

ZOOM IN

The question:

WTO security exceptions: A landmark Panel report in times of crisis

Introduced by Loris Marotti and Giovanna Adinolfi

Just over a year has passed since the adoption of the report in the *Russia–Traffic in transit* case in which, for the first time, the national security exceptions under Article XXI GATT 1994 have been interpreted and applied by a WTO Panel. The report appeared as a glimmer of light in rather troubled years for the WTO dispute settlement system (DSS). Indeed, despite the (then-ongoing) collapse of the WTO Appellate Body – and consequently of the WTO DSS in general – the Panel managed to take a stance on a provision whose meaning and implications have long been controversial among States and commentators both in the GATT and in the WTO eras.

The report may be seen as a careful exercise of balance between the need to safeguard member States' interests in matters of national security and the need to set and preserve a judicial scope of review in order to prevent potential abuses. Its main takes may be summarized as follows. First, contrary to what had been claimed by a number of members – and by Russia in the present case – the invocation of Article XXI's security exceptions by a member State falls within the jurisdiction of WTO dispute settlement organs. Secondly, while the adjectival clause 'which it considers' in Article XXI no doubt leaves a member State with broad discretion in the adoption of measures necessary for the protection of its security interests, no unconditional deference is accorded to the invoking State when it comes to the assessment of Article XXI exceptions, except for the determination of the 'necessity' of the measures at stake. In essence, the Panel finally discarded the alleged self-judging nature of the provision, either by finding that the situations envisaged in Article XXI (b) – and particularly the situation of 'emergency in the international relations' – are subject to objective determination and by subjecting States' determinations of their 'essential security interests' to a good faith test.

In times when international law is at risk of being diluted by security narratives, which often lend themselves to abuses by States, a decision like this is to be welcome, not least for the impact it may have on the interpretation and application of similar security exceptions clauses by other international courts and tribunals. With respect to the WTO context, the Panel report ultimately confirms that law works even in times of crisis. States are not left with unreviewable discretion when trade relations are affected by ‘emergencies in international relations’, be they wars, disasters, pandemics (?) and other events.

However, as mentioned above, the report was issued in times of huge crisis for WTO adjudication. Indeed, eight months after its adoption, the term of a member of the Standing Appellate Body expired. Since December 2019, the Appellate Body is composed only by two out of seven members, rendering impossible the establishment of the three-member committee required to hear new cases. This is just the last chapter of a long-standing saga. But, it risks being disruptive for the WTO in general (whose multilateral trade negotiations launched in 2001 have failed), for its DSS (deemed as the ‘jewel of the crown’, in the words of the former Director-General Pascal Lamy) and for the disputes under adjudication, in particular those involving security concerns and wherein the responding parties (United States and Qatar) argue that Article XXI is a self-judging clause. In *Russia – Traffic in Transit*, the report was approved since both Ukraine and Russia considered some of their key allegations had been endorsed by the Panel. In the pending cases on Article XXI, it is not to be excluded that either party files an appeal, preventing the adoption of the panel report and sticking it in limbo. The issue is then whether the legal reasoning by the Panel in *Russia – Traffic in Transit* can become the touchstone for the settlement of the other disputes, in particular in an era where an already highly controversial provision as Article XXI is strained by an expansion of the notion of security beyond the traditional military concerns.

It is against this background that QIL asked two authors to discuss the Panel report in light of both the features of the security exceptions under Article XXI and through the prism of the crisis of the WTO DSS. Viktoriia Lapa offers an in-depth analysis of the Panel report and critically illustrates its reasoning and findings. While commending the Panel for having carefully struck the delicate balance between trade and security issues in a highly sensitive case such as the one opposing Ukraine and



Russia, Lapa claims at the same time that several issues have been left open by the Panel and that, in the end, the case at hand was relatively uncontroversial as to the existence of the objective conditions justifying recourse to Article XXI. Laura Magi, on the other hand, looks at the Panel report under the more general legal and political framework of the crisis of the WTO DSS brought by the stalemate of the Appellate Body. Magi convincingly notes how the unfortunate coincidence of the DSS crisis with several pending cases involving the application of Article XXI GATT risks to hamper further developments of WTO case law on national security exceptions. That is another – often overlooked – reason to hope for the overcoming of the current deadlock in Geneva.

