fn 30 thereto; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and *EC and certain member States – Large Civil Aircraft*, para. 791; and Panel Reports, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.19–7.20; *EC – IT Products*, para. 7.196; *China – Broiler Products*, para. 7.515; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.358.)

410 Russia's opening statement at the first meeting of the Panel, para. 23.

411 Ibid. para. 22. See also Russia's second written submission, paras. 14–15.

412 Russia's opening statement at the first meeting of the Panel, para. 22.

413 Ibid. See also Russia's opening statement at the second meeting of the Panel, para. 13.

414 Ukraine's opening statement at the first meeting of the Panel, para. 53; and response to Panel question No. 1 after the first meeting of the Panel, para. 12.

415 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 45.

416 Ibid. para. 49.

417 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 51. Ukraine argues that, contrary to Russia's understanding, "the matter before the Panel includes the *de facto* application of Decree No. 1 and Resolution No. 1, and thus the restrictions on traffic in transit imposed by both instruments" and not "any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus". (Ukraine's opening statement at the second meeting of the Panel, para. 24.)

418 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58–60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.

419 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 59–60; and Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region, Income Group, and Subregion of the World, (The Regions of Central Asia, Eastern Asia and Caucasus), (Exhibit UKR-102).

420 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 61.

421 Ukraine's panel request, section III.A., p. 5.

422 Appellate Body Report, *US – Continued Zeroing*, para. 169.

423 Ibid. (emphasis added)

424 Ibid.

425 Ibid. para. 167 (quoting Panel Report, *US – Continued Zeroing*, para. 7.56).

426 Ibid. para. 166.

427 Appellate Body Report, *US – Continued Zeroing*, para. 165. The 18 anti-dumping duty orders at issue were also listed in the annex to the European Communities' panel request, and a citation was included for each order. (Ibid.)

428 Ibid.

429 Ibid. The complainant also stated in its panel request that it "ha [d] identified in the annex to this request a number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers . . . in excess of the dumping margin which would have been calculated using a WTO consistent methodology". (Ibid.)

430 Ibid. para. 166.

431 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 60; and The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102).

432 The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102), p. 2. (pagination of PDF file)

433 Ibid. p. 3. (pagination of PDF file)

434 Ibid. p. 5. (pagination of PDF file)

435 Ibid. (pagination of PDF file)

436 Article V:1 of the GATT 1994 provides that "[g]oods . . . shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier

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of the contracting party across whose territory the traffic passes."

437 This is particularly so when a complainant brings a claim under the second sentence of Article V:2 of the GATT 1994, which provides that "[n]o distinction shall be made which is based on . . . the place of . . . destination."

438 In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that, because the very existence and precise contours of a measure that is unwritten may be uncertain, complainants are expected to identify such measures in their panel requests as clearly as possible. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.) In this appeal, the Appellate Body concluded, on its own motion, that the United States' challenge to an unwritten LA/MSF programme was not identified as a specific measure in the United States' panel request and was therefore outside the panel's terms of reference. The Appellate Body considered that the references in the United States' panel request to individual provisions of LA/MSF could not, at the same time, be read to also refer to a distinct measure consisting of an unwritten LA/MSF Programme. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 790, 792 and 795.)

439 The Panel notes that other panels have found measures to be insufficiently specified for purposes of Article 6.2 of the DSU where they were described too broadly in a panel request. For example, in *Australia – Apples*, New Zealand's panel request referred to both "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand*" and, "in particular" to a list of 17 requirements spelled out in the report and identified in the panel request through bullet points. (Panel Report, *Australia – Apples*, para. 7.1446.) The panel found that "given the length and complexity of Australia's [report]", the broad reference in New Zealand's panel request to "measures specified in and required by Australia pursuant to the [report]" failed to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. (Ibid. para. 7.1449.)

440 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58–60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.

441 Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 62.

442 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 173. (emphasis original)

443 Ibid.

444 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 165. (emphasis original)

445 Ibid. para. 166.

446 Ibid. para. 167.

447 Although the third sub-category of the second group of measures described in section III.A. of the panel request refers to amendments to any of the measures mentioned in sections II.A. and III.A., this sub-category is prefaced by the explanation that this inclusion is necessary owing to Russia's failure to comply with the transparency and notification obligations under the GATT 1994 and Russia's Accession Protocol in respect of some of the measures. The existence and content of Decree No. 319 was clearly known to Ukraine at the time of its panel request, as it specifically refers to this instrument in the context of its discussion of the first group of measures in section II.A. Therefore, in the circumstances, it would not have been reasonable for Russia to infer, from the references to amendment measures in the third sub-category of measures described in section III.A., that Ukraine was referring to the amendments to Decree No. 1 effected by Decree No. 319.

448 See Ukraine's opening statement at the second meeting of the Panel, paras. 25–26. Ukraine argues that the use of the phrase "related measures" has not changed the essence of the measures that fall within the Panel's terms of reference. (See ibid. para. 27.)

449 Russia's second written submission, para. 10.

450 See para. 7.283 above.

451 In the previous Sections of this Report, the Panel refers to "2014 transit bans and other transit restrictions" as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods". In this Section, however, for ease of reference, the Panel will refer to these measures as the "2014 Belarus-Russia Border Bans".

452 See Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.

453 For a description of the 2014 measures, see paras. 7.1.d and 7.106.c above, and paras. 7.326–7.327 below.

454 See para. 7.10 above.

455 Resolution No. 830, (Exhibit UKR-11); Resolution No. 981, (Exhibit UKR-14); Resolution No. 157, (Exhibit UKR-16); Resolution No. 472, (Exhibit UKR-17); Resolution No. 897, (Exhibit UKR-19); Resolution No. 1086, (Exhibit UKR-20); and Resolution No. 1292, (Exhibit UKR-94).

456 See para. 7.269.a above. The Panel interprets the Plant Instruction in the context of the contemporaneous Veterinary Instruction, given that both instruments were issued on the same date by the same government authority, in reference to the same ban on products under Resolution No. 778. The Panel therefore considers that "the checkpoints" referred to in the Plant Instruction, properly construed, must be those checkpoints listed in the Veterinary Instruction. This interpretation of the two Instructions was also put forward by Ukraine in its panel request, in which Ukraine asserted that the entry of both veterinary and plant goods was only allowed "through the checkpoints located at the Russian part of the external border of the Customs Union". (Ukraine's panel request, Section III.A., p. 4.) For more detail, see fn 458 below.

457 Veterinary Instruction, (Exhibits UKR-21, RUS-10).

458 Plant Instruction, (Exhibits UKR-22, RUS-11). The Veterinary Instruction specifically prohibits transit across Russia through Belarussian checkpoints, owing to the detection of "gross violations" during the transit of Resolution No. 778 goods through the Republic of Belarus, and limits entry to nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).) The Plant Instruction, conversely, simply states that the transit of phytosanitary goods covered by Resolution No. 778, destined for third countries including Kazakhstan, will take place "exclusively through the checkpoints across the state border of the Russian Federation". (Plant Instruction, (Exhibits UKR-22, RUS-11).) The Plant Instruction does not, on its face, refer to prohibiting transit across Russia through Belarussian checkpoints, or the nine checkpoints identified in the Veterinary Instruction. However, in an official statement issued by the *Rosselkhoznadzor*, it was explained that the Plant Instruction was intended to prevent the "illegal delivery of quarantined products

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

from the territory of Belarus" and "false transit by the Belarusian and Kazakhstani competent services". (Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014, (Exhibit UKR-88).)

459 Russia's first written submission, para. 31; and opening statement at the first meeting of the Panel, para. 6.

460 Russia's first written submission, paras. 3, 27 and 30; and opening statement at the first meeting of the Panel, para. 6.

461 Russia's first written submission, para. 26. Decree No. 1 provides that all road and railway cargo transportation from Ukraine to Kazakhstan, through the territory of Russia, shall be carried out only from the territory of Belarus and shall be subject to additional conditions related to identification seals and registration cards, at specific control points to be established by the Russian Government. Decree No. 1 was amended in various respects by Decree No. 319 on 1 July 2016, including by extending the restrictions on traffic in transit from Ukraine, destined for Kazakhstan, to traffic in transit from Ukraine, destined for the Kyrgyz Republic. Decree No. 319 also imposed a temporary prohibition on the transit from Ukraine, across the territory of Russia, of goods that would be subject to import duties above zero if imported into Russia, as well as goods covered by Resolution No. 778. (Decree No. 1, (Exhibits UKR-1, RUS-1); and Decree No. 319, (Exhibits UKR-2, RUS-2).) Decree No.1 has been extended to apply until 30 June 2018 by Decree No. 643, (Exhibits UKR-98, RUS-13).

462 Russia's first written submission, para. 26.

463 Russia's opening statement at the first meeting of the Panel, para. 5.

464 Ibid. para. 6.

465 Russia's opening statement at the first meeting of the Panel, para. 6.

466 Ibid.

467 Ukraine's first written submission, paras. 59 and 244; and Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor*, dated 10 October 2016, (Exhibit UKR-75). See also Ukraine's opening statement at the first meeting of the Panel, paras. 9–11.

468 Ukraine's first written submission, paras. 59 and 244. Ukraine similarly argues that Decree No. 1 and Resolution No. 1 would supersede the Plant Instruction, but only to the extent of a conflict between them, because Presidential decrees and Government resolutions are superior to agency instructions in the Russian legal hierarchy, and in this case, the relevant decree and resolution were also promulgated later in time. (Ukraine's first written submission, para. 60; and opening statement at the first meeting of the Panel, para. 13.)

469 Ukraine's second written submission, para. 18.

470 Ukraine's first written submission, para. 244; and opening statement at the first meeting of the Panel, para. 11.

471 Russia's first written submission, para. 25.

472 Ibid. (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156).

473 Appellate Body Report, *EC – Chicken Cuts*, para. 156. (underlining added; footnote omitted)

474 In its first written submission, Ukraine clarifies that its reference to the Plant Instruction in its panel request contained a typographical error. (See Ukraine's first written submission, fn 77 to para. 55; and opening statement at the first meeting of the Panel, para. 18.) Russia also seems to have understood that particular reference to be a typographical error. (See Russia's first written submission, para. 24.)

475 See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.108–7.117.

476 Panel Report, *US – Continued Zeroing*, para. 7.50.

477 Appellate Body Report, *US – Continued Zeroing*, para. 169. See also Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 21–22, where, in connection with arguments concerning a different measure, Ukraine refers to the Appellate Body's statement in *US – Continued Zeroing* to support its argument that Article 6.2 of the DSU does not require that the existence of the measures at issue be demonstrated in a panel request.

478 Panel Report, *US – Orange Juice (Brazil)*, paras. 7.41–7.42.

479 Panel Report, *Russia – Tariff Treatment*, Annex A-1, para. 6.7.

480 See Ukraine's opening statement at the second meeting of the Panel, paras. 6–7.

481 See para. 7.327 above.

482 The introduction to the Veterinary Instruction provides that the prohibition on transit of veterinary Resolution No. 778 goods across Russia from the checkpoints in the territory of Belarus is necessitated by the "detection of gross violations during the transit through the territory of the Republic of Belarus" of veterinary Resolution No. 778 goods. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).)

483 However, see fns 456 and 458 above.

484 Russia's opening statement at the first meeting of the Panel, paras. 5–6; and Ukraine's second written submission, para. 14. This was effected through two resolutions of the Government of the Russian Federation: (a) Resolution No. 842, (Exhibit UKR-13), which added Ukraine to the list of countries whose veterinary and plant goods were subject to Resolution No. 778, but with a proviso that the import ban applying to such goods of Ukrainian origin would be applied from the effective date of paragraph 1 of Resolution No. 959 of the Government of the Russian Federation, dated 19 September 2014, but no later than 1 January 2016; and (b) Resolution No. 1397, (Exhibit UKR-15), which amended Resolution No. 778 to provide that the import ban on specified veterinary and plant goods would be applied to Ukraine from 1 January 2016.

485 Decree No. 1, (Exhibits UKR-1, RUS-1). Decree No. 1 was amended by Decree No. 319 to extend these requirements to Ukrainian traffic in transit destined for the Kyrgyz Republic, as of 1 July 2016. (Decree No. 319, (Exhibits UKR-2, RUS-2).) The control points were established by Resolution No. 1, (Exhibits UKR-3, RUS-4).

486 See, e.g. Ukraine's first written submission, para. 60; and Russia's first written submission, para. 26.

487 The temporary prohibition introduced by Decree No. 319 also applies to the transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU. (Decree No. 319, (Exhibits UKR-2, RUS-2).)

488 Decree No. 1, as amended by Decree No. 319, (Exhibit RUS-1), section 1.1. (underlining original)

489 See para. 7.315 above.

490 Ukraine's panel request, section III.A., p. 5. (underlining original; italics added) See also ibid. section III.A., first sentence, p. 4.

https://doi.org/10.1017/ilm.2019.40 Published online by Cambridge University Press

APPENDIX – SUBSEQUENT CONDUCT CONCERNING ARTICLE XXI OF THE GATT 1947

INTRODUCTION

1.1. Russia has directed the Panel to analyse the "historic perspective" in order to support its interpretation of Article XXI.[1] In particular, Russia has drawn the attention of the Panel to the following documents: (a) statements made by Czechoslovakia in 1949, in the context of its dispute with the United States over certain export controls; (b) statements made by Ghana in 1961, in the context of opposing Portugal's accession to the GATT 1947; (c) statements made by the European Communities and the United States in 1982, in the context of the dispute between the European Communities and Argentina over certain import measures; (d) statements made by the United States in 1985, in the context of its dispute with Nicaragua over an embargo on Nicaraguan goods; and (e) statements made by the European Communities in 1991, in the context of the dispute between the European Communities and Yugoslavia over the withdrawal of certain preferences.[2]

1.2. The Panel recalls that in interpreting the terms of a treaty in accordance with the customary rules of interpretation, it is empowered to consider any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[3] The Panel also recalls that pursuant to Article 13 of the DSU, it is empowered to seek information from "any relevant source" in making its findings.[4] Accordingly, the Panel has conducted a survey of the discussions referred to it by Russia and related documents in order to examine the attitudes of GATT contracting parties and WTO Members on occasions when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.[5] The Panel's conclusions on this survey are contained in paragraphs 7.80 and 7.81 of the Panel Report.

1.3. The Panel wishes to note that it does not consider that certain documents referred to it by Russia establish any relevant conduct of "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. In particular, the Panel notes that statements made by Ghana to justify the imposition of an import ban against Portugal in 1961 were made prior to Portugal's accession, during which the parties had not yet assumed any obligations to one another under the GATT 1947.[6] In the Panel's view, invocations of Article XXI by a contracting party in order to defend measures taken against a non-contracting party, as well as any invocations of Article XXI by non-contracting parties during accession negotiations, cannot establish a pattern of practice between "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. Accordingly, the Panel has omitted from this survey such invocations of Article XXI made in the context of accession negotiations to the GATT 1947 and WTO Agreement.[7]

1.4. Additionally, the Panel observes that on several occasions, GATT contracting parties and WTO Members have unilaterally invoked Article XXI in the context of notifying measures to various GATT and WTO bodies.[8] The Panel recalls the statements of the Appellate Body in *EC – Chicken Cuts* that it is unlikely that a "concordant, common and discernible pattern" of practice can be established from the pronouncements of one or very few parties to a multilateral treaty.[9] The Panel also recalls the Appellate Body's caution about deducing agreement, without more, from "a lack of reaction" or protest by other Members.[10] Accordingly, the Panel does not consider that it can ascribe any weight to the silence of other GATT contracting parties and WTO Members as to these notifications. The Panel has consequently omitted from this survey such unilateral invocations of Article XXI except where they provoked debate.

1.5. The following Section proceeds to summarize the relevant conduct of GATT contracting parties and WTO Members, subsequent to the conclusion of the GATT 1947, when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.

SUBSEQUENT CONDUCT OF GATT CONTRACTING PARTIES AND WTO MEMBERS

United States v. Czechoslovakia (1949)

1.6. In 1948, the United States enforced its "Comprehensive Export Schedule" by imposing export controls on US exports going to certain parts of Europe.[11] At the time, the United States licensed products in short supply or of military significance to Western European countries that were participating in the Marshall Plan, but exports of such products to Eastern European countries that did not participate in the Marshall Plan became subject to export

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controls. Czechoslovakia fell into the group of non-participating Eastern European countries, for which reason products destined for its borders were subject to export licensing controls. The United States explained that one of the purposes of the export control regime was "to prevent the shipment to Eastern Europe of things that would contribute significantly to the military potential of that region".[12] Czechoslovakia asserted that the United States' use of the term "military potential" referred to "an entirely different thing" than what was covered by the terms of Article XXI(b)(ii), in particular, the term "military establishment". Czechoslovakia claimed that the US export control measure was inconsistent with the basic principles of Articles I and XIII of the GATT. Czechoslovakia also requested all relevant information concerning the administration of restrictions and the distribution of licences by the United States pursuant to Article XIII.[13] In response, the United States referred to Articles XXI(b)(i) and XXI(a) of the GATT. The United States stated that it considered it to be "contrary to its security interest—and to the security interest of other friendly countries—to reveal the names of the commodities that it considers to be most strategic".[14]

1.7. At the June 1949 meeting of the GATT Council, Czechoslovakia requested a decision on whether the United States had failed to carry out its obligations under the GATT through its administration of the export licenses.[15] The United Kingdom expressed the view that "every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement".[16] Pakistan stated that Article XXI embodied "exceptions to all other provisions of the Agreement, [and] should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article".[17] Cuba stated that Czechoslovakia's request should be dismissed because it lacked a factual basis. Moreover, Cuba considered that the United States had justified its case under Article XXI "whose provisions overrode those of Article I".[18]

1.8. In response to Czechoslovakia's request for a decision under Article XXIII, only Czechoslovakia voted in the affirmative.[19] Czechoslovakia noted that it did not consider that the contracting parties had made a legally valid decision or correct interpretation of the General Agreement, and that it would regard itself free to take any steps necessary to protect its further interests.[20]

United States – Suspension of Obligations with Czechoslovakia (1951)

1.9. In 1951, the United States requested the GATT Council to formally dissolve its reciprocal obligations with Czechoslovakia under the GATT 1947, and to withdraw the benefits of trade-agreement tariff concessions from Czechoslovakia.[21] The United States justified this request by arguing that the assumption that it was in its and Czechoslovakia's mutual interests to promote the movement of goods, money and people between them was no longer valid.[22] Although the United States did not formally refer to Article XXI of the GATT 1947, it argued that "manifestations of Czechoslovak ill-will" towards the United States and the progressive integration of Czechoslovakia's economy into the Soviet bloc had led the United States to request that the GATT obligations between the two countries be dissolved.[23] Czechoslovakia considered the United States' request to be "another attempt [by the United States] to achieve political ends by means of economic pressure".[24] Czechoslovakia was of the view that the "General Agreement should not be misused for the enforcement of political intentions" and for "forceful, unilateral imposition of a foreign will, by means of the violation of agreements".[25]

1.10. The GATT CONTRACTING PARTIES declared that the United States and Czechoslovakia were free to suspend, each with respect to the other, the obligations of the GATT.[26]

United States – Imports of Dairy Products (1951)

1.11. In 1951, the Netherlands and Denmark each circulated a memorandum to the GATT contracting parties noting the imposition by the United States of certain import controls on dairy products under Section 104 of the Defense Production Act.[27] Section 104 stated that these import controls were "necessary for the protection of the essential security interests and economy of the United States in the existing emergency in international relations".[28] The Netherlands and Denmark considered these restrictions to be inconsistent with Article XI of the GATT 1947.[29] In response, the United States circulated a memorandum noting that these objections had been formally communicated to Congress.[30] The United States also included two statements made to the Senate Banking and Currency Committee by the Assistant Secretary of State and Under Secretary of Agriculture recommending the repeal of Section

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104.[31] The Assistant Secretary of State had asserted to the Committee that "the restrictions required by Section 104 appear to the Department clearly to violate the provisions of the [GATT]."[32] The Under Secretary of Agriculture also noted to the Committee that "[i]t seems unlikely that we will be able to convince these [objecting] countries that certain imports, which would at most have a limited effect on our agriculture, would endanger the essential security interests and economy of the United States."[33] The Under Secretary stated additionally that "if we use the security exception of the [GATT] to justify protection of a few selected products, this would give other countries a good excuse for using the same exception to justify any protective barriers by which they may wish to limit their imports of our farm products."[34]

1.12. At the September 1951 meeting of the GATT contracting parties, the Netherlands and Denmark reiterated their objections to the measure.[35] Denmark also noted that it agreed with the remarks of the Canadian representative in an earlier speech that "it was obvious that defence production and national security would seem to have little connection with the import control of cheese."[36] Italy, New Zealand, Norway, Australia, France, Canada, Finland, the United Kingdom and Sweden also noted their opposition to the measure.[37] Canada asserted that it was difficult "to find any grounds for the action whatsoever".[38] The United States did not contest that the measure infringed the GATT 1947, and responded that Section 104 had been recommended as a last-minute amendment by a committee "which had limited acquaintance with international problems".[39] The United States asserted that the measure should be regarded as an "isolated incident and must not be held as an indication of any reorientation of the basic policy of the United States".[40] The United States noted that vigorous efforts were being made by the executive branch to secure the repeal of the measure, and asked that its government be given the opportunity to complete this action.[41] The Council agreed to keep this matter on its agenda.[42]

1.13. At the October 1951 meeting of the GATT contracting parties, a resolution was adopted affording the United States a reasonable period of time to repeal the measure, subject to a reporting obligation.[43] In 1952, the United States provided a report noting that Section 104 had been revised but not repealed.[44] At the October 1952 meeting of the GATT contracting parties, several contracting parties expressed their continuing opposition to the measure.[45] The United States acknowledged that the measure was inconsistent with the GATT 1947 and noted that it would not object to other contracting parties withdrawing reasonably necessary concessions.[46] The GATT CONTRACTING PARTIES agreed to convene a Working Party to examine the issue.[47] In November 1952, the Working Party recommended that the GATT contracting parties authorize the Netherlands to impose a retaliatory quota on wheat flour from the United States.[48] This recommendation was adopted as a resolution at the November 1952 meeting of the GATT CONTRACTING PARTIES.[49]

1.14. The GATT CONTRACTING PARTIES re-authorized this retaliatory quota on an annual basis until 1959, pursuant to the recommendations of subsequent Working Parties.[50]

United States – Section 232 of the Trade Expansion Act (1968)

1.15. In 1968, the United Kingdom and Japan submitted a notification to the Committee on Trade in Industrial Products expressing concern that certain powers given to the President of the United States under the Trade Expansion Act of 1962 could disrupt foreign trade.[51] During the Committee's first examination of the notified barriers in 1969[52], Japan expressed concern over the "lack of a definition of 'security'" and "the wide discretion as to form of action and the lack of a time-limit for carrying out investigations" under the Trade Expansion Act of 1962.[53] The United States responded that the legislation "was in conformity with Article XXI", and pointed out that "the existence of an institutional framework for national security cases could be regarded as a safeguard, since it ensured full consideration of the merits of each case before action was taken."[54] In 1970, at the next examination of these notifications by a Working Group convened for this purpose, the Working Group concluded that there was a "divergence of view as to the meaning and scope of certain essential concepts in the GATT, in particular . . . the scope of some of the exceptions . . . especially Articles XX and XXI".[55]

1.16. In 1970, the Joint Working Group on Import Restrictions was notified of a global quota maintained by the United States on petroleum oil products.[56] At the April 1970 meetings of the Joint Working Group[57], the European Communities and Canada asserted that they considered these restrictions to be inconsistent with the GATT 1947.[58] The European Communities did not accept that these restrictions could be justified by national security

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considerations and considered that the restrictions had been applied to the benefit of the petroleum industry of the United States.[59] The European Communities also asserted that a recent US Task Force had given arguments against the maintenance of the system for security reasons.[60] The United States responded that the restrictions had been applied under Section 232 of the Trade Expansion Act of 1962 "in accordance with Article XXI", given the "high degree of industrialization of the United States as well as its remoteness from some major oil supplying countries".[61]

1.17. Although the Council agreed that the Joint Working Group on Import Restrictions should continue its review of import restrictions, the Joint Working Group did not meet again after 1970.[62]

Austria – Penicillin and Other Medicaments (1970)

1.18. In 1970, the Joint Working Group on Import Restrictions was notified of certain restrictions maintained by Austria on penicillin, tyrothricin and related medicaments, which took the form of either import licensing restrictions or quotas.[63] At the April 1970 meetings of the Joint Working Group[64], a question was posed to Austria as to "what part of Article XXI might cover this restriction".[65] Austria responded that it regarded the restriction to be necessary under Article XXI(b)(ii) of the GATT 1947 "in order to have available a local source of supply in case of emergency".[66] In 1971, these restrictions were considered again by the Group of Three.[67] The Group of Three noted Austria's explanation that the restrictions were maintained for defence reasons, but concluded that as "other countries find it possible to do without restrictions, it should … be possible for Austria to do the same".[68] In 1972, these restrictions were considered again by the Group on Residual Restrictions.[69] At the January 1972 meeting of the Group, the United States recalled the recommendation of the Group of Three that Austria should eliminate the restrictions on these products "as other countries did not find it necessary to maintain them for security or other reasons".[70] At the July 1972 session of the Committee on Trade and Development, in the context of discussions on the Second Report of the Group of Three[71], Austria asserted that it would not be possible to liberalize imports of these products "for reasons previously stated", but noted that "sympathetic consideration would be given in this connexion to any trade problems faced by developing countries."[72]

1.19. Austria continued to maintain certain restrictions on penicillin and related medicaments until December 1990, when these were abolished as part of the Uruguay Round negotiations at the request of the United States.[73]

Sweden – Import Restrictions on Certain Footwear (1975)

1.20. In 1975, Sweden notified the GATT Council of its intention to introduce a global import quota system for leather shoes, plastic shoes and rubber boots. Sweden advised that it was introducing this system "in order to allow time to remedy the serious difficulties that have arisen in this sector of the industry", referring to downward trends in the Swedish shoe industry that had begun in the 1960s and had accelerated during the 1970s.[74] Sweden considered that the reasons underlying this development were the relatively high production costs in Sweden, combined with the traditional liberal trade policy pursued by the Swedish Government, which thereby encouraged and made possible a very substantial increase in the volume of imports. Sweden considered that "[t]he continued decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy."[75] Sweden's security policy necessitated the maintenance of a minimum domestic production capacity in vital industries, such capacity being considered by Sweden to be "indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations".[76] At the October 1975 meeting of the GATT Council, several contracting parties expressed concern at the Swedish decision, taken at a time of high unemployment in their own countries.[77] They noted that Sweden had not provided a detailed economic justification for the measures, and expressed doubts as to the justification for these measures under the GATT.[78] Sweden responded that it considered the measure to be taken in conformity with "the spirit of Article XXI", but added that it did not wish to deprive contracting parties of the possibility to consult and therefore declared its readiness to consult bilaterally with interested contracting parties even if such a consultation was not formally required by Article XXI.[79] Many delegations reserved their rights under the GATT and took note of Sweden's offer to consult.[80]

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1.21. In March 1977, Sweden notified the GATT Council that it intended to terminate the quotas in respect of leather shoes and plastic shoes as of 1 July 1977.[81]

European Communities v. Argentina (1982)

1.22. In 1982, Argentina brought to the GATT Council's attention the suspension by the European Communities, Canada and Australia of imports from Argentina.[82] Argentina noted that there had been no pronouncement by the UN Security Council authorizing the application of Article XXI(c) of the GATT.[83] Argentina stated that the measures adopted by the European Communities (other than the United Kingdom), Canada and Australia were entirely without justification, coming from countries with which the Argentine Republic had maintained relations. Such measures therefore constituted a hostile act and "flagrant economic aggression".[84] Further, such measures were not derived from any "economic or commercial issue", but from the unjustified interference in a long-standing territorial dispute in the region of the Malvinas Islands.[85] Argentina stated that the measures adopted by the United Kingdom similarly had no justification, even under Article XXI(b) of the GATT, since the Security Council resolution which had recognized that there was a breach of the peace situated the problem solely in the region of the Malvinas Islands, and consequently the metropolitan territory of the United Kingdom was not affected.[86] The European Communities, Canada and Australia issued a joint communication stating that they had taken the measures at issue in light of the situation addressed in UN Security Council Resolution 502, on the basis of their "inherent rights of which Article XXI of the General Agreement is a reflection".[87]

1.23. At the May 1982 meeting of the GATT Council, Argentina reiterated that the measures were not applied for "economic and trade reasons", but were based on reasons of a "political nature and were meant to exert political pressure on the sovereign decisions of Argentina in order to intervene in a conflict in which only one of the countries was involved".[88] Argentina stressed that UN Security Council Resolution 502 had not asked for or authorized the adoption of any measures such as the trade sanctions taken, nor were the measures justified under Article XXI. Argentina considered that the "concerted coercive action" taken by a number of economically powerful countries violated the letter and the spirit of the GATT.[89] The European Communities stressed that the measures were taken on the basis of their inherent rights, of which Article XXI was a reflection, and did not require notification, justification or approval, as confirmed by 35 years of implementation of the GATT.[90] Canada stated that the situation which had necessitated the measures needed to be resolved by appropriate action outside the GATT, as the GATT had neither the competence nor the responsibility to deal with the political issue that had arisen. Canada also noted that Article XXI did not contain a definition of "essential security interests", and that many contracting parties had taken the same or similar actions for political reasons. In the present case, the action had been taken to encourage a peaceful settlement by temporarily suspending the normal operation of some provisions of the GATT. Canada considered that the fact that the action had been taken was not really unprecedented; what was unprecedented was the examination of the action in the GATT.[91] Australia endorsed the statements of the European Communities and Canada, and stated that the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification.[92]

1.24. Peru, Brazil, Uruguay, Zaire, Colombia, Dominican Republic, Cuba, Pakistan, Romania and Poland expressed opposition to, or concern at, what they considered was a dangerous precedent involving the use by contracting parties of trade and economic measures for non-trade reasons, and which were not justified under the GATT.[93] India, Yugoslavia, Indonesia, Hungary and Czechoslovakia considered more generally that the GATT Council should approach the issues in this case with caution.[94] Japan also considered that the interjection of political elements into GATT activities would not facilitate the Organization's carrying out of its functions.[95]

1.25. The Philippines noted that UN Security Council Resolution 502 referred only to Argentina and the United Kingdom, while the joint communication issued by the European Communities, Canada and Australia gave the impression that the European Communities, Canada and Australia had taken these measures in the exercise of their inherent rights, of which Article XXI was a reflection. The Philippines questioned this argument as applied to the European Communities, which was not a contracting party to the GATT 1947.[96] Spain considered that the actions of the United Kingdom could be justified under Article XXI(b)(iii), but had doubts that the same could be said for other States, which were not technically in the same position as the United Kingdom with respect to Argentina.[97]

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1.26. The United States considered that, regrettably, contracting parties had in the past used sanctions involving trade in the context of their security interests as they perceived them. However, the GATT had never been the forum for resolution of disputes whose essence was security and not trade, and for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes. Trade measures could not be "split off" as if taken in a vacuum, since the specific justification of international measures could not be discussed in the context of broadly embargoed trade.[98] The United States also expressed the view that the GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise, since no country could participate in the GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests.[99] New Zealand questioned whether the GATT was the appropriate body in which the circumstances that had led to the imposition of economic sanctions should be debated. New Zealand stated that it has also imposed sanctions on Argentina for reasons similar to those given by the European Communities, Canada and Australia. New Zealand considered that it had an inherent right as a sovereign state to take such action and that such actions were in conformity with New Zealand's rights and obligations under the GATT.[100] Singapore expressed the view that the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests, while also recognizing the danger of a broad interpretation of Article XXI.[101] Norway also considered that the European Communities, Canada and Australia did not contravene the GATT in taking the measures in question.[102]

1.27. At the June 1982 meeting of the GATT Council, Argentina formally requested an interpretation of Article XXI of the GATT 1947: (a) to know whether Article XXI exempted contracting parties from obligations regarding notification and surveillance procedures; (b) to determine the natural rights which could be inherent for contracting parties and had been invoked in relation to Article XXI in general; (c) to establish whether any contracting party, including one not involved in a problem between two other contracting parties, could interpret "per se" that there existed an emergency in international relations as referred to in Article XXI(b)(iii) and consequently take unilateral measures; and (d) to determine whether one or more contracting parties could take action under Article XXI(c) without the prior existence of a specific provision adopted by the United Nations authorizing the application of restrictive trade measures.[103] This proposal was supported by a number of contracting parties.[104] Canada did not support the proposal, expressing the view that the case of Ghana was the only appropriate precedent for the present case, and asserting that it provided an example of the notion of national security being interpreted in a broad sense by the government of that country.[105] Australia doubted the need for an interpretation of Article XXI, given its infrequent use thus far.[106] The United States considered that debate in the Council would not serve a useful purpose, stressing that the GATT had no role in a crisis of military force.[107] Japan, New Zealand and Norway similarly expressed doubts that a note interpreting Article XXI would lead to useful results.[108] The European Communities suggested that if the Council were to adopt a decision, the proposal should have a chance of obtaining a consensus.[109] The Chair subsequently reported that informal consultations with delegations to arrive at suggestions for resolving the matter had not resulted in conclusions that could lead to such suggestions.[110]

The 1982 Decision regarding Article XXI

1.28. On 29 November 1982, the contracting parties adopted a Ministerial Declaration in which the contracting parties decided, in drawing up their work program and priorities for the 1980s, to "abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".[111] On 30 November 1982, the GATT CONTRACTING PARTIES adopted a Decision Concerning Article XXI of the General Agreement (1982 Decision), setting forth procedural guidelines for the application of Article XXI, until such time as the GATT CONTRACTING PARTIES might decide to make a formal interpretation of Article XXI.[112] Under the 1982 Decision, the GATT CONTRACTING PARTIES noted that: (a) the exceptions envisaged in Article XXI "constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"; (b) recourse to Article XXI could constitute an element of disruption and uncertainty for international trade, and "affect benefits accruing to contracting parties under the GATT"; and (c) consequently, "in taking action in terms of the exceptions provided in Article XXI", contracting parties should take into consideration the interests of third parties which might be affected. The GATT CONTRACTING PARTIES therefore undertook to ensure that contracting parties should be informed to the fullest extent possible of trade measures taken

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under Article XXI, and noted that all contracting parties affected by actions taken under Article XXI retained their full rights under the GATT.[113]

United States – Imports of Sugar from Nicaragua (1983)

1.29. In 1983, the President of the United States announced that the United States would be reducing Nicaragua's allocation of the total import quota for sugar. The President stated that by denying to Nicaragua a foreign exchange benefit, the United States "hoped to reduce the resources available to [Nicaragua] for financing its military build-up, and its support for subversion and extremist violence in the region".[114] This announcement was subsequently implemented pursuant to the President's authority under the Tariff Schedules of the United States to give due consideration to the interests of domestic producers in the sugar market.[115]

1.30. Following the announcement, Nicaragua requested consultations with the United States, arguing that the measure would create "serious adverse trade effects".[116] The consultations did not achieve a mutually satisfactory solution, and Nicaragua subsequently requested the establishment of a panel.[117] At the July 1983 meeting of the GATT Council, the United States stated that "[t]he motives for the measure were not strictly trade considerations; and it followed that any examination of this matter in purely trade terms would be sterile or disingenuous."[118] The United States also questioned the utility of resolving this issue by establishing a panel, stating that "[a] political solution could resolve the trade aspect of this dispute; but a GATT panel could not appropriately examine or assist in the resolution of the political or security issues that lay at its core."[119] India considered that the Council should follow established GATT practice and establish a panel, as Nicaragua had requested a panel after fulfilling the proper procedures and that "[i]t was not for the Council to judge the merits of the case at this stage."[120]

1.31. The Council agreed to establish a panel[121], and the panel's composition and terms of reference were announced at the October 1983 meeting of the GATT Council.[122]

1.32. Before the panel, Nicaragua argued that the United States had violated Articles II, XI and XIII and Part IV of the GATT 1947 by reducing its sugar quota below the level agreed upon in the United States schedule of concessions.[123] Nicaragua also cited the "fundamental principle" embodied in paragraph 7(iii) of the 1982 Ministerial Declaration that "no contracting party should use trade measures to exert pressure for the purposes of solving non-economic problems."[124] In response, the United States argued that it was "neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms".[125] In the view of the United States, while the action did affect trade, it was not taken for trade-policy reasons.[126] Consequently, any attempt to discuss the issue in purely trade terms, "divorced from the broader context of the dispute", would be disingenuous.[127] The panel considered that within its terms of reference, it could examine the measures "solely in the light of the relevant GATT provisions, concerning itself with only the trade issues under dispute", and therefore did not consider Article XXI.[128] The panel proceeded to conclude that the reduced sugar quota was inconsistent with the United States' obligations under Article XIII:2 of the GATT 1994, and exercised judicial economy over Nicaragua's other claims.[129]

1.33. At the March 1984 meeting of the GATT Council, Nicaragua commended the panel's findings and added that it had been perplexed by "the US reasons for adopting the measure, the refusal to have recourse to exceptions provided under the General Agreement, and the questioning of the GATT's competence to examine this case".[130] Nicaragua "wondered what would the United States consider to be the competent forum for discussing the justification of a measure designed to restrict access to a market which had the effect of reducing export earnings".[131] The United States reiterated its view that examination of the matter in purely trade terms within the GATT was disingenuous, noting that "the reduction in Nicaragua's sugar imports had not secured any economic or trade benefit for the United States."[132] The United States added that while it would not object to the adoption of the report, a resolution of its broader dispute with Nicaragua would be required before it would remove the contested measure.[133] Venezuela, Mexico and Argentina considered that the US measure had contravened the Ministerial Declaration[134], and Cuba, the Dominican Republic and Switzerland criticized the United States for using economic measures to secure political objectives.[135] Several contracting parties including Venezuela, Mexico and Brazil and the United Kingdom, on behalf of Hong Kong reiterated the importance of positively resolving the case through the GATT's dispute settlement system.[136] Argentina added that it could not understand why the Panel had not examined the motivations for the

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measure outside of trade considerations, and that it "regretted that the United States had been unable to advance any argument based on the General Agreement to justify its measure".[137] Poland stated its firm belief that no measure having adverse trade implications for another contracting party could be dismissed as irrelevant for the GATT.[138]

1.34. The Council took note of these statements and adopted the panel's report.[139]

1.35. At the May 1984 meeting of the GATT Council, Nicaragua noted that the United States had recently increased its total sugar import quota without allocating any share of this increase to Nicaragua.[140] Nicaragua asked the United States to inform the Council of its intentions regarding the recommendations of the contracting parties. The United States maintained its earlier position that the lifting of the measures would first require a "resolution of the broader dispute".[141] At the November 1984 meeting of the GATT Council, Nicaragua noted that not only had the United States failed to implement the panel's recommendations, it had once again applied a measure limiting Nicaragua's sugar quota.[142] Nicaragua noted that "[i]f the measure corresponded to security considerations, Nicaragua wondered why the United States had not invoked Article XXI."[143] The United States maintained its previous position.[144] The Council took note of these statements.[145]

European Communities v. Czechoslovakia (1985)

1.36. In 1985, Czechoslovakia notified the Group on Quantitative Restrictions and Other Non-Tariff Measures that it considered Italy and the United Kingdom to be maintaining a discriminatory embargo on exports of certain electronic products to Czechoslovakia.[146] The United Kingdom and Italy asserted that the measures were maintained under Article XXI(b) of the GATT 1947.[147] In 1986, Czechoslovakia submitted an additional notification, responding to the United Kingdom that "the imports of computers and related equipment . . . mentioned in the Czechoslovak notification are not related to either fissionable materials or traffic in arms or to traffic in other goods carried on for the purposes of supplying a military establishment."[148] Czechoslovakia also asserted that "[t]he two contracting parties in this case cannot be said to be in a state of belligerency or other emergency situation."[149] Czechoslovakia considered that the United Kingdom had not demonstrated "a genuine causal link between its security interests and the trade action taken", and therefore did not consider the action to be in conformity with the GATT 1947.[150]

United States v. Nicaragua (1985)

1.37. In 1985, the United States circulated a communication stating that it had imposed a complete import and export embargo on Nicaragua and declared a national emergency due to the extraordinary threat to national security posed by Nicaragua's policies and actions.[151] At a special meeting of the GATT Council requested by Nicaragua in May 1985, Nicaragua argued that this measure "violated both the general principles and certain specific provisions" of the GATT 1947.[152] Nicaragua argued that the US Administration, in declaring a national emergency to deal with a perceived threat by Nicaragua, seemed to have lost any sense of proportion and was trying to override the principles of international trade.[153] Nicaragua said that it was absurd to suggest that it could pose a threat to the national security of the United States, pointing to the relative power and size of the two countries as well as the absence of any "armed conflict between the United States and Nicaragua".[154] Nicaragua also noted that "the United States, in stating to the Security Council that its measures were principally intended to prevent Nicaragua from having the benefit of trading with the United States, had thereby acknowledged that this was not a matter of national security but one of coercion."[155]

1.38. The United States stated that it took the measures for "national security" reasons and that the measures fell within the exception contained in Article XXI(b)(iii).[156] The United States emphasized that Article XXI left it to each contracting party to judge what measures it considered necessary for the protection of its essential security interests.[157] According to the United States, it was not for the GATT to approve or disapprove this judgement.[158] The United States also considered that GATT, as a trade organization, had "no competence to judge such matters" and that its effectiveness in addressing trade issues would only be weakened if it became a "forum for debating political and security issues".[159] Nicaragua responded that Article XXI "was not to be applied in an arbitrary fashion" and required "some correspondence between the measures adopted and the situation giving rise to their adoption".[160] Nicaragua also considered that "since this matter involved commercial and trade measures, the GATT, as the institution responsible for the conduct of international trade, should express a view on this issue."[161]

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1.39. Cuba, Argentina, Peru, Brazil, Spain, Czechoslovakia, Romania, Yugoslavia and Portugal considered that the measures taken by the United States were incompatible with Article 7(iii) of the 1982 Ministerial Declaration[162], and Poland, Chile, Hungary, Austria, Sweden, Switzerland, Jamaica and China, as an observer, criticized the use of economic measures to secure political objectives.[163] Argentina and Brazil additionally asserted that the measures were incompatible with the Charter of the United Nations (UN Charter), and Argentina cited incompatibility with the 1982 Decision.[164]

1.40. Cuba, Poland and Chile asserted that the GATT was the proper forum for discussing disputes with trade implications.[165] Poland noted that this was required to ensure that "GATT's conciliatory functions and responsibilities have practical meaning."[166] Chile did not consider that an invocation of Article XXI implied that the trade consequences of measures taken under it could not be discussed under the GATT.[167] Hungary noted that while ideally politics and trade should be kept separate, a total separation was not realistic and was "evidenced by the provisions in the General Agreement covering cases in which political and commercial considerations were in opposition".[168]

1.41. Canada conversely considered that "this was fundamentally not a trade issue", and urged the two parties to seek a solution outside of the GATT context.[169] The European Communities stated that its concern was to protect the GATT multilateral system from being damaged by any ill-considered development of a situation that could neither be dealt with nor settled in the GATT framework.[170] The European Communities agreed that the GATT was not the appropriate forum because the US measures were only part of a broader situation and the GATT had never had the authority or competence to settle "disputes essentially linked to security".[171] Japan agreed that even though "the issue now before the Council obviously had a trade aspect, that aspect stemmed from deep roots and it had to be admitted that GATT was not competent to grapple with those roots".[172]

1.42. Spain and Czechoslovakia considered that the measures taken by the United States could not be justified under the provisions of Article XXI.[173] Cuba and Peru argued that Nicaragua could not possibly threaten the security of the United States, and Cuba considered that the United States was "putting forward various political pretexts, including a reference to Article XXI" in order to "punish Nicaragua for not serving US interests".[174] Cuba asserted that "recourse to Article XXI had to be backed by certain facts" to effectively guarantee against an abuse of the GATT system.[175] Brazil noted that the right to invoke Article XXI "should only be exercised in the light of other international obligations such as those assumed under the UN Charter".[176] Czechoslovakia stated that the United States' interpretation of Article XXI would enable any contracting party wanting to justify introduction of certain trade measures against any other contracting party to simply refer to Article XXI and declare that its security was threatened. On the contrary, Czechoslovakia considered that Article XXI "dealt with emergency situations and therefore had to be applied according to the specific provisions in paragraphs b(i), (ii), or (iii)".[177]

1.43. India argued that "a contracting party having recourse to Article XXI(b)(iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken; the security exception should not be used to impose economic sanctions for non-economic purposes".[178] India did not consider that the United States had established such a nexus.[179]

1.44. Sweden agreed with the United States that it was "up to each country to define its essential security interests under Article XXI", but noted that "contracting parties should be expected to exercise their rights under that Article with utmost prudence."[180] Finland, Switzerland, Norway, Iceland, Egypt and Portugal expressed similar views.[181] Sweden further considered that the United States had not shown such prudence in choosing to give "a too far-reaching interpretation" of Article XXI.[182] The European Communities agreed that Article XXI "left to each contracting party the task of judging what was necessary to protect its essential security interests", but noted that such discretion should be exercised in a spirit of "responsibility, discernment, moderation, ensuring above all that discretion did not mean arbitrary application".[183]

1.45. Australia stated that the United States was permitted under Article XXI "to take action of this kind with no requirement to justify such action", noting that the UN Security Council was the appropriate forum for the discussion of such issues. Nevertheless, Australia believed that contracting parties should avoid any action which could threaten

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GATT's credibility and undermine attachment to the principles of an open multilateral system. Australia considered that, while in principle, Nicaragua retained its GATT rights, in practical terms the US action had rendered this right inoperative.[184] Canada expressed a similar view.[185]

1.46. Nicaragua circulated a draft decision to the contracting parties for their consideration, but the Council agreed to defer any determination on this matter to its next meeting.[186] Nicaragua subsequently requested consultations with the United States in relation to this matter.[187] At the July 1985 meeting of the GATT Council, Nicaragua requested the establishment of a panel.[188] The United States reiterated the futility of resolving this issue through GATT procedures, as the trade effects of the measure had already been acknowledged and the export embargo had removed any opportunity for Nicaragua to retaliate.[189] The United States considered Nicaragua's request for a panel as "a further attempt ... to politicize GATT".[190] The United States also contended that under Article XXI(b) a panel "could neither examine the national security reasons for the US action, nor determine the appropriateness of invoking the security exception".[191] The European Communities considered that each party had to judge on its own whether to invoke Article XXI. The European Communities questioned what a panel could do in this case, since it could not interpret Article XXI and the United States had already recognized trade prejudice.[192] The European Communities said that it could not oppose a contracting party's request for a panel, provided the terms of reference clearly did not include interpretation of Article XXI.[193] Canada expressed full agreement with the United States that only the individual contracting party itself could judge questions involving national security, noting that a panel could not make that judgment.[194] Nevertheless, Canada considered that measures taken under Article XXI could have trade effects which could be considered by a GATT panel. Canada considered that every contracting party had a right to request and to receive a hearing of a panel on any GATT-related issue, even where a panel was unlikely to be able to make a useful finding. Canada agreed that a panel would serve no useful purpose in the present case, since nullification and impairment of benefits had already been admitted and Nicaragua had no means to retaliate under Article XXIII:2.[195] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[196]

1.47. At the October 1985 meeting of the GATT Council, the United States agreed to the establishment of a panel on the condition that it "could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States".[197] At the March 1986 meeting of the GATT Council, the panel was established with the aforementioned carve-out from its terms of reference.[198]

1.48. Before the panel, Nicaragua argued that the embargo imposed by the United States had deprived Nicaragua of benefits under Articles I:1, II, V, XI:1, XIII, XXIV, XXXVI, XXXVII and XXXVIII of the GATT 1947.[199] Nicaragua argued that the embargo therefore constituted a *prima facie* nullification or impairment of benefits accruing to Nicaragua under the General Agreement. Nicaragua stressed that whether the invocation of Article XXI(b)(iii) was justified or not, benefits accruing to Nicaragua under the General Agreement had been seriously impaired or nullified as a result of the embargo. Nicaragua argued that it had been recognized both by the drafters of the General Agreement and by the contracting parties that an invocation of Article XXI did not prevent recourse to Article XXIII. Nicaragua said that it had no reason to expect that an embargo would cut off all trade relations with the United States when the United States' tariff concessions were negotiated (i.e. between 1949 and 1961) and that the embargo had in fact nullified or impaired the benefits accruing to Nicaragua under all of the trade-facilitating provisions of the General Agreement.[200]

1.49. The United States reiterated its position that its actions were valid under Article XXI, but that the panel could not in any event examine the validity of, nor the motivation for, its invocation of Article XXI(b)(iii) within its terms of reference.[201] The United States agreed that a measure not conflicting with obligations under the General Agreement could be found to cause nullification and impairment, and that an invocation of Article XXI did not prevent recourse to the procedure of Article XXIII. However, the United States argued that nullification or impairment could not be presumed in cases in which Article XXI was invoked.[202] Rather, this was dependent on the facts and circumstances of the particular case, including the expectations that the contracting party bringing the complaint could reasonably have had when it negotiated its tariff concessions. The United States did not consider it meaningful for the Panel to propose in the present case a ruling on the question of whether nullification or impairment could be caused through measures under Article XXI.[203]

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1.50. The panel stated that it had not considered the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article because this examination was precluded by its mandate.[204] The panel concluded that as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, "it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement."[205] In examining the embargo in the light of Article XXIII:1(b), the panel noted the question of whether the nullification or impairment of the trade opportunities of Nicaragua through the embargo constituted a nullification or impairment of benefits accruing to Nicaragua within the meaning of Article XXIII:1(b). In the panel's view, this question raised basic interpretive issues relating to the concept of non-violation and nullification and impairment which had not been addressed by the drafters of the GATT or decided by the contracting parties. Against this background, the panel felt that it would only be appropriate for it to propose a ruling on these issues if such a ruling would enable the contracting parties to draw practical conclusions from it in the case at hand.[206] The panel reasoned that, as long as the embargo was not found to be inconsistent with the General Agreement, the United States would be under no obligation to follow a recommendation by the contracting parties under Article XXIII:2 to withdraw the embargo.[207] Moreover, even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether it was justified under Article XXI, the contracting parties could, in the circumstances of the present case, take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo. In the light of all these considerations, the panel decided not to propose a ruling on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.[208] However, the panel noted that embargoes such as those imposed by the United States, independent of whether they were justified under Article XXI, ran counter to the basic aims of the GATT 1994 and encouraged each contracting party to "carefully weigh[] its security needs against the need to maintain stable trade relations".[209]

1.51. At the November 1986 meeting of the GATT Council, Nicaragua expressed disappointment that the panel report had neither determined the level of nullification or impairment of Nicaragua's rights under the GATT 1947, nor made any specific recommendations.[210] Nicaragua also noted that it "remained clear that the United States had imposed the embargo not for reasons of security, but for political coercion" and noted that the case involved a "clear misuse of Article XXI".[211] Nicaragua requested that the Council recommend a removal of the embargo, authorize special support measures to compensate Nicaragua for damage caused by the embargo, and prepare an interpretive note on Article XXI which would reflect the elements of this case.[212] Nicaragua also asked that in making such recommendations, the Council give consideration to the ruling of the International Court of Justice (ICJ) "as proof that the conditions necessary for invoking Article XXI had not been met".[213] Nicaragua added that it could not support the adoption of the report until the Council was in a position to make such recommendations.[214]

1.52. The United States said that the panel had reached sound conclusions in a difficult situation and recommended that the Council adopt the report.[215] The United States stated that it continued to believe that this dispute should never have been brought to GATT. There were and had been many instances of trade sanctions that had been imposed by various contracting parties for reasons, it could be surmised, of national security. Rarely had those situations even been raised in GATT, and never before had a party insisted on a panel, because contracting parties, including those against whom sanctions had been imposed, had tacitly recognized that GATT, by its traditions, its competence, and the terms of Article XXI, could not help resolve such matters, and that pressing the issue would only weaken GATT's intended role.[216] In this regard, the United States observed that "GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations."[217] The United States also agreed with the panel's decision not to address the "novel and delicate question of nullification and impairment in a situation of Article XXI trade sanctions" when the outcome of such question "could create a precedent of much wider ramifications for the scope of GATT rights and obligations but which would serve no useful purpose in the particular matter before the [p]anel".[218] The United States considered that nullification or impairment in situations where no GATT violation had been found was a "delicate issue, linked to the question of 'reasonable expectations'."[219] According to the United States, applying the concept of "reasonable expectations" to a case of trade sanctions motivated by national security

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considerations would be "particularly perilous", since at a broader level, those security considerations would nevertheless enter into expectations.[220]

1.53. Chile noted that "Article XXI should be invoked only when absolutely necessary to protect national security interests, and not to punish another contracting party."[221] Nigeria stated that Article XXI could only be invoked "in cases of a state of war or emergency", and that neither was the case with the US embargo as "[t]he ICJ had found no evidence that Nicaragua's policies threatened the United States and thus had found no justification for the embargo."[222] Argentina asserted that it was clear to the international community at large that Article XXI had been improperly invoked and that "the ICJ had confirmed that the US embargo was not compatible with GATT."[223] Peru rejected the use of trade measures for political coercion "unless such action was approved by the UN Security Council" and noted that the UN General Assembly had condemned the embargo.[224] Colombia, Trinidad and Tobago and Czechoslovakia expressed similar views.[225] Sweden expressed concern that the restricted terms of reference in this dispute should not prejudice the mandate of future panels, noting that panels "should be able to examine all relevant GATT Articles, including Article XXI".[226] Jamaica also expressed concern that the restricted terms of reference had been agreed upon without prior examination by the contracting parties.[227]

1.54. Hungary argued that Article XXI provided discretion to the contracting parties to judge whether circumstances warranted its invocation, but noted that "the most powerful trading nations should demonstrate the greatest self-restraint."[228] The European Communities reiterated its view that the United States "alone had the sovereign right to determine its national security interests", and noted that Article XXI was an "essential safety valve" which the European Communities did not support being subject to further interpretation, discussion, or negotiation either in the Council or in the new round.[229] That said, the European Communities also considered that the discretionary rights inherent in Article XXI should not be arbitrarily invoked.[230] Several GATT contracting parties also reiterated views expressed at earlier meetings of the Council.[231]

1.55. The Council concluded that it could not adopt the panel's report without consensus, but agreed for the Chair to engage in informal discussions and to keep this matter on its agenda.[232]

1.56. At the April 1987 meeting of the GATT Council, Nicaragua reiterated its position that it could not support the adoption of the report until the Council was in a position to make recommendations.[233] It noted that such recommendations would need to consider the decisions of other fora, in particular, the ICJ "which had concluded that the embargo was not necessary to protect any US security interest, as well as Resolutions 40/188 and 41/164 of the United Nations General Assembly which called for the immediate cessation of the embargo".[234] Nicaragua also argued that certain amendments that the United States had proposed to UN document A/C.2/41/L.2 suggested that it did consider the GATT to have competence to rule on this matter.[235] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and that the panel's findings confirmed this position. The United States reiterated that with respect to this and other similar issues brought before the Council in the past, the GATT, by its traditions, its competence, and the terms of Article XXI itself, could not resolve cases where trade sanctions were imposed for national security reasons.[236] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[237]

1.57. At the July 1987 meeting of the GATT Council, Nicaragua circulated a draft decision adopting the panel report, but recommending that the United States take into consideration the negative trade effects of the embargo and authorizing contracting parties wishing to do so to grant trade concessions to Nicaragua.[238] Nicaragua reiterated its view that "no one believed that Nicaragua was a threat to any country's security" and that it "could not accept that the United States had the right to invoke Article XXI and still less to impose the embargo".[239] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and condemned Nicaragua's draft resolution as politically motivated.[240] The United States also asserted that the panel's report had found that "the United States was under no obligation to remove the embargo", and reiterated its position that the United States "had acted in full conformity with its GATT rights and obligations".[241] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[242] At the November 1987 meeting of the GATT Council, Nicaragua noted that the President of the United States had proposed that the embargo be renewed for an additional six months.[243] Nicaragua expressed its intention to request that the contracting parties

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implement paragraph 21 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance at its Forty-Third Session.[244] The Council took note of these statements.[245]

1.58. At the June 1989 meeting of the GATT Council, Nicaragua noted that the President of the United States had sent a message to Congress in April 1989 extending the national emergency and economic sanctions against Nicaragua indefinitely.[246] Nicaragua also read out an official United States document stating that trade sanctions were an essential element of the United States policy regarding Nicaragua, and that, in the United States' view, present conditions in Nicaragua did not justify the lifting of trade sanctions.[247] Nicaragua noted that this document "did not refer to the protection of the United States' essential security interests, but exclusively to Nicaragua's internal matters" and thus "infringed the fundamental principles of the United Nations Charter and other instruments of international law" and could not be justified under Article XXI.[248] Nicaragua called on the contracting parties to "impose a limit on the irresponsibility with which the United States had claimed to interpret the provisions of Article XXI".[249] Nicaragua also noted that it still could not support the adoption of the panel's report, as to do so would create a dangerous precedent by denying Nicaragua the right to have its complaint examined in accordance with Article XXIII:2.[250] The United States expressed surprise that Nicaragua had brought this issue back to the Council some two and a half years after the first consideration of the panel report, and renewed its request for the adoption of the panel's report, as it believed no other resolution of the matter was realistic.[251] The United States also asserted that the panel "had confirmed that the United States was within its rights to invoke Article XXI".[252] The Council took note of these statements.[253]

1.59. In March 1990, Nicaragua circulated a communication noting that the United States had lifted the embargo and other economic measures on Nicaragua.[254] At the April 1990 meeting of the GATT Council, Nicaragua welcomed the removal of the embargo, but noted that the dispute had demonstrated that the GATT "did not have mechanisms to establish a proper balance between rights and obligations".[255] The United States stated that "in light of changed circumstances and recent events, the conditions which had necessitated action under Article XXI of the General Agreement had ceased to exist" and it had consequently terminated the embargo.[256] The United States also noted its intention to restore Nicaragua's sugar allocation.[257] Cuba stated that the embargo "had been imposed for political reasons and its lifting was a reminder of its political nature and coercive character".[258] The Council took note of the statements.[259]

1.60. The panel report in *United States – Trade Measures Affecting Nicaragua* was never adopted.[260]

Negotiating Group on GATT Articles

1.61. The Negotiating Group on GATT Articles also reviewed Article XXI in meetings in November 1987 and June 1988, on the basis of communications submitted by Nicaragua[261], a Secretariat background note[262] and a communication submitted by Argentina.[263] The Negotiating Group was unable to agree on any of the proposals regarding Article XXI, and the Chairman's Report to the Group of Negotiations on Goods did not list Article XXI among the provisions that it was considering.[264]

Negotiations Leading to the Adoption of the April 1989 Decision (1988–1989)

1.62. As stated above[265], the GATT CONTRACTING PARTIES jointly agreed, in adopting the April 1989 Decision, that any panel or working party would be established at the GATT Council meeting following the meeting at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise.[266] Prior to the adoption of the April 1989 Decision, trade ministers considered a proposal which provided that, where the Council could not agree on whether a matter fell within the scope of Article XXIII of the GATT, a panel would make a recommendation on the jurisdictional issue as a preliminary matter, with bracketed text stating "including the question of whether the matter is appropriate for resolution through the panel process".[267] By 6 December 1998, a Secretariat note stated that this language in the proposal was to be deleted. The final draft text of the report from the Trade Negotiations Committee Meeting omitted this language and included only the text that formed part of the April 1989 Decision; namely, that "a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda".[268]

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European Communities v. Yugoslavia (1991)

1.63. In 1991, the European Communities circulated a communication stating that it had suspended the benefit of certain trade concessions that had been granted to Yugoslavia on a preferential basis.[269] The European Communities referred in this context to its "vigorous efforts over recent months to put a stop to bloodshed in Yugoslavia", including promoting cease-fire agreements which unfortunately had not led to the "full cessation of hostilities".[270] The European Communities stated that the measures had been taken upon consideration of its "essential security interests and based on GATT Article XXI", as it was faced with "continuing risks of political instability in this region of Europe, with potentially destabilizing consequences elsewhere".[271] In response, Yugoslavia circulated a communication noting that it did not presently claim that the measures violated any GATT provisions as "the majority do not relate to the contractual obligations under the GATT or could be justified under Article XXI".[272] However, Yugoslavia did express concerns about the negative trade effects of the measure as well as the use of punitive economic measures to secure political objectives.[273] Yugoslavia also requested that it be notified of any additional measures pursuant to the 1982 Decision, and noted that it reserved its rights under the GATT.[274]

1.64. Following this communication, Yugoslavia requested consultations with the European Communities in relation to these and certain other measures.[275] The consultations did not achieve a mutually satisfactory solution, and Yugoslavia subsequently requested the establishment of a panel.[276] In its request, Yugoslavia asserted that the measures were taken "for purely political reasons" and were inconsistent with the GATT and paragraph 7(iii) of the 1982 Ministerial Declaration.[277] Yugoslavia stated that the measures could not be justified under Article XXI, as the situation in Yugoslavia did not correspond to the "notion or meaning" of Article XXI(b) and Article XXI(c), and no relevant UN body had authorized economic sanctions against Yugoslavia.[278] At the February 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a GATT panel.[279] The European Communities queried whether the withdrawal of preferences violated Article I of the GATT, and noted that as the situation was delicate and continually evolving, its primary objective was not to hamper the peace processes that had been engaged in securing a political solution in Yugoslavia.[280] The European Communities stated that it was willing to engage in consultations, but that the establishment of a GATT panel "could only exacerbate the problem".[281] Yugoslavia's request for the establishment of a GATT panel was supported by Chile, Cuba, and Venezuela.[282] India also supported the request. It asserted that trade measures for non-economic reasons should only be taken within the framework of a UN Security Council decision, and noted that Yugoslavia's request "encompassed an issue which was covered by GATT provisions".[283] The Council agreed to revert to this matter at its next meeting.[284]

1.65. At the March 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a panel.[285] Yugoslavia asserted that the continued discrimination by the European Communities was wrong, as the peace process in Yugoslavia was proceeding well and the non-economic reasons underlying the measures had "completely changed".[286] The European Communities acknowledged the right of Yugoslavia to request the establishment of a panel, but considered the timing to be inopportune as the European Communities was "deeply involved" in the ongoing peace process and did not consider that a panel established at the present time would aid that process.[287] The European Communities recognized that under the April 1989 Decision, a panel had to be established at the second Council meeting at which it was requested, unless at that meeting the Council decided otherwise. The European Communities queried whether, given that the measures had been taken for non-economic reasons, a different course of action could be taken, such as establishing the panel but "delaying its activation subject to further clarity in the situation".[288] The European Communities also reserved its right to reflect further on what the standard terms of reference should be in disputes involving measures taken for non-economic reasons.[289] The United States affirmed Yugoslavia's right to request a panel, but noted that the problems that had given rise to the measures were not capable of resolution by the Council and should be resolved politically.[290] Canada expressed similar views.[291] New Zealand noted that while the GATT process needed to be observed, the "trends in the political situation" should be ascertained before any GATT consideration of the measures.[292] Argentina asserted that Yugoslavia had the right to have a panel examine any question relating to the application of GATT provisions, including "measures taken for non-economic reasons and invoked under Article XXI".[293] Mexico affirmed Yugoslavia's right to request a panel, but noted that the GATT was "perhaps not the most appropriate forum to discuss those issues, much less to solve them".[294] Japan affirmed Yugoslavia's right to request a panel, but noted that the circumstances were "rather unique" and that its

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preferred approach was for the parties to seek a solution through dialogue.[295] Tanzania affirmed Yugoslavia's right to request a panel, but noted that it would not want to see a peaceful solution in Yugoslavia impaired by GATT dispute settlement procedures.[296]

1.66. The Chair of the GATT Council stated that the Council had to decide on the establishment of a GATT panel in light of the rules in the April 1989 Decision. The Chair recalled a previous understanding that, under the rules in the April 1989 Decision, a contracting party had the right to a panel at the second Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting, the Council decided otherwise. The Chair therefore proposed that the Council agree to establish a panel with standard terms of reference unless, as provided for in the April 1989 Decision, the parties agreed to other terms of reference within 20 days.[297] The GATT Council agreed to establish a panel with standard terms of reference unless otherwise agreed by the parties.[298] The panel did not proceed owing to the subsequent dissolution of the State of Yugoslavia.

Nicaragua v. Honduras and Colombia (1999)

1.67. In 1999, Nicaragua imposed a tax on all goods and services imported, manufactured or assembled, coming from or originating in Honduras and Colombia, and cancelled licences for all fishing vessels under Honduran and Colombian flags, as a response to the ratification of the bilateral Treaty on Maritime Delimitation in the Caribbean Sea (Ramírez-López Treaty) between those states.[299] In January 2000, Colombia requested consultations with Nicaragua in relation to these measures.[300] These consultations did not achieve a mutually satisfactory solution, and in March 2000, Colombia requested the establishment of a panel.[301]

1.68. At the April 2000 meeting of the DSB, Colombia reiterated its request for a panel.[302] Nicaragua responded that the Ramírez-López Treaty infringed its "sovereign rights in the Caribbean Sea by imposing limits unilaterally, illegally and arbitrarily through reciprocal recognition by Honduras and Colombia of their expansionist aims in the Caribbean Sea to the detriment of Nicaragua's territorial rights".[303] Nicaragua considered that Colombia and Honduras had created "serious international tension" in the form of despatching Honduran troops at its northern border and conducting military manoeuvres by deploying war planes and ships in the region of its continental shelf.[304] Nicaragua asserted that the Organization of American States had recognized the "state of serious international tension" by appointing a special envoy to assess the situation.[305] Accordingly, Nicaragua considered that its measures were consistent with "Article XXI of the GATT 1994 and Article XIV*bis* of the GATS, which reflected a state's inherent right to protect its security, and therefore constituted a general exception to multilateral trade rules".[306] Nicaragua noted that it had not adopted the measures for trade purposes or to protect domestic industry, but rather to safeguard its essential security interests.[307] Nicaragua recognized Colombia's right to request establishment of a panel, but doubted the utility of having a panel examine the matter, asserting that "it had been customary practice in the WTO that the contracting party applying the measure should be the sole judge in matters that concerned its essential security interests, in particular if such interests could be threatened by any actual or potential danger."[308] According to Nicaragua, if the panel "gave itself powers that belonged to political fora that could result in a dangerous and unacceptable precedent".[309] Nicaragua was also of the view that, "before establishing a panel to examine this matter, the General Council should take a decision on the competence of panels to deal with highly political issues and should make a formal interpretation of Article XXI of GATT 1994."[310] Honduras disputed Nicaragua's assertions regarding the movement of troops and military equipment. Honduras also noted that the DSU provided it with the possibility of restoring its rights, but considered the subject of maritime limits to fall outside of the mandate of the WTO.[311] The DSB agreed to revert to this matter at its next meeting.[312]

1.69. At the May 2000 meeting of the DSB, Colombia reiterated its request for a panel.[313] Nicaragua reiterated its position that Article XXI of the GATT 1994 "could not be subjected to an examination by a panel", and asserted that the 1982 Decision had given the Ministerial Conference and General Council "exclusive authority" to interpret Article XXI to the exclusion of any other body.[314] Japan, Canada, the European Communities and Honduras expressed the view that issues of national security were sensitive and should be addressed with great caution.[315] The European Communities asserted that the panel could examine the facts to determine whether the matter concerned a national security issue or a trade policy measure.[316]

1.70. The DSB agreed to establish the panel[317], but the panel was never composed.[318]

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1.71. In July 2006, in the context of the Trade Policy Review of Nicaragua, Colombia noted that Nicaragua had suspended the application of the tax to goods and services imported from or originating in Honduras since March 2003. [319] Colombia argued that this made the "discrimination of Nicaragua's trade policy against Colombia much more obvious", and asked to have the trade practice put on record in the conclusions of the Trade Policy Review.[320] Nicaragua maintained that the tax was applied in conformity with Article XXI of the GATT 1994 in order to protect Nicaragua's essential security interests.[321]

India v. Pakistan (2002)

1.72. During the 2002 Trade Policy Review of Pakistan, India asserted that Pakistan had consistently denied MFN status to India in violation of the basic principles of the GATT 1994 and the WTO.[322] Pakistan responded that the India-Pakistan relationship had to be viewed in the context of the "difficult political relations between the two countries over the course of the past 50 years".[323] Pakistan noted that after the 1965 war, trade and diplomatic relations had been terminated by both sides, and the subsequent process of normalization had been slow and on an item-by-item basis through limited trade and shipping routes.[324] Pakistan therefore considered that both India and Pakistan had acted consistently with Article XXI(b)(iii) by treating each other as exceptions to MFN principles.[325]

1.73. At the 2008 Trade Policy Review of Pakistan, India reiterated that Pakistan was denying MFN status to India, to which Pakistan responded that trade relations between India and Pakistan were continuously liberalizing and improving.[326]

United States v. Brazil (2003)

1.74. In 2003, the United States circulated a communication to the Committee on Import Licensing raising concerns about Brazil's import licensing system for certain lithium compounds and the compatibility of the system with the Import Licensing Agreement.[327] The United States disagreed with the inclusion of these lithium compounds in a measure regulating goods related to the production of nuclear energy, as the United States domestic industry had reported that these lithium compounds had no nuclear application but were rather used as a raw material in various commercial products.[328] The United States therefore requested that Brazil provide additional information about the operation of the system.[329] The United States repeated these concerns at the October 2003 meeting of the Committee on Import Licensing.[330] The Committee took note of these statements.[331] In 2004, Brazil circulated a communication responding to the questions of the United States, in which Brazil asserted that the restrictions were maintained because lithium could have an application in the production of nuclear energy.[332] At the September 2004 meeting of the Committee on Import Licensing, the United States observed that the explanation given by Brazil was "tenuous", as it did not demonstrate that the lithium compounds had any nuclear application outside of its "common commercial use".[333] The United States asserted that in practice, these licensing requirements acted as quantitative restrictions and noted that Brazil's response "engendered some suspicion that there might be other more protectionist reasons for the requirement".[334] The United States noted that it would circulate further questions to Brazil in writing, and Brazil responded that such questions would be conveyed to its government.[335] The Committee took note of these statements.[336]

1.75. At the June 2005 meeting of the Committee on Import Licensing, the United States noted that they had not yet received a response to their questions.[337] Brazil reiterated that the restrictions were justified because of the potential risks and uses of lithium compounds "including for nuclear ends".[338] The Committee took note of these statements.[339] At the June 2006 meeting of the Committee on Import Licensing, the United States noted that they had still not received a response to their questions, as recently circulated with supplementary questions.[340] The United States also asserted that "it seemed clear that none of the requests for information that the U.S. was making, involved the national security provisions of Article XXI of the GATT 1994, since the information was requested for commercial purposes."[341] Brazil responded that there had been no change in its policy, but that it had taken note of the concerns of the United States.[342] The Committee took note of these statements.[343] Similar views were expressed at subsequent meetings of the Committee on Import Licensing until 2009.[344] In 2009, Brazil circulated a communication to the Committee on Import Licensing responding to the questions of the United States, in which Brazil reiterated that "since some lithium compounds have an application in the production of nuclear energy", this restriction "was treated as a matter of national security".[345]

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1.76. At the October 2009 meeting of the Committee on Import Licensing, the United States thanked Brazil for its response.[346] At the April 2010 meeting of the Committee on Import Licensing, the United States thanked Brazil again and noted that it did not have further questions at the time.[347]

European Union v. Brazil (2013)

1.77. During the 2013 Trade Policy Review of Brazil, the European Union posed a question to Brazil regarding its import licensing restrictions on nitrocellulose.[348] The European Union asserted that industrial nitrocellulose was a different product from military-grade nitrocellulose, and argued that as the former was a safe product which did not pose any problems related to national security, it was not justifiable to impose a *de facto* import ban on the product.[349] Brazil responded that it did not necessarily agree that industrial nitrocellulose posed no problems related to security, as low concentrations of the product could be used as an explosive.[350] Brazil noted that it was however currently reviewing its legislation on controlled products.[351]

1.78. At the April 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns about Brazil's import licensing scheme for nitrocellulose.[352] The European Union argued that the Brazilian producer of nitrocellulose benefited from the restrictions as a monopoly supplier in the closed local market.[353] The European Union also stressed that the "essential security exceptions in the provision of Article XXI of the GATT 1994 were to be applied on traffic in implements of war and to goods for the purpose of supplying a military establishment, but not to the non-military industrial sector."[354] The European Union requested that Brazil remove the licensing requirements and asked for additional information regarding grants of such licenses over the last five years.[355] Brazil took note of these comments and asked that the European Union provide its comments and questions in writing.[356] The Committee took note of these statements.[357]

1.79. The European Union subsequently circulated a communication to the Committee on Import Licensing containing these questions to Brazil.[358] At the October 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns and further asserted that industrial nitrocellulose was only used for "commercial purposes such as for applications like printing inks, wood lacquer, or nail varnish".[359] Brazil responded that it disagreed with the European Union's view that industrial and military nitrocellulose were substantially and chemically different products, as regardless of its intended use, "the product poses risks".[360] The Committee took note of these statements.[361] Brazil contemporaneously circulated a communication responding to the European Union's questions in which Brazil asserted that nitrocellulose was a hazardous material at any concentration, and controls on the product were therefore legitimate for "security and safety reasons".[362] Similar views were expressed at subsequent meetings of the Committee on Import Licensing[363], and the European Union circulated further questions to Brazil in 2016.[364] Discussions between the European Union and Brazil on this issue continued into 2018.[365]

United States v. Cuba (1962–1996)

1.80. In 1962, the United States imposed an embargo prohibiting imports into the United States of all products of Cuban origin, in addition to all goods imported via Cuba, and ordering a continuing prohibition on all exports from the United States to Cuba.[366] In 1968, Cuba submitted a notification to the Committee on Trade in Industrial Products stating that the embargo constituted a non-tariff barrier which adversely affected Cuba's trade.[367] During the Committee's first examination of the notified barriers in 1969[368], Cuba emphasized that the embargo differed from the previously examined trade barriers because it was not limited to particular products or particular commercial interests, but instead was "designed to reduce a small country to submission by starvation".[369] The United States responded that the embargo had been imposed for reasons of "individual and collective self-defense" and to "promote national and hemispheric security", and invoked Article XXI as justification for its actions.[370] Cuba responded that the invocation of Article XXI was inadequate because the United States had unilaterally adopted coercive measures without securing any authorization from the international legal community, in particular the UN Security Council.[371]

1.81. In 1986, Cuba circulated a communication expressing concern over a measure imposed by the United States removing quotas for sugar imports unless the supplying country guaranteed that it would not import sugar from Cuba for re-export to the United States.[372] At the May 1986 meeting of the GATT Council, Cuba argued

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that this measure violated the GATT and stated that the United States was undermining free trade, not only by harming Cuba, but also by trying to hamper its normal trade with third countries.[373] The United States responded that the measure was a reflection of the long-standing trade embargo against Cuba which the United States had maintained for national security reasons.[374] Nicaragua, Argentina, Brazil, Hungary, Peru, Czechoslovakia, Poland and Uruguay all opposed the measure, considering it to be politically motivated, coercive and discriminatory.[375] The Council took note of the statements.[376]

1.82. In 1987, in the context of the meetings of the United Nations Conference on Trade and Employment, the Cuban Vice-Minister for Foreign Trade made a statement asserting that the embargo imposed by the United States violated the objectives and principles of the GATT, including those enumerated in Articles I, II and V and Part IV.[377] The Vice-Minister also noted that the United States had unjustifiably invoked Article XXI, "since it is no secret that Cuba has not threatened, is not threatening nor will ever threaten the United States: on the contrary, the latter country has threatened and is threatening our security through sabotage, spying, violation of our land, sea and air frontiers, and has organized and supported armed aggression against our people as on the occasion of the mercenary landing at the Bay of Pigs".[378]

1.83. In 1988, in the context of the discussion of the United States embargo against Nicaragua at the Fourth Meeting of the Forty-Third Session, Cuba noted that the United States had justified its embargoes against both Nicaragua and Cuba on grounds of national security.[379] Cuba responded that "[i]f two small countries could pose a threat to an enormous military and economic power such as the United States, many countries might find themselves subject to similar measures by that country."[380] Cuba called on the contracting parties to recognize the rights of Nicaragua.[381]

1.84. In 1989, in the context of the Trade Policy Review Mechanism, the United States submitted a report to the GATT Council summarizing its domestic trade framework.[382] In this report, the United States cited "U.S. foreign policy and national security goals" and the President's "wartime and national emergency powers" as the justification for the Office of Foreign Assets Control's administration of the economic embargo against Cuba.[383] In response, Cuba circulated a communication stating that the embargo contradicted the United States' commitments under the GATT 1947 and paragraph 7(iii) of the 1982 Ministerial Declaration.[384] Cuba also asserted that the invocation of Article XXI by the United States was inappropriate, "[s]ince Cuba has not provoked any 'national emergency', there is no 'wartime' nor any serious international tension."[385] Cuba expressed similar views on several subsequent occasions between 1990 and 1996.[386]

United States v. Cuba (including Helms-Burton Act) (1996–2016)

1.85. In 1996, Cuba circulated a Communication noting the adoption by the United States of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act).[387] Cuba argued that the objective of the Helms-Burton Act was to "intimidate the world business community and prevent it from participating in the ever-widening economic opportunities for foreign investment" in Cuba.[388] Cuba also asserted that the measure constituted a violation of its sovereignty by attempting to legislate on its internal matters, namely, the property of Cuban nationals.[389] At the March 1996 meeting of the Council for Trade in Goods, Cuba argued that the Helms-Burton Act was incompatible with various provisions of the GATT 1994 and other WTO Agreements.[390] The United States responded that it had recognized the need to take strong measures after the recent shooting down of two unarmed US civilian aircraft by the Cuban government, and asserted that "persons who knowingly and intentionally did business in Cuba using confiscated property were furthering wrongs committed against the former owners of this property, and were undermining the interests of the USA and its citizens".[391] Canada stated that the Helms-Burton Act was not a "useful tool" for achieving democratic reform in Cuba and noted that the legislation "was designed to chill investment in Cuba".[392] The Council for Trade in Goods took note of these statements.[393] Several Members reiterated their views at the April 1996 meeting of the General Council.[394]

1.86. In May 1996, the European Communities requested consultations in respect of the extraterritorial application of the United States' trade embargo against Cuba under the Helms-Burton Act and related US legislation and regulations.[395] These consultations did not achieve a mutually satisfactory solution, and the European Communities subsequently requested the establishment of a panel. [396] At the October 1996 meeting of the DSB, the European

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Communities reiterated its request for a panel, noting that its concern with the legislation "was not its objectives, but the extra-territorial means chosen to achieve those objectives".[397] The United States asserted again that the Helms-Burton Act was a response to the shooting down of two civilian aircraft by the Cuban government.[398] The United States described this incident as the latest in a series of actions taken by the Cuban government over the past 35 years that had directly affected US interests, and noted that the Helms-Burton Act, other US laws and regulations, as well as the Cuban embargo which dated from the 1960s "reflected the abiding US foreign policy and security concerns with regard to Cuba pursued by eight US Presidents".[399] The United States asserted that the Helms-Burton Act was "designed to promote a swift transition to democracy in Cuba" and noted that the European Communities had not suggested that the US policy with regard to Cuba generally, or the Helms-Burton Act in particular, was motivated by trade protectionism.[400] The United States noted that several of the challenged measures had been in force for years or decades, and had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of its essential security interests.[401] The United States questioned the utility and desirability of pursuing this issue through the WTO, arguing that the WTO had been established to manage "trade relations", not "diplomatic or security relations" with negligible trade and investment effects.[402] The United States refused to join a consensus to establish a panel, and urged the European Communities to explore other options.[403] Cuba asserted that the Helms-Burton Act was incompatible with the GATT 1994, but noted that it would reply to the "political statement" by the United States in other fora such as the UN General Assembly.[404] The DSB agreed to revert to this matter at its next meeting.[405]

1.87. At the November 1996 meeting of the DSB, the European Communities reiterated its request for a panel.[406] The United States maintained its earlier position, and noted that it did not believe that a panel would lead to a resolution of the dispute, but rather, would pose serious risks to the WTO as a nascent organization.[407] Cuba responded that unlike the United States, Cuba had never launched an invasion, or initiated any military actions or intelligence operations against the United States.[408] Cuba asserted that if anything, "Cuba would be in a better position than the US to resort to Article XXI of the GATT 1994."[409] Cuba noted, however, that the DSB was not the appropriate forum to enumerate an endless list of such grievances.[410]

1.88. The DSB agreed to establish the panel with standard terms of reference.[411] In 1997, the European Communities requested that the panel suspend proceedings while a mutually agreeable solution was negotiated.[412] The European Communities and the United States subsequently reached an Understanding that the United States would consult with Congress with a view to obtaining a waiver for the European Communities from the Helms-Burton Act.[413] The panel's authority lapsed in April 1998.[414] At the April 1998 meeting of the DSB, Cuba expressed its continuing conviction that the measures were illegal and reserved its right to revert to this matter.[415]

1.89. Cuba and the United States have reiterated their views about the Helms-Burton Act and the embargo more generally on several subsequent occasions.[416]

CONCLUDING REMARKS

1.90. As discussed in paragraphs 7.80 and 7.81 of the Panel Report, the Panel considers that the foregoing survey of the pronouncements of the GATT contracting parties and WTO Members does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31 (3)(b) of the Vienna Convention.

ENDNOTES

1 Russia's first written submission, para. 40. This Appendix uses the term "European Communities" to refer to both the European Economic Community and the European Community prior to 2009, and the term the "European Union" to refer to the European Union after 2009. On 1 November 1993, the *Treaty on European Union* (done at Maastricht, 7 February 1992) entered into force. On 1 December 2009, *the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the

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Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

2 Ibid. paras. 41–46.

3 Article 31(3)(b) of the Vienna Convention provides that: "[t]here shall be taken into account, together with the context: . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

4 Article 13 of the DSU provides that: "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."

5 This document examines the subsequent conduct of GATT contracting parties and WTO Members in GATT and WTO fora from the period of 1 January 1948 (entry into force of the GATT 1947) to 6 June 2017 (composition of the Panel in this dispute). By including documents in this survey, the Panel does not intend to attribute any legal significance to the type of document examined or the contents of any such documents. The Panel notes only that it has examined such documents in order to conclude that this record does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention. (See para. 7.80 of the Panel Report.)

6 See, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

7 See, e.g. GATT Contracting Parties, Twenty-Sixth Session, Report by the Working Party on the Accession of the United Arab Republic, L/3362, paras. 20–22; GATT Contracting Parties, Accession of Thailand, Questions and Replies to the Memorandum on Foreign Trade Regime (L/4803), L/5300, pp. 5 and 18–26; and GATT Contracting Parties, Accession of Saudi Arabia, Questions and Replies to the Memorandum on the Foreign Trade Regime (L/7489 & Add.1), L/7645/Add.1, pp. 27 and 32.

8 See, e.g. Committee on Technical Barriers to Trade, Notification by Thailand, G/TBT/Notif.95/123, p. 1 (referring to consumer protection and national security as its objective and rationale for undertaking a particular measure); and Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions by the Seychelles, G/MA/QR/N/SYC/1, pp. 23, 25, 35, 36, 45 and 49.

9 Appellate Body Report, *EC – Chicken Cuts,* para. 259.

10 Ibid. para. 272.

11 GATT Contracting Parties, Third Session, Statement by the Head of the Czechoslovak Delegation Mr. Zdeněk AUGENTHALER to Item 14 of Agenda (CP.3/2/Rev.2), GATT/CP.3/33, p. 3 (referring to the official publication of the US Department of Commerce – "Comprehensive Export Schedule" No. 26, issued on 1 October 1948, p. 18.)

12 Ibid. p. 5. (referring to the statement of Mr. Willard L. Thorp made at the General Assembly in Paris on 4 November 1948).

13 Ibid. pp. 5–6. Czechoslovakia stated that the notion of "war or military potential" is an extremely elastic notion, embracing the reserves of man-power and economic resources of a country including the extent to which both have been militarized. In addition, this concept also embraces a time element, that is, not only the possibility to develop military strength but also the degree of actual preparedness. Thus, according to Czechoslovakia, Article XXI should be interpreted narrowly so as to avoid a situation in which "practically everything may be a possible element of war potential". (Ibid.)

14 GATT Contracting Parties, Third Session, Reply by the Vice Chairman of the United States Delegation, Mr John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda, GATT/CP.3/38, pp. 2–3 and 9–11. In addition, the US delegate provided dollar estimates of approved Czechoslovakian licences for different products such as electrical equipment and machinery to demonstrate that the United States had been highly selective in imposing controls for security reasons and had not denied licences where the product was for peaceful use. (Ibid.) See also GATT Contracting Parties, Third Session, Reply of the Head of the Czechoslovak Delegation, Mr. Zdeněk AUGENTHALER, to the Speech of the Vice-Chairman of the USA Delegation, Mr. John W. Evans, under Item 14 of the Agenda, GATT/CP.3/39, pp. 2–3.

15 See GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 4.

16 Ibid. p. 7; and GATT Contracting Parties, Third Session, Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1.

17 GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 6.

18 Ibid. p. 5.

19 Ibid. p. 9. The vote was one affirmative, 17 negative, three abstentions and two absents. (Ibid.)

20 Ibid. p. 10.

21 GATT Contracting Parties, Sixth Session, Statement by the United States, Termination of Obligations between the United States and Czechoslovakia under the Agreement, GATT/CP.6/5, p. 1.

22 Ibid. According to the United States, Czechoslovakia had persecuted and harassed American firms, imprisoned American citizens, and confiscated the property of American citizens without justification. (Ibid.)

23 Ibid.

24 GATT Contracting Parties, Sixth Session, Termination of Obligations between the United States and Czechoslovakia under the Agreement, Statement by Czechoslovakia, GATT/CP.6/5/Add.1, p. 2.

25 Ibid. p. 3.

26 GATT Contracting Parties, Sixth Session, Item 21 – Termination of Obligations between the United States and Czechoslovakia under the Agreement, Declaration Proposed by the Delegation of the United States, GATT/CP.6/5/Add.2.

27 GATT Contracting Parties, Sixth Session, Item 30 – Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26; GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1; and GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28. See also GATT Contracting Parties, Sixth Session,

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Summary Record of the First Meeting held on 17 September 1951, GATT/CP.6/SR.1, p. 4.

28 GATT Contracting Parties, Sixth Session, Item 30 - Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

29 GATT Contracting Parties, Sixth Session, Item 30 – Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26, p. 3; and GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

30 GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1.

31 Ibid. pp. 4 and 7.

32 Ibid. p. 3.

33 Ibid. p. 6.

34 Ibid.

35 GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 3–4.

36 Ibid. p. 4.

37 Ibid. pp. 4–7. Czechoslovakia also noted that while it did not particularly suffer from the measure in question, it hoped that the contracting parties would always be prepared to defend the spirit of the GATT. (Ibid. p. 7.)

38 Ibid. p. 6.

39 GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 7–8.

40 Ibid. p. 8.

41 Ibid.

42 Ibid. p. 9.

43 GATT Contracting Parties, Sixth Session, Summary Record of the Twenty-Seventh Meeting held on 27 October 1951, GATT/CP.6/SR.27, p. 8. For the draft resolution, see GATT Contracting Parties, Sixth Session, Item 30 – Resolution of the Contracting Parties on the United States Import Restrictions on Dairy Products imposed under Section 104 of the United States Defence Production Act, Proposal by the Chairman after Consultation with Interested Delegations, GATT/CP.6/51. For the adopted resolution, see GATT Contracting Parties, Decisions, Declarations and Resolutions of the Contracting Parties at the Special Session held on March-April 1951 and the Sixth Session held on September-October 1951, GATT/CP/130, pp. 14–15.

44 See GATT Contracting Parties, United States' Restrictions on Dairy Products, Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19, p. 1. See also GATT Contracting Parties, United States' Restrictions on Dairy Products, Supplementary Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19/Add.1.

45 See GATT Contracting Parties, Seventh Session, Summary Record of the Tenth Meeting held on 28 October 1952, SR.7/10, pp. 2–8. The Netherlands, New Zealand, Denmark, Canada, Italy, Norway, Cuba, Australia, United Kingdom, India, Czechoslovakia and South Africa expressed objections to the measure, and Pakistan expressed gratitude that the United States had taken some steps to mitigate the effects of the restrictions. (Ibid.)

46 Ibid. pp. 8–9.

47 Ibid. p. 9.

48 Working Party 8 on Netherlands Action under Article XXIII:2, Report to the Contracting Parties, L/61, p. 3. The Netherlands had requested that it be allowed to impose an upper limit of 57,000 metric tons on the import of wheat flour, but the Working Party recommended that the Netherlands impose an upper limit of 60,000 metric tons. (Ibid. pp. 1–3.)

49 GATT Contracting Parties, United States Import Restrictions on Dairy Products, Draft Resolution, L/59; and GATT Contracting Parties, Seventh Session, Summary Record of the Sixteenth Meeting held on 8 November 1952, SR.7/16, p. 7.

50 Negotiating Group on Dispute Settlement, Communication from the United States, MTN.GNG/NG13/W/40, fn 4 to p. 9. See also GATT Contracting Parties, United States Restrictions on Dairy Products, Resolution Proposed for Adoption by the CONTRACTING PARTIES, L/154; GATT Contracting Parties, United States Import Restrictions on Dairy Products, Resolution of 5 November 1954, L/280; GATT Contracting Parties, Tenth Session, Report of the Working Party, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, L/464; GATT Contracting Parties, Eleventh Session, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, Report of the Working Party, L/590; GATT Contracting Parties, Twelfth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/754; and GATT Contracting Parties, Thirteenth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/918.
See also GATT Contracting Parties, Report of the Working Party on Italian Import Restrictions, L/1468, paras. 5–6. In 1961, a Working Party was convened to examine a variety of Italian import restrictions and prohibitions. Before the Working Party, Italy asserted that prohibitions or restrictions on certain items were justified under the "provisions of Article XX or Article XXI of the General Agreement". (Ibid. para. 5.) The Working Party did not respond specifically to this invocation, but noted in general that they deplored "the continued use of discriminatory restrictions for which no justification could be found". (Ibid. para. 6.)

51 Committee on Industrial Products, Inventory of Non-Tariff Barriers, COM.IND/4, pp. 231–232. The notification referred to "escape clause tariff action", or the powers under the Trade Expansion Act of 1962 to increase the rate of import duty on any item in order to effect additional protection of a domestic industry. (Ibid. p. 231.)

52 See Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19–25 June 1969, COM.IND/W/7, para. 1.

53 Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, Part 4 – Specific Limitations on Imports and Exports, COM.IND/W/12, p. 269.

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54 Ibid. pp. 269–271.

55 Committee on Trade in Industrial Products, Draft Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), Revision, Spec(70)48/Rev.1, para. 4; and Committee on Trade in Industrial Products, Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), COM.IND/W/49, para. 5.

56 Joint Working Group on Import Restrictions, Import Restrictions, Addendum, Industrial Products, L/3377/Add.2, pp. 1–2; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 4. The United States had limited imports to 12 per cent of domestic production. (See Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49.) Notifications could be provided to the Joint Working Group by countries maintaining the restrictions as well as their trading partners. (Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 5.)

57 Ibid. para. 1.

58 Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49. During these meetings, there was also debate on whether certain restrictions maintained by Japan and Switzerland on various fissile chemical elements could be justified under Article XXI. (Ibid. pp. 71 and 73.)

59 Ibid. p. 49.

60 Ibid.

61 Ibid.

62 See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.

63 Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23–24; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6. The Joint Working Group's documents from April 1970 and November 1970 label these restrictions as "global quotas", but documents from June 1970 label these as "discretionary licensing" restrictions. (Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23–24; Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6; and Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Table of Import Restrictions (Chapters 25–99), COM.IND/W/28/Rev.2, p. 8.) Later documents from the Group on Residual Restrictions appear to clarify that these products were subject to *either* import licensing restrictions or global quotas. (See Group on Residual Restrictions, Additional Products Suggested for Examination, Note by the Secretariat, COM.TD/W/140, p. 14; and Group on Residual Restrictions, Proceedings of the Meeting of the Group held on 24–25 January 1972, Note by the Secretariat, COM.TD/85, para. 58.)

64 Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 1.

65 Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 95.

66 Ibid. Although the Council agreed that the Joint Working Group on Import Restrictions should continue to annually or biennially review such import restrictions, the Joint Working Group did not meet again after 1970. (See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.)

67 See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 14. The Group of Three was convened by the Committee on Trade and Development, and consisted of the Chairman of the contracting parties, the Chairman of the Council and the Chairman of the Committee on Trade and Development. (See Committee on Trade and Development, Report of the Committee on Trade and Development to the Contracting Parties, L/3487, para. 9.)

68 Group of Three, Preliminary Report of the Group of Three, W(71)2, p. 23; and Group of Three, Report of the Group of Three, L/3610, p. 21.

69 Group on Residual Restrictions, Note on Proceedings of the Meeting of the Group held on 24–25 January 1972, Prepared by the Secretariat, COM.TD/85, para. 1.

70 Ibid. para. 58.

71 The Group of Three had noted in their Second Report that Austria had not "found it possible so far to liberalize imports of penicillin, tyrothricin and medicaments as recommended in L/3610". (Group of Three, Second Report, L/3710, p. 20.)

72 Committee on Trade and Development, Proceedings of the Twenty-First Session, Note Prepared by the Secretariat, COM.TD/87, para. 13.

73 See Committee on Trade and Development, Action by Governments Relevant to the Provisions of Part IV, Addendum, COM.TD/W/170/Add.7, p. 2; Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Part IV, Specific Limitations, NTM/INV/IV, Inventory Number IV.A.4; Group of Negotiations on Goods, Communication from Austria, Uruguay Round – Market Access, MTN.GNG/NG1/W/63, p. 2; and GATT Council, Trade Policy Review Mechanism, Austria, Report by the Secretariat, C/RM/S/19A, para. 46.

74 Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear,* L/4250, paras. 1 and 3.

75 Ibid. para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 8; and GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, pp. 17–18.

76 Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear*, L/4250, para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

77 Ibid.

78 Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

79 GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

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80 Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

81 Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear*, Addendum, L/4250/Add.1. Relatedly, at the December 1983 meeting of the Group on Quantitative Restrictions and Other Non-Tariff Measures, it was recorded by the Secretariat that some delegations wondered "how a discriminatory restriction, such as that imposed by one contracting party on imports of footwear, could be compatible with the provisions of Article XXI". (Group on Quantitative Restrictions and Other Non-Tariff Measures, Meeting held on 5–8 December 1983, Note by the Secretariat, NTM/5, para. 27.)

82 Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317.

83 Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317, para. III.

84 Ibid. para. IV.

85 Ibid. Argentina referred in this regard to UN Resolutions 2065 (XX), 3160 (XXVIII) and 31/49 (XXXI). (Ibid.)

86 Ibid. para. V.

87 Communication from the Commission of the European Communities, Australia and Canada, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5319/Rev.1, para. 1(b).

88 GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 2.

89 Ibid. p. 4.

90 Ibid. p. 10.

91 Ibid. pp. 10–11.

92 Ibid. p. 11.

93 Ibid. pp. 4–9. For example, Brazil drew attention to subparagraph (iii) of Article XXI(b), and stated that the present case could set a dangerous precedent if the measures were considered necessary for the protection of essential security interests taken in time of war or other emergency in international relations, because such interests had not been demonstrated. While this matter could be considered to be an emergency in international relations, Brazil stressed that this was the case only in respect of the region in question, as defined by the Security Council, whose action had a bearing on the GATT in light of Article XXI(c). Brazil also stated that it was difficult to accept that the countries in question, except for one, were taking this action in protection of their essential security interests. (GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 5.) Pakistan did not consider the situation addressed by UN Security Council Resolution 502 to be an "extreme" emergency in international relations, of the sort permitted under the spirit of the GATT. (GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 7.)

94 Ibid. pp. 7–9.

95 Ibid. p. 9.

96 Ibid. p. 7.

97 Ibid. p. 6.

98 Ibid. p. 8.

99 Ibid. p. 8.

100 Ibid. p. 9.

101 Ibid. p. 7.

102 Ibid. p. 10.

103 GATT Council, Minutes of Meeting held on 29–30 June 1982, C/M/159, pp. 15–16.

104 Brazil, Cuba, India, Uruguay, Colombia, Spain, Peru, Romania, Nigeria, Yugoslavia, the Philippines and the Dominican Republic (with Venezuela and Ecuador as observers). (Ibid. pp. 17–18.)

105 GATT Council, Minutes of Meeting held on 29–30 June 1982, C/M/159, p. 18. For the statements of Ghana referred to by Canada, see, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

106 GATT Council, Minutes of Meeting held on 29–30 June 1982, C/M/159, p. 19.

107 Ibid.

108 Ibid. p. 20.

109 Ibid. p. 21.

110 GATT Council, Minutes of Meeting held on 2 November 1982, C/M/162, p. 18.

111 GATT Contracting Parties, Thirty-Eighth Session, Ministerial Declaration adopted on 29 November 1982, L/5424, p. 3.

112 Decision Concerning Article XXI of the General Agreement of 30 November 1982, L/5426.

113 Ibid.

114 GATT Panel Report, *US – Sugar Quota*, L/5607, para. 2.3.

115 Ibid.

116 Communication from Nicaragua, *US – Sugar Quota*, L/5492.

117 Communication from Nicaragua, *US – Sugar Quota, Recourse to Article XXIII:2 by Nicaragua*, L/5513.

118 GATT Council, Minutes of Meeting held on 12 July 1983, C/M/170, p. 12.

119 Ibid.

120 Ibid.

121 Ibid. p. 13. Colombia, Spain, Brazil, Singapore, Argentina, Switzerland and Finland (on behalf of the Nordic countries) supported Nicaragua's request for a panel. (Ibid.)

122 GATT Council, Minutes of Meeting held on 3 October 1983, C/M/171, p. 12.

123 GATT Panel Report, *US –Sugar Quota*, L/5607, para. 3.1.

124 Ibid. para. 3.9.

125 Ibid. para. 3.10.

126 Ibid.

127 Ibid. para. 3.11.

128 Ibid. para. 4.1.

129 Ibid. paras. 4.3–4.6.

130 GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, p. 8.

131 Ibid.

132 Ibid.

133 Ibid.

134 Ibid. p. 9.

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135 Ibid. p. 10.

136 GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, pp. 8–9.

137 Ibid. p. 9.

138 Ibid. p. 10.

139 Ibid. p. 11. Argentina, Australia, Brazil, Cuba, Colombia, Poland, India, Norway on behalf of the Nordic countries, Uruguay, Dominican Republic, United Kingdom on behalf of Hong Kong, Hungary, Portugal, Peru, Jamaica, Austria, Egypt, Romania, Switzerland, Chile, Singapore, Nigeria, Yugoslavia, Canada, Trinidad and Tobago, Senegal and Zaire supported the adoption of the panel's report. (Ibid. p. 9.)

140 GATT Council, Minutes of Meeting held on 15–16 May 1984, C/M/178, p. 27.

141 Ibid. Argentina and Cuba expressed their concern with the United States' failure to comply with the recommendations. (Ibid. pp. 27–28.)

142 GATT Council, Minutes of Meeting held on 6–8 and 20 November 1984, C/M/183, p. 65.

143 Ibid.

144 Ibid. Several contracting parties such as Argentina, Brazil, Cuba, Hungary, India, Uruguay and Poland expressed their concern with the United States' ongoing failure to comply with the recommendations. (Ibid. pp. 65–66.)

145 Ibid. p. 66.

146 Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.10, Inventory Numbers IV.B.17.1 (p. 59 of PDF file) and IV.B.18 (p. 61 of PDF file). Czechoslovakia characterized the measure maintained by Italy as an "embargo" on exports of electronic systems to Czechoslovakia, and the measure maintained by the United Kingdom as an embargo on exports of computers and related equipment. Italy responded that there was no embargo, but an inter-ministerial Committee which examined each export license application. (Ibid.)

147 Ibid.

148 Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.12, Inventory Number IV.B.18 (p. 9 of PDF file).

149 Ibid.

150 Ibid.

151 Communication from the United States, *US – Nicaraguan Trade,* L/5803. The measures were embodied in an Executive Order issued by President Reagan, and comprised: (a) a prohibition on all imports into the United States of goods and services of Nicaraguan origin; (b) a prohibition on all exports from the United States of goods to or destined for Nicaragua; (c) a prohibition on Nicaraguan air carriers engaging in air transport to or from points in the United States, and transactions relating thereto; and (d) a prohibition on vessels of Nicaraguan registration from entering the United States' ports, and a prohibition on transactions related thereto. (Communication from the United States, *US – Nicaraguan Trade,* L/5803, p. 2.)

152 GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 2. Nicaragua specifically alleged that the US measures contravened Articles I, II, V, XI, XIII, XXXVI, XXXVII and XXXVIII of the GATT 1947. Nicaragua also alleged that US measures violated the spirit and provisions "of the UN Charter, the resolutions of the UN General Assembly and Security Council, the decisions of the [ICJ], the Charter of the Organization of American States, and other international instruments, including the Bilateral Treaty of Friendship, Commerce and Navigation". (Ibid. p. 4.)

153 Ibid. p. 3.

154 Ibid. Nicaragua also criticized the refusal from the United States to enter into dialogue, as well as "the US policy of force, serious threats of increased military aggression and disregard of international legal provisions and of the bodies and tribunals responsible for ensuring their observance". (Ibid. p. 2.)

155 Ibid. p. 4. Nicaragua argued that "the measures had been taken as a form of coercion for political reasons, and formed part of a US policy of political, financial, trade and military aggression against Nicaragua", which included the mining of the country's ports and campaigns to prevent the harvesting of coffee and other products. (Ibid. p. 2.)

156 Ibid. p. 4.

157 Ibid. pp. 4–5.

158 Ibid. p. 5.

159 Ibid. pp. 4–5.

160 Ibid. p. 16.

161 Ibid.

162 Ibid. pp. 5–7, 9, 10 and 12. See also Ministerial Declaration adopted on 29 November 1982, L/5424 (1982 Ministerial Declaration). Paragraph 7(iii) of the 1982 Ministerial Declaration provides that the GATT CONTRACTING PARTIES, in drawing up the work programme and priorities for the 1980s, undertake, individually and jointly "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".

163 GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, pp. 5–15.

164 Ibid. pp. 6–7. The 1982 Decision is discussed in paragraph 1.28 of this Appendix.

165 Ibid. pp. 5–8.

166 Ibid. p. 8.

167 Ibid.

168 Ibid.

169 Ibid. p. 12.

170 Ibid. p. 13.

171 Ibid.

172 Ibid. p. 14.

173 Ibid. pp. 9–10.

174 Ibid. pp. 5–6.

175 GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 5.

176 Ibid. pp. 7–8.

177 Ibid. p. 10.

178 Ibid. pp. 10–11.

179 Ibid. p. 11.

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180 GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 10.

181 Ibid. pp. 11–15.

182 Ibid. p. 10.

183 Ibid. p. 13.

184 Ibid. pp. 12–13.

185 Ibid. p. 12.

186 Ibid. p. 17.

187 Communication from Nicaragua, *US – Nicaraguan Trade*, L/5847.

188 GATT Council, Minutes of Meeting held on 17–19 July 1985, C/M/191, p. 41. Colombia, Argentina, Poland, Uruguay, Peru, Brazil, Cuba, Chile, Spain, Romania, Jamaica, India, Hungary, Yugoslavia, Trinidad and Tobago and Czechoslovakia, as well as Venezuela and Mexico as observers, supported Nicaragua's request to establish a panel. (Ibid. p. 42.)

189 Ibid. p. 41.

190 Ibid. p. 42.

191 Ibid. p. 43.

192 Ibid. p. 44.

193 Ibid.

194 Ibid. p. 45.

195 GATT Council, Minutes of Meeting held on 17–19 July 1985, C/M/191, p. 45.

196 Ibid. p. 46.

197 GATT Council, Minutes of Meeting held on 10 October 1985, C/M/192, p. 6.

198 GATT Council, Minutes of Meeting held on 12 March 1986, C/M/196, p. 7. The agreed terms of reference were as follows: "To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI: (b)(3) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter". (Ibid.)

199 GATT Panel Report, *US – Nicaraguan Trade*, L/6053 (unadopted), para. 4.3.

200 Ibid. para. 4.8.

201 Ibid. para. 4.6.

202 Ibid. para. 4.9.

203 Ibid.

204 Ibid. para. 5.3.

205 Ibid.

206 GATT Panel Report, *US –Nicaraguan Trade*, L/6053 (unadopted), para. 5.6.

207 Ibid. para. 5.9.

208 Ibid. para. 5.11.

209 Ibid. para. 5.16.

210 GATT Council, Minutes of Meeting held on 5–6 November 1986, C/M/204, p. 7. Uruguay, Nigeria, Argentina, Colombia, Cuba, Peru, Hungary, Trinidad and Tobago, Czechoslovakia, Yugoslavia, Romania, Poland, India, Mexico and Tanzania, as an observer, supported Nicaragua's request to lift the embargo. Uruguay, Argentina, Colombia, Cuba, Peru, Hungary, Czechoslovakia, Yugoslavia and Romania supported Nicaragua's request to take measures to compensate Nicaragua. Uruguay, Nigeria, Argentina, Colombia, Czechoslovakia, Yugoslavia and Romania supported a re-examination of Article XXI in depth during the Uruguay Round negotiations. (Ibid. p. 10.)

211 Ibid. p. 8.

212 Ibid.

213 Ibid. p. 7.

214 Ibid. p. 17.

215 Ibid. pp. 8–10.

216 Ibid. p. 8.

217 Ibid.

218 GATT Council, Minutes of Meeting held on 5–6 November 1986, C/M/204, p. 9.

219 Ibid.

220 Ibid.

221 Ibid. p. 10.

222 Ibid. pp. 10–11. Nigeria also noted that "[a]ny action which clearly undermined the United Nations Charter had to be seen as a gross abuse of rights conferred by the General Agreement." (Ibid.)

223 Ibid. p. 11.

224 Ibid. p. 13.

225 Ibid. pp. 12–14.

226 Ibid. pp. 11–12.

227 Ibid. p. 15.

228 Ibid. p. 13.

229 Ibid. p. 16.

230 Ibid.

231 Ibid. pp. 11–15. Sweden reiterated its view that it was the sole prerogative of each GATT contracting party to determine whether or not to invoke Article XXI. Peru and Poland reiterated their opposition to the use of trade measures for political reasons. India reiterated its view that a contracting party having recourse to Article XXI should be able to demonstrate a genuine nexus between its security interests and the trade action taken. Japan reiterated its view that the roots of the present dispute were too deep to be addressed in the context of the General Agreement. (Ibid.)

232 Ibid. p. 17.

233 GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, pp. 17–18.

234 GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, p. 17.

235 Ibid. p. 18.

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236 Ibid.

237 Ibid.

238 GATT Council, Minutes of Meeting held on 15–17 July 1987, C/M/212, pp. 24–25. Cuba supported the adoption of this decision, and the European Communities, Switzerland, Canada, Australia, Austria, Japan, Finland on behalf of the Nordic countries, Israel, Turkey, Singapore, Yugoslavia and Indonesia requested the continuation of informal consultations aimed at seeking a consensus solution to this matter. An alternate text, adopting the panel report but solely recommending that other parties grant trade concessions to Nicaragua, was circulated by six Latin American countries. (Ibid. pp. 25–28. See also Communication from Argentina, Brazil, Colombia, Mexico, Peru and Uruguay, *US –Nicaraguan Trade*, C/W/525.)

239 GATT Council, Minutes of Meeting held on 15–17 July 1987, C/M/212, p. 28.

240 Ibid. p. 25.

241 Ibid. p. 26.

242 Ibid. p. 29.

243 GATT Council, Minutes of Meeting held on 10–11 November 1987, C/M/215, p. 40.

244 Ibid.

245 Ibid. Several contracting parties including Nicaragua, the United States, Brazil, Cuba, Argentina, Mexico, Colombia, Peru, Romania and Uruguay reiterated their views on the matter at the Fourth Meeting of the Forty-Third Session. (See GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting held on 2 December 1987, SR.43/4, pp. 12–16.)

246 GATT Council, Minutes of Meeting held on 21–22 June 1989, C/M/234, p. 37.

247 Ibid. The document went on to state that, if Nicaragua fulfilled its *Esquipulas* commitments and held free, fair and open elections, this might resolve the emergency which had led the US Administration to impose trade sanctions. (Ibid.)

248 Ibid. p. 38.

249 GATT Council, Minutes of Meeting held on 21–22 June 1989, C/M/234, p. 41.

250 Ibid. p. 40.

251 Ibid. p. 38.

252 Ibid. The European Communities reiterated its view that invocation of Article XXI was at the discretion of governments but that this "did not necessarily mean an arbitrary step or measure". (Ibid. p. 40.)

253 Ibid. p. 42. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989 (the April 1989 Decision), section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.) The procedural rules adopted under the April 1989 Decision applied to the GATT Council discussions concerning *European Communities v. Yugoslavia (1991)*, discussed below, and the Helms-Burton legislation in 1996 (see discussion in *United States v. Cuba (including Helms-Burton Act) (1962–2016)*, while the equivalent rules under the DSU applied to the situation involving Nicaragua and Honduras (also discussed further below).

254 Communication from Nicaragua, *US – Nicaraguan Trade,* L/6661.

255 GATT Council, Minutes of Meeting held on 3 April 1990, C/M/240, p. 31.

256 Ibid.

257 Ibid.

258 Ibid. p. 32. The European Communities reiterated its view that discretionary but not arbitrary use of Article XXI was to be recommended. (Ibid.)

259 Ibid.

260 See GATT Council, Status of Work in Panels and Implementation of Panel Reports, Report of the Director-General, C/172, p. 1.

261 Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/34; and Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/39.

262 Article XXI, Note by the Secretariat, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/16.

263 Communication from Argentina, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/44.

264 Negotiating Group on GATT Articles, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG7/W/73.

265 See fn 253 of this Appendix.

266 See the April 1989 Decision, section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.

267 Group of Negotiations on Goods, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988, MTN.GNG/13, pp. 59–60.

268 Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, Trade Negotiations Committee, MTN.TNC/7(MIN), 9 December 1988, p. 29; Mid-Term Meeting, Trade Negotiations Committee, MTN.TNC/11, 21 April 1989, p. 27.

269 Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 1. The measures comprised: (a) the suspension of the bilateral trade agreement between Yugoslavia and the European Communities, (b) the reapplication of certain quantitative limitations on textile products from Yugoslavia, (c) withdrawal of Generalized System of Preferences benefits from Yugoslavia, (d) suspension of the trade concessions granted to Yugoslavia as part of the Treaty establishing the European Coal and Steel Community, and (e) suspension of bilateral trade agreements between Member States of the European Communities and Yugoslavia. (Ibid. p. 2.)

270 Ibid.

271 Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 2.

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272 Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, p. 2.

273 Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, pp. 2–3.

274 Ibid. p. 3. Yugoslavia also noted that it reserved its right to propose that the GATT contracting parties issue a "formal interpretation" on Article XXI under this Decision. (Ibid.)

275 Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1. In addition to the measures notified by the European Communities, Yugoslavia also challenged a decision to apply selective positive measures in favour of "those parties which contribute to progress towards peace". Yugoslavia asserted that this additional measure created a dangerous precedent for GATT practice. (See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, pp. 1–2.)

276 Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1, p. 1. The request for establishment of a GATT panel was made pursuant to Article XXIII:2 and also paragraphs C.1 and F(a) of the April 1989 Decision. (See fn 253 of this Appendix.)

277 See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, p. 2. Yugoslavia specifically alleged that the measures contravened, *inter alia,* Articles I and XXI of the GATT 1947. (Ibid.)

278 Ibid. p. 2.

279 GATT Council, Minutes of Meeting held on 18 February 1992, C/M/254, p. 35. Chile, Cuba, Venezuela and India supported Yugoslavia's request for the establishment of a panel. (Ibid. pp. 35–36.)

280 Ibid.

281 Ibid. p. 36.

282 Ibid.

283 Ibid.

284 Ibid.

285 GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 14. India, Pakistan, Argentina, Chile, Peru, Cuba, Mexico and Venezuela all made statements supporting Yugoslavia's right to the establishment of a panel. (Ibid. pp. 15–17.)

286 Ibid. p. 14.

287 Ibid.

288 GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 15. The European Communities asserted that the April 1989 Decision was silent on this issue. (Ibid.)

289 Ibid. pp. 15 and 18.

290 Ibid. p. 15.

291 Ibid.

292 GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 17.

293 Ibid.

294 Ibid.

295 Ibid.

296 Ibid.

297 Ibid. pp. 17–18.

298 Ibid. p. 18.

299 Request for the establishment of a panel by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2, p. 1; and Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, p. 12.

300 Request for consultations by Colombia, WT/DS188/1.

301 Request for the establishment of a panel by Colombia, WT/DS188/2. Colombia specifically alleged that the measures were inconsistent with Articles I and II of the GATT 1994, as well as Articles II and XVI of the GATS. (Ibid. p. 1.)

302 Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, item 4.

303 Ibid. para. 51.

304 Ibid. para. 52. Nicaragua also referred to complaints made by Miskito communities bordering Honduras and the increase in the defence budget of Honduras adopted by the Congress of the Republic. (Ibid.)

305 Ibid. para. 53.

306 Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, para. 54. Nicaragua specifically argued that the measures were fully justified under Article XXI(b)(iii) of the GATT 1994 and Article XIV*bis*:1(b)(iii) of the GATS Agreement. (Ibid. para. 60.)

307 Ibid. para. 55. Nicaragua also asserted that there had been no nullification or impairment under Article II of the GATT 1994 because Nicaragua had not exceeded its scheduled tariff ceilings. (Ibid. para. 60.)

308 Ibid. para. 58.

309 Ibid. para. 59.

310 Ibid.

311 Ibid. para. 61.

312 Ibid. para. 62.

313 Dispute Settlement Body, Minutes of Meeting held on 18 May 2000, WT/DSB/M/80, para. 26.

314 Ibid. paras. 29–30.

315 Ibid. paras. 32–35.

316 Ibid. para. 35.

317 Ibid. para. 40.

318 See Note by the Secretariat, Update of WTO Dispute Settlement Cases, WT/DS/OV/34, p. 60.

319 Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 35.

320 Ibid.

321 Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 131.

322 Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

323 Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

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324 Ibid.

325 Ibid.

326 Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 16 and 18 January 2008, Addendum, WT/TPR/M/193/Add.1, pp. 101–102. Pakistan expressed similar views at its 2015 Trade Policy Review. (Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 24 and 26 March 2015, Addendum, WT/TPR/M/311/Add.1, pp. 17 and 52.)

327 Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Questions from the United States to Brazil, G/LIC/Q/BRA/1. Article XXI of the GATT 1994 applies to the Import Licensing Agreement by reference through Article 1.10 of that Agreement.

328 Ibid. p. 1.

329 Ibid. p. 2.

330 Committee on Import Licensing, Minutes of the Meeting held on 2 October 2003, G/LIC/M/18, p. 8.

331 Ibid.

332 Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Replies from Brazil to Questions from the United States, G/LIC/Q/BRA/2, p. 2.

333 Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, pp. 2–3.

334 Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, p. 3.

335 Ibid. pp. 3–4. The United States circulated a communication reiterating these concerns and posing further questions in November 2004. (See Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3.)

336 Ibid. p. 4.

337 Committee on Import Licensing, Minutes of Meeting held on 15 June 2005, G/LIC/M/21, p. 3.

338 Ibid.

339 Ibid. p. 5.

340 Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 3. See also Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3/Add.1.

341 Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 4.

342 Ibid. p. 3.

343 Ibid. p. 4.

344 See, e.g. Committee on Import Licensing, Minutes of Meeting held on 2 April 2007, G/LIC/M/25, p. 3; Committee on Import Licensing, Minutes of Meeting held on 28 April 2008, G/LIC/M/27, pp. 5–6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, pp. 3–4; and Committee on Import Licensing, Minutes of Meeting held on 30 April 2009, G/LIC/M/29, p. 8. Brazil also emphasized that controls on lithium products in other countries were not uncommon, and maintained that this was a matter of national security due to the application of lithium compounds in the production of nuclear energy. (See Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, p. 4.)

345 Committee on Import Licensing, Replies from Brazil to Questions from the United States, Brazil's Non-Automatic Import Licensing Procedures, G/LIC/Q/BRA/13, p. 1.

346 Committee on Import Licensing, Minutes of Meeting held on 19 October 2009, G/LIC/M/30, pp. 6–7.

347 Committee on Import Licensing, Minutes of Meeting held on 12 July 2010, G/LIC/M/31, pp. 5–6.

348 Trade Policy Review Body, Trade Policy Review, Brazil, Minutes of Meeting held on 24 and 26 June 2013, Addendum, WT/TPR/M/283/Add.1, p. 103.

349 Ibid.

350 Ibid.

351 Ibid.

352 Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.

353 Ibid.

354 Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.

355 Ibid.

356 Ibid.

357 Ibid.

358 Committee on Import Licensing, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, Questions from the European Union to Brazil, G/LIC/Q/BRA/18.

359 Committee on Import Licensing, Minutes of Meeting held on 20 October 2014, G/LIC/M/40, p. 8.

360 Ibid. p. 9.

361 Ibid.

362 Committee on Import Licensing, Replies from Brazil to Questions from the European Union, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, G/LIC/Q/BRA/19, p. 3.

363 See Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2015, G/LIC/M/42, pp. 6–7; and Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, pp. 7–8. Brazil subsequently emphasized the risk that nitrocellulose posed to human health as another justification for the measure. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6.) Brazil also asserted that nitrocellulose was reportedly employed in certain criminal activities, such as ATM robberies. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, p. 8.)

364 Committee on Import Licensing, Questions from the European Union to Brazil, G/LIC/Q/BRA/20. For Brazil's response, see Committee on Import Licensing, Replies from Brazil to the European Union, G/LIC/Q/BRA/21.

365 See, e.g. Committee on Import Licensing, Follow-Up Questions from the European Union to Brazil, Import Licensing System of Brazil, G/LIC/Q/BRA/22; and Committee on Import Licensing, Replies from Brazil to Questions from the

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European Union, Import Licensing System of Brazil, G/LIC/Q/BRA/23.

366 GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec(90)4, p. 2.

367 Committee on Industrial Products, Inventory of Non-Tariff Barriers, COM.IND/4, pp. 228–229.

368 Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19–25 June 1969, COM.IND/W/7, para. 1.

369 Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.

370 Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.

371 Ibid. Cuba based its arguments upon its reading of paragraph (c) of Article XXI. (Ibid. p. 313.)

372 Communication from Cuba, *United States – Measures Affecting Cuban Sugar Exports*, L/5980.

373 GATT Council, Minutes of Meeting held on 22 May 1986, C/M/198, p. 33. Cuba specifically argued that the US measures violated Part IV and GATT Articles dealing with quantitative restrictions, non-discrimination and most-favoured-nation treatment. (Ibid.)

374 Ibid. p. 34.

375 Ibid. p. 33.

376 Ibid. The same contracting parties reiterated these views at the First Meeting of the Forty-Second Session in 1986. (See GATT Contracting Parties, Forty-Second Session, Summary Record of the First Meeting on 24 November 1986, SR.42/1, pp. 11–13.)

377 GATT Contracting Parties, Forty-Third Session, Cuba, Statement by Mr. Alberto Betancourt Roa, Vice Minister, Ministry of Foreign Trade, SR.43/ST/10, p. 7.

378 Ibid.

379 GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting on 2 December 1987, SR.43/4, p. 14.

380 Ibid.

381 Ibid.

382 GATT Council, Trade Policy Review Mechanism, United States, Report by the United States of America, C/RM/G/3.

383 Ibid. p. 81.

384 GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec (90)4, p. 5. Cuba specifically cited incompatibility with Articles II, XI:1, XIII:1, XXXVI and XXXVII of the GATT 1947. (Ibid. pp. 5–6.)

385 Ibid. p. 5.

386 See, e.g. GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 11–12 March 1992, C/RM/M/23, pp. 26–27; GATT Council, Minutes of Meeting held on 29 September – 1 October 1992, C/M/259, pp. 77–78; GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 16–17 February 1994, C/RM/M/45, p. 24; and Communication from Cuba, *Analysis of the Effects of the Embargo Imposed by the Government of the United States of America against Cuba*, L/7525.

387 Communication from Cuba, *United States - Cuban Liberty and Democratic Solidarity Act of 1996,* WT/L/142. The Helms-Burton Act, amongst other things, empowered the President to "encourage" other countries to restrict their trade and credit relations with Cuba, withheld payments to international financial institutions which approved loans to Cuba, and denied entry into the United States for companies with certain investments and assets in Cuba. (See Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6–7.)

388 Ibid. p. 2.

389 Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers-Requests, Communication from Cuba, TN/MA/NTR/2, pp. 2–3.

390 Council for Trade in Goods, Minutes of Meeting held on 19 March 1996, G/C/M/9, pp. 3–4. Cuba specifically alleged that the measure was incompatible with the principles of MFN treatment, Article XI and Part IV of the GATT 1994, the Agreement on Trade-Related Investment Measures, and the commitments of the United States to ensure freedom of access in trade in services. (Ibid.)

391 Ibid. p. 6.

392 Ibid. p. 5. Mexico, Chile, the European Communities, Nicaragua and India also expressed concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5–6.)

393 Ibid. p. 6.

394 General Council, Minutes of Meeting held on 16 April 1996, WT/GC/M/11, pp. 5–9. Bolivia, Canada, the European Communities, Mexico, India, Nicaragua, Madagascar, Jamaica, the Philippines, Australia, Switzerland, Norway, Colombia, Trinidad and Tobago, Japan, Sri Lanka and Iceland expressed their concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5–10.)

395 Request for consultations by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1.

396 Request for the establishment of a panel by the European Communities, WT/DS38/2 (European Communities' panel request), pp. 1–2. The other challenged measures included: (a) denial of access to the US tariff rate quota for sugar (through a prohibition on the allocation of any of the sugar quota to a country that was a net importer of sugar unless that country certified that it did not import Cuban sugar that could indirectly find its way to the US); (b) denial of transit of EC goods and vessels of EC Member States through US ports where the vessels carried goods or passengers to or from Cuba, or carried goods in which Cuba or a Cuban national had any interest; (c) prohibiting US persons from financing transactions involving confiscated property owned by a US national; (d) a right of action in favour of US citizens to sue EC citizens and companies in US courts to obtain compensation for Cuban properties "trafficked" by such EC citizens or companies and confiscated by the Cuban Government from persons who were US nationals; and (e) denials of visas and exclusion from the US of persons (including the spouses, minor children and agents of such persons) involved in confiscating or "trafficking" in confiscated property owned by US nationals or persons. (European Communities' panel request, pp. 1–2.)

397 Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 6. Australia, Bolivia,

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Canada, India and Switzerland also expressed their concern about the potential extra-territorial application of the Helms-Burton Act. (Ibid. pp. 7–9.)

398 Ibid. p. 6.

399 Ibid. pp. 6–7.

400 Ibid. p. 7.

401 Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 7.

402 Ibid.

403 Ibid. p. 7.

404 Ibid. p. 8.

405 Ibid. p. 9.

406 Dispute Settlement Body, Minutes of the Meeting held on 20 November 1996, WT/DSB/M/26, p. 2. New Zealand and Norway expressed their concerns regarding the extraterritorial application of the measures. (Ibid. pp. 2–3.)

407 Ibid. p. 2.

408 Ibid. pp. 2–3.

409 Ibid. p. 3.

410 Ibid.

411 Ibid. p. 2.

412 Communication from the Chairman of the Panel, WT/DS38/5.

413 See Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Communication by the United States, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25.

414 Note by the Secretariat, Lapse of the Authority for Establishment of the Panel, WT/DS38/6.

415 Dispute Settlement Body, Minutes of the Meeting held on 22 April 1998, WT/DSB/M/45, pp. 15–16.

416 See, e.g. Dispute Settlement Body, Minutes of the Meeting held on 22 June 1998, WT/DSB/M/46, pp. 17–18; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 17 September 2001, Addendum, WT/TPR/M/88/Add.1, p. 242; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 16 January 2004, Addendum, WT/TPR/M/126/Add.3, p. 117; Negotiating Group on Market Access, Non-Tariff Barriers Imposed by the United States Impeding and Prohibiting Cuba's Trade, Communication from Cuba, TN/MA/W/71, pp. 1–12; Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6–7; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 22 and 24 March 2006, Addendum, WT/TPR/M/160/Add.1, pp. 162–166; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 9 and 11 June 2008, Addendum, WT/TPR/M/200/Add.1, p. 165; Trade Policy Review Body, Trade Policy Review, United States, Record of Meeting held on 29 September and 1 October 2010, WT/TPR/M/235, pp. 58–59; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 16 and 18 December 2014, Addendum, WT/TPR/M/307/Add.1, p. 221; and Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 19 and 21 December 2016, Addendum, WT/TPR/M/350/Add.1, pp. 159–160.

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