

International Economic Law and Policy Blog

Litigating GATT Article XXI: The EU's View of the Scope of the Exception

A clarification of the scope of the GATT Article XXI security exception may come sooner than expected, as Russia has invoked Article XXI(b)(iii) in the Russia - Traffic in Transit (DS512) dispute. The EU's third party submissions are now online: Third party written submission and third party oral statement. Here's an excerpt from the written submission:

61. Article XXI(b), nevertheless, differs from Article XX in that the term "necessary" is preceded and qualified by the terms "which it considers". These terms imply that, in principle, it is for each Member to assess by itself whether a measure is "necessary". However, once again, this does not mean that Members enjoy unfettered discretion and that panels must accord complete deference to a Member asserting the necessity of the measure.

62. Panels must review, within the analytical framework described above, whether invoking Member can plausibly consider that the measure is necessary. This **limited review** is necessary in order to ensure that the exception is applied in good faith by the invoking Member and prevent abuses.

63. In order to allow panels to conduct this limited review, the invoking Member, which bears the burden of proof, must provide the panel with an explanation of why it has considered that the measure at issue was necessary having regard to the factors mentioned above. Where, as in the present case, the invoking Member fails to provide such explanations, it must be concluded that that Member has failed to meet its burden of proof.

And this is from the oral statement:

21. The term "necessary" in Article XXI(b) of GATT 1994 must be given the same meaning as in Article XX. However, the terms "which it considers" imply that, in principle, it is for each Member to assess by itself whether a measure is "necessary". Again, this does not give the Member unfettered discretion. However, a panel's review should give deference to the invoking Member. The review should be limited to assessing whether the invoking Member can plausibly consider the measure necessary and whether the measure is applied in good faith. Since the invoking Member bears the burden of proof, it must provide the panel with an explanation of why it has considered the measure necessary in light of the factors mentioned above.

The panel was composed on June 6, 2017. The panelists are Georges Abi-Saab, Ichiro Araki, and Mohammad Saeed.