

# WTO Panel Issues Landmark Decision Regarding Actions Taken to Protect National Security Interests

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On Friday, April 5th, a World Trade Organization (WTO) panel issued its decision in a landmark dispute between Russia and Ukraine. The dispute, *Russia – Measures Concerning Traffic In Transit*, marks the first time a WTO panel has been tasked with determining whether it has jurisdiction to review actions taken by a WTO Member to protect its own national security interests.

The dispute was brought by Ukraine in September 2016 after Russia imposed various restrictions preventing Ukraine from using Russian road and rail transit to trade goods destined for Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan. In defense, Russia claimed that its actions were not subject to WTO review because they constituted actions necessary to protect Russia's "essential security interests" during an "emergency in international relations" between Russia and Ukraine. Actions taken by a WTO Member during a war or an emergency in international relations are excepted from WTO review pursuant to Article XXI of the General Agreements on Tariff and Trade 1994 (GATT). The Trump Administration has cited Article XXI as exempting from WTO jurisdiction its decision to impose duties on imports of steel and aluminum products pursuant to Section 232 of the Trade Expansion Act of 1962 (Section 232).

Article XXI is the so-called "security exemption" from certain WTO obligations. Article XXI(b)(iii) provides, among other things, that a party may take any action that it considers necessary to protect its essential security interests taken "in a time of war or other emergency in international relations." According to Russia, Article XXI is a "self-judging" provision, meaning that a WTO Member may itself determine whether it has taken action to protect its essential security interests during an emergency in international relations, and a WTO panel may not second-guess or review that decision. In other words, Russia claimed that once it cited Article XXI as a basis for its actions, the WTO could no longer examine the challenge.

The panel held otherwise. First, the panel found that it possessed jurisdiction to review Ukraine's challenges and Russia's invocation of a defense pursuant to GATT Article XXI. It then examined what had transpired between Russian and Ukraine since 2014 to determine whether it constituted an "emergency in international relations." The panel concluded that there was an emergency in international relations between the two countries because relations had deteriorated so badly that they were a concern to the international community, the situation was recognized by the UN General Assembly as an armed conflict, and a number of countries imposed sanctions against Russia in connection with the situation. Thus, after finding that the Article XXI security exemption was satisfied, the panel did not make any additional findings regarding Ukraine's challenges. It made no

recommendations for any further actions.

This decision has implications for the United States, as several foreign governments have challenged at the WTO the U.S.'s imposition of tariffs under Section 232. In response, the U.S. government has cited Article XXI, arguing that its Section 232 actions are unreviewable by the WTO. While WTO panel decisions are not supposed to be binding precedent, Friday's panel decision in the *Russia-Ukraine* dispute is highly likely to be cited in the WTO disputes involving U.S. steel and aluminum Section 232 tariffs.

While Ukraine is quite likely to appeal the panel's decision to the WTO's Appellate Body, it is unclear whether such an appeal would result in timely resolution of the dispute. By the end of 2019, and unless new Members are appointed, the Appellate Body will not have enough Members to render decisions.