

Russia – Measures Concerning Traffic in Transit

(DS512)

Responses of the United States of America to Questions
From the Panel and Russia
to Third Parties

February 20, 2018

General U.S. Answer to Questions from the Panel and the Russian Federation

1. For convenience, the United States first presents its views on certain issues that apply to a number of questions from the Panel and the Russian Federation, and then refers to this answer as appropriate in the context of other questions.
2. As the Panel is aware, the United States considers that the text and negotiating history of GATT 1994 Article XXI, as well as its place within the broader WTO framework, indicate that this provision is non-justiciable. That is, the text leaves its invocation to the judgment of a Member through the phrase “that it considers essential”. A Member’s judgment as to any element of this invocation is therefore not capable of findings by a panel. This being the case, the Panel would carry out its mandate, consistent with the terms of reference and the DSU, by acknowledging that Russia has invoked Article XXI and, on this basis, concluding that it cannot make findings as to whether Russia’s measures are consistent with its WTO obligations. To proceed further – by addressing whether Russia invoked Article XXI in good faith or deciding if the invocation, as an affirmative defence, justifies or excuses any non-compliance – would be incompatible with the provisions of the DSU that require the Panel to make an objective assessment of the matter and provide findings that will assist the DSB in making any recommendations.
3. The text of Article XXI, establishing that its invocation is non-justiciable, is supported by the drafting history of Article XXI. In particular, certain proposals from the United States during that process demonstrate that the revisions to what became Article XXI reflect the intention of the negotiators that the defence be self-judging, and not subject to the same review as the general exceptions contained in GATT 1994 Article XX.
4. In December 1945, the United States proposed the establishment of an International Trade Organization of the United Nations for the purpose of administering commercial relations between trading partners in accordance with rules set forth in a Charter for the Organization. The Draft Charter proposed by the United States the following year included two articles containing exceptions to certain provisions of the Charter.¹ The articles, respectively and in relevant part, read as follows:

Article 32 (General Exceptions to Chapter IV):

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures ...

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and

¹ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 11 (October 31, 1946).

implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

5. Notably, these provisions as originally drafted do not appear to be self-judging. First, they lacked the key phrase that appears in the current text of Article XXI regarding action by a Member that “it considers necessary for” the protection of its essential security interests. Second, the essential security exception set out in Article 32 was one of twelve exceptions, several of which later formed the basis for GATT 1994 Article XX. Thus, no distinction was being drawn at this point between essential security interests and other issues that would permit derogation from the commitments of the ITO / GATT.

6. In March 1947, a general exception to Chapter V of the Draft Charter was put forward in Article XX (cf. Article 37 of the Charter).² The proposed text read:

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 this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ...

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.³

7. The chapeau of this provision on general exceptions and a number of the subparagraphs are identical to what would become Article XX in the GATT 1994. With its proviso, the chapeau contemplated review by a panel so that the exceptions would not be applied to discriminate unfairly. As the subparagraphs corresponding to essential security were included here together with other exceptions, and therefore were also subject to the proviso in the chapeau, this too suggests that the drafters did not, at this time, view the essential security exception in subparagraph (e) as self-judging.

8. However, two months later, the United States offered certain amendments to the New York Draft Charter, including to Article 37 referenced above.⁴ Specifically, the United States proposed removing, *inter alia*, item (e) from Article 37, “which relates only to Chapter V, and that a new Article be inserted at an appropriate place toward the end of the Charter which would make these items

² Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34, at 77 (March 5, 1947).

³ In addition to item (e) that provided an exception for measures “[i]n time of war or other emergency in international relations” relating to the protection of essential security interests, the proposed text also included other security-based exceptions at items (c), (d), and (k), respectively, providing for measures “[r]elating to fissionable materials; [r]elating 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; ... [or] [u]ndertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.”

⁴ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947).

general exceptions to the entire Charter.”⁵ The United States also proposed that the new article would contain the introductory text, “Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures,” which would be followed by the list of items transferred from Article 37.

9. On July 4, 1947, the United States proposed suggestions regarding the arrangement of the Charter as a whole, including the addition of a new Chapter VIII, entitled “Miscellaneous,” and the placement in this new chapter of the proposed General Exceptions to the Charter as a whole.⁶ In this proposal, the United States also proposed additional text to make the self-judging nature of these exceptions apparent. Draft Article 94 stated:

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.⁷

10. For the first time in the drafting of the general exceptions, the text now referenced what a Member considered to be necessary – but this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interest. The drafting history thus shows a deliberate textual distinction drawn between the self-judging nature of general exceptions pertaining to essential security and those related to other interests that, unlike the removal of the security-based exceptions referenced above, were retained in Article 37.

11. The drafting history shows additional revisions to the proposal from the United States, but the self-judging nature of the provision never changed. If anything, it was strengthened and emphasized. In August 1947, the proposal was moved from Article 94 to Article XXI (cf. Articles 43 and 94 of the Charter and Article XX of the New York Draft of Agreement) and was changed from “action which *it*

⁵ The United States, in addition to moving item (e) to the new Article, proposed moving the other security-based exceptions that are referenced in Footnote 4 (*i.e.*, items (c), (d), and (k)) as well.

⁶ E/PC/T/W/236, at 1, 12, Annex A (proposing a new Article 94 “covering national security exceptions taken from Articles 37 and 59 of New York Draft plus Article 42, 3,(a) of the new draft on Business Practices (E/PC/T/112, at 5)”) (July 4, 1947); *see* E/PC/T/A/SR/33, at 4.

⁷ E/PC/T/W/236, at Annex A. Emphasis added.

may consider to be necessary” to the current formulation, “action which *it considers necessary* for the protection of its essential security interests.”⁸

12. Regarding the scope of application of the exception, at a meeting of the negotiating committee in 1947, the delegate from the Netherlands requested clarification on the meaning of the “essential security interests” of a Member, which the delegate suggested could represent “a very big loophole in the whole Charter.”⁹ Responding to these concerns, the delegate from the United States explained that the exception would not “permit anything under the sun.” and that the limitation on actions not consistent with the Charter related to the time in which such actions would be taken – i.e., “in time of war or other emergency in international relations.”¹⁰ The delegate suggested that there must be some latitude for security measures, and that it was a question of balance. In situations such as times of war, however, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are.”¹¹

13. Moreover, “in defence of the text,” the Chairman recalled the context of the exception as part of the Charter of the ITO, and that in that context “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind” raised by the Netherlands delegate. Therefore, the delegates and the Chairman recognized that the security exceptions would be self-judging and that no formal review of a Member’s invocation of the exceptions could be requested.

14. During the same meeting, the Chairman noted that the question arose whether “we are in agreement that these clauses [on national security] should not provide for any means of redress”.¹² In response, the U.S. delegate noted that “[i]t 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.”¹³ The delegate from Australia, in lifting a reservation on this article, then noted that, as Article 94 (the national security general exception) “is so wide in its coverage” – in particular, the “which it may consider to be necessary” language – Australia’s agreement was done with the assurance that “a Member’s rights under Article 35(2) are not impinged upon.”¹⁴ The U.S.

⁸ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/189, at 47 (August 30, 1947).

⁹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33, at 19 (July 24, 1947).

¹⁰ Id. at 20.

¹¹ Id.

¹² Verbatim Report, Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/PV/33, at 26 (July 24, 1947) (statement by the Chairman).

¹³ Id. at 26-27 (statement by U.S. delegate). Emphasis added.

¹⁴ Id. at 27 (statement by Australian delegate). See Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 5 (July 24, 1947): “During the discussion the Delegate

delegate noted that Article 35(2) permitted recourse to its procedure “whether or not [a measure] conflicts with the terms of this Charter.”¹⁵ Therefore, the negotiating history again demonstrates the negotiators understood that the essential security exception was “so wide in its coverage” that it was not justiciable; and that while the delegates considered that a claim for nullification or impairment “whether or not a measure conflicts” with the agreement might be available, they were clear that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.

15. The drafting history outlined above shows that the self-judging nature of the security exception in what was to become Article XXI was an intentional choice of the CONTRACTING PARTIES. Again, the text initially included an exception for security purposes together with other exceptions, all of which were subject to review including under what became the current chapeau of Article XX of the GATT 1994. In the course of the negotiation, the drafters continued to revise the general exception applicable to essential security, and agreed to separate it from the other exceptions so as to apply more broadly to the Charter as a whole. In so doing, they also agreed to the current formulation of the chapeau of Article XXI, which states that the exception would apply when a Member is taking “any action which it considers necessary for” the protection of its essential security interests. Therefore, both the text, in context, and the drafting history of Article XXI of the GATT 1994, confirm that a Member’s invocation of its essential security interests in defence of an action “taken in time of war or other emergency in international relations” is self-judging and not justiciable by a dispute settlement panel.

QUESTIONS FROM THE PANEL

Question 1. What do you mean by justiciability? Is non-justiciability anything more than a case of a flagrant lack of jurisdiction?

16. As noted in the third-party oral statement of the United States, the terms justiciability and jurisdiction do not appear in the WTO agreements. We have used these terms to denote different legal concepts that are of relevance to the Panel’s consideration of this dispute. Because they are different concepts, we would not agree that justiciability relates to a lack of jurisdiction – rather, it relates to the nature of the inquiry that an adjudicator could make over a matter put before it.

for Australia stated that it should be clear that the terms of Article 94 would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.”

¹⁵ Id. at 29 (statement by U.S. delegate). See also Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (January 9, 1948): “After extensive discussion of sub-paragraph (b) of Article 89 it was decided to allow this sub-paragraph to remain as in the Geneva text. The working party considered that this sub-paragraph would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter. Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.”

17. The United States is of the view that the Panel does possess jurisdiction over this dispute, but that the dispute presents a non-justiciable issue for which the Panel cannot make findings or provide a recommendation. As indicated in the U.S. third-party oral statement:

For purposes of discussion, we might define jurisdiction in this context as the extent of power of the Panel under the DSU to make legal decisions in this dispute, and justiciability as whether an issue is subject to findings by the Panel under the DSU. With this understanding, the United States considers that the Panel has jurisdiction in the context of this dispute in the sense that the DSB has 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. The United States also considers that Russia’s invocation of Article XXI is non-justiciable, and it follows that the Panel may not make findings on Ukraine’s claims. Most importantly, Article XXI is a self-judging provision, and its invocation is not subject to review by the DSB (i.e., all WTO Members convening as that Body) or an adjudicator to which the DSB refers a matter (automatically, under the DSU).¹⁶

18. The position of the United States, as reflected above, is consistent with the meaning and use of these legal terms, as provided in a number of sources. For example, the Oxford English Dictionary defines “jurisdiction” as [1] administration of justice; exercise of judicial authority; or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power; and [2] power or authority in general; administration, rule, control.¹⁷ Black’s Law Dictionary similarly defines jurisdiction as a court’s power to decide a case or issue a decree.¹⁸ These definitions are in accord with the view of the United States that the Panel has jurisdiction over this dispute because it has the power or authority to administer the dispute under the terms of reference established under the DSU. Through this administration, the Panel may receive statements from the parties, including third parties, and assemble to hear the different views of Members. The Panel, however, must exercise its jurisdiction properly under the authority of the DSU and that comes with the limits agreed by the Members when they formed the WTO. This is where the separate question of justiciability arises.

19. Black’s Law Dictionary defines “justiciability” as the quality, state, or condition of being *appropriate or suitable* for adjudication by a court and “justiciable” in the context of a case or dispute as properly brought before a court of justice and *capable of being disposed of judicially*.¹⁹

20. Similarly, the Oxford Companion to Law defines “justiciability” in the following way:

The quality of being capable of being considered legally and determined by the application of legal principles and techniques. *This concept is of importance in international law, where it is sometimes argued that certain disputes are not justiciable, being political and not legal in nature.* ‘Justiciable’ is frequently equated

¹⁶ Third-Party Oral Statement of the United States of America, paras. 3-5.

¹⁷ The Compact Oxford English Dictionary, Second Edition, 1989, at 904.

¹⁸ Black’s Law Dictionary, ed. Bryan A. Gardner, Tenth Edition, 2009, at 980.

¹⁹ Black’s Law Dictionary, ed. Bryan A. Gardner, Tenth Edition, 2009, at 997. Emphasis added.

with ‘legal’. Many disputes between states are political in that they involve issues of independence, national honour, vital interests, or the like, but they are not necessarily, on that account, non-justiciable and some other disputes are certainly justiciable. In truth, a state will contend that a dispute is not justiciable if it does not, for reasons of policy, want to submit to judicial or arbitral decision of the issue. *The only clear cases for treating an issue as non-justiciable are where there are no legal criteria by which the issue can be judged[.]*²⁰

21. In other words, for convenience, we have used the term “jurisdiction” to refer to the ability of a Panel or the Appellate Body, under the terms of reference set by the DSB pursuant to the DSU, to organize and hear a dispute from a Member, including receiving submissions from the parties and third-parties. We have used the term “justiciability” to refer to the ability of the Panel or Appellate Body to make findings and provide a recommendation to the DSB.

22. The United States considers this dispute to be 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. WTO Members agreed to remove invocation of the essential security exception from multilateral judgment when they agreed to the self-judging text included in Article XXI. As noted in the General U.S. Answer to the Panel’s and Russia’s questions, this understanding comports with the negotiating history, which reveals that the drafters of the GATT 1947 deliberately set the general exception applying to national security apart from other general exceptions and deliberately made this security exception self-judging.

Question 2. The Russian Federation has referred to an emergency in international relations that occurred in 2014, which is publicly known and also known to Ukraine.

- a. Is the Russian Federation required to further elaborate on the specific events of 2014 to which it refers in order to satisfy the conditions for successfully invoking Article XXI(b)(iii)?**

23. A WTO Member is not required, when invoking Article XXI, to elaborate on the specific events that caused it to invoke the essential security exception. There is nothing in the text of Article XXI that requires any elaboration on the part of the invoking Member. Such a requirement would be inconsistent with the self-judging nature of the provision and the text that firmly establishes the exception. Moreover, the Panel’s question confirms that any “require[ment] to further elaborate” the events underlying an invocation of Article XXI would, in effect create “conditions” for successfully invoking the Article, contradicting the text (and negotiating history) of this provision.

24. The text of Article XXI contains no requirement for a Member to detail reasons or events to invoke the security exception. The text instead provides only that a Member “considers” the action necessary for the protection of its essential security interests in time of war or other emergency in international relations. It would be error to impose through review in dispute settlement additional requirements that do not exist in the text of Article XXI.

²⁰ The Oxford Companion to Law, ed. David M. Walker, 1980 at 694. Emphasis added.

b. Is the Panel able to take judicial notice – or otherwise inform itself - of the events of 2014 to which the Russian Federation refers?

25. As with jurisdiction and justiciability discussed above, “judicial notice” is not a term that appears in the WTO agreements. The United States understands that this concept generally refers to a tribunal’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact.²¹ Application of such a concept would be unnecessary in this dispute. As the United States has explained in its oral statement and answer to Question 1, the Panel does not have authority to make findings concerning Russia’s invocation of the security exception under Article XXI, other than to note the invocation itself. Therefore, whether the Panel could take judicial notice of events to which Russia refers is not relevant to resolution of this dispute.

Question 3. Canada contends in paragraph 6 of its oral statement that “[the] subjective standard [in Article XXI(b)] also applies to the language of subparagraph (iii) as it completes the phrase begun in the opening words of paragraph (b)”. Do you agree?

26. The United States agrees with Canada that Article XXI(b) is subjective – that is, self-judging – and this applies throughout the Article. Subparagraph (iii) is an integral part of the Article XXI(b). That is, a Member may take any action which it considers necessary for a given purpose. That purpose is for the protection of its essential security interests taken in time of war or other emergency in international relations. It is the *Member* that will consider the action necessary for that purpose. To review a Member’s consideration of that purpose would be to read a proviso or condition into the text that is not there (e.g., provided that a war or other emergency in international relations is demonstrated to exist). Further, there would be no agreed criteria to apply in reviewing whether a war or other emergency international relations exists.

Question 4. With what degree of specificity should the invoking Member identify the essential security interests in Article XXI(b)?

27. As indicated in its oral statement, the United States is firmly of the view that an invocation is proper under Article XXI when the invoking Member “considers” its actions to be necessary for protection of its essential security interests taken in time of war or other emergency in international relations. Any requirement for specificity or elaboration that the Member would need to provide when invoking its rights under Article XXI would be inconsistent with the text of the Article itself. The United States refers the Panel to the General U.S. Answer to the Panel’s and Russia’s questions and its answer to the Panel’s Question 2 as well.

Question 5. Several third parties have expressed views that the Panel should review whether a Member invoking Article XXI(b) honestly considers, or believes in good faith, that the action taken was necessary for the protection of its essential security interests. If that is the case, what type of evidence would satisfy this requirement?

28. This question indirectly highlights the unreviewable quality of invocations under Article XXI. The question implicitly suggests that it is unclear what evidence, other than a Member’s belief that the action in question was necessary for the protection of its essential security interests, would satisfy the

²¹ Black’s Law Dictionary, ed. Bryan A. Gardner, Tenth Edition, 2009 at 975.

standard to determine whether a Member invoked the security exemption honestly or in good faith. An honest application or good faith standard, ultimately, collapses into the same self-judging test that the United States advocates. Anything more than this requires a Panel to scrutinize the invocation to determine, from the Panel's perspective and not from the perspective of the Member who is responsible for making this determination, whether the invocation is proper.

29. As explained in the General U.S. Answer and in the response to Question 1, where there are no legal criteria available upon which to judge an issue, as is the case here, a panel should decline to review the matter. As noted by the Chairman of the negotiating group developing this provision, ultimately it is the attitude of Members in invoking and applying this provision that is the guarantor against misuse of the national security exception.²²

30. We recall that the Members who have advocated for this standard have not distinguished a good faith application from one where a Member considers, for itself, that action is necessary to protect an essential security interest. It is significant to note that, during the oral statements at the third-party session in this dispute, the representative from Brazil referenced the dispute with Sweden concerning the purported invocation of the security exception with respect to the importation of certain shoes. This example was intended to point out an instance where the security exception was invoked in bad faith or otherwise could not have related to an essential security interest. However, after reviewing the actual documents from this dispute, the United States notes that the dispute in question did not involve an invocation under Article XXI. Specifically, the Secretariat Note indicates that Sweden invoked "the spirit" of Article XXI, but did not actually invoke the security exception.²³ This confirms that Members in fact have strived to limit their invocations of Article XXI to situations in which they consider this would be appropriate.

Question 6. Assume for the sake of argument that the Panel were to determine whether the Russian Federation's assertion that the action it took was necessary for the protection of its essential security interests was reasonable or plausible. Can the Panel undertake this assessment without the Russian Federation having indicated what its "essential security interests" are?

31. As noted above, the United States does not consider that the Panel can assess whether Russian's assertions are "reasonable or plausible". This issue falls outside the competency of the WTO because Russia's determination to take actions with respect to shipments from Ukraine is political in nature. This issue is not capable of review and resolution by the WTO's dispute settlement system. Similarly, without Russia's indicating what its "essential security interests" are, the Panel would in any event not be capable of assessing whether Russia's assertion was reasonable or plausible. And it is not the role of the WTO to establish what are a Member's "essential security interests".

Question 7. Does paragraph (a) of Article XXI relieve a Member of the burden to establish the circumstances that it considers to justify its reliance on the exception contained in Article XXI(b)(iii)?

²² Verbatim Report, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/A/PV/33, at 21 (July 24, 1947).

²³ Note by the Secretariat, NG7/W/16, at 2 (August 18, 1987).

32. The United States does not consider that Article XXI imposes a burden on a Member to establish the circumstances that it considers justify action to protect its essential security interests. The invocation of the security exceptions under Article XXI is self-judging, and therefore there is no “burden” to establish “the circumstances that it considers to justify its reliance” on Article XXI. That said, the text of subparagraph (a) offers further confirmation of the self-judging nature of the essential security exception in Article XXI(b). Article XXI(a) establishes that nothing in the GATT 1994 requires disclosure of information if a Member considers the disclosure contrary to its essential security interests. It would thus be contrary to Article XXI(a) to require a Member to furnish information it considers contrary to its essential security interests, including in relation to a Member’s invocation of Article XXI(b).

QUESTIONS FROM THE RUSSIAN FEDERATION

33. The United States appreciates the questions from the Russian Federation, which highlight some of the serious implications underlying this dispute, including the implications that would arise were an invocation of Article XXI not to be considered self-judging. Russia has asked certain questions that cannot be answered in the abstract, but the United States would refer Russia to the General U.S. Answer to the questions posed by the Panel and by Russia, as well as the responses to the specific questions from the Panel, above.