

**In the World Trade Organization
Panel Proceedings**

***RUSSIA — MEASURES CONCERNING TRAFFIC IN
TRANSIT***

(DS512)

**European Union
Third Party Written Submission**

Geneva, 8 November 2017

TABLE OF CONTENTS

1. INTRODUCTION.....	1
2. UKRAINE HAS MADE A PRIMA FACIE CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH VARIOUS PROVISIONS OF THE GATT 1994.....	1
3. JUSTICIABILITY OF ARTICLE XXI OF GATT 1994.....	2
4. BURDEN OF PROOF UNDER ARTICLE XXI OF GATT 1994	5
5. LEGAL STANDARD FOR THE INTERPRETATION AND APPLICATION OF ARTICLE XXI(B)(III) OF GATT 1994	7
5.1. <i>The first element of the analysis under Article XXI(b)(iii).....</i>	9
5.1.1. <u><i>Measures taken in time of war or other emergency in international relations.....</i></u>	<u>10</u>
5.1.2. <u><i>Essential security interests</i></u>	<u>12</u>
5.1.3. <u><i>Designed "for the protection of..."</i></u>	<u>12</u>
5.2. <i>The second element of the analysis under Article XXI(b)(iii)</i>	13
6. CONCLUSIONS	17

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
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<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R , adopted 19 January 2010, DSR 2010:I, p. 3
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016
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<i>EC – Bananas III (Ecuador) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB/ECU , 24 March 2000, DSR 2000:V, p. 2237
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<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R , adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

LIST OF ABBREVIATIONS

Abbreviation	Full Name
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1. INTRODUCTION

1. The European Union exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the provisions of the covered agreements at issue in this dispute, including in particular Article XXI of the General Agreement on Tariffs and Trade 1994.
2. In addition, as explained in the European Union's request to be joined in the consultations (WT/DS512/2), the European Union also has a substantial trade interest in this dispute. This dispute and the measures at issue relate, *inter alia*, to traffic in transit from the territory of Ukraine through the territory of the Russian Federation to certain third countries, including goods originating in other WTO Members than Ukraine, e.g. the European Union. Due to its geographical location, the European Union is a major user of transit routes concerned by this dispute. In particular, the European Union is a major exporter to Kazakhstan and to the Kyrgyz Republic. In 2015, the combined value of the European Union's exports of goods to these countries exceeded 6.4 billion euros. A significant proportion of these exports are shipped by railway or by road over territories concerned by this dispute.
3. In this submission the European Union provides its views on certain legal issues raised by this dispute, including in particular the justiciability of Article XXI of GATT 1994, the burden of proof under that provision and the legal standard for the application of Article XXI(b)(iii). The European Union reserves its right to further elaborate on these issues and to address other issues during the third-party session and in response to questions from the Panel.

2. UKRAINE HAS MADE A PRIMA FACIE CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH VARIOUS PROVISIONS OF THE GATT 1994

4. The European Union considers that Ukraine has shown in a compelling way that the various measures at issue are inconsistent with the various provisions of the GATT 1994 cited by Ukraine, including, in particular, Article V of GATT 1994.

5. The European Union notes that Russia does not appear to contest that the four measures at issue are inconsistent, in principle, with the provisions cited by Ukraine. Given that these violations of the substantive provisions of GATT 1994 have not been contested by Russia, the European Union sees no need to comment on these aspects in more detail at this stage.
6. Russia limits itself to argue that the first measure no longer existed at the time where the Panel was established and that Ukraine has not shown the existence of the fourth measure. The European Union does not take position on these issues, which are largely factual.
7. Nevertheless, the European Union would observe, in relation to the first issue, that the mere fact that the product scope of the second measure encompasses that of the first measure does not have the necessary implication that the second measure has superseded the first measure and that this measure therefore ceased to exist. It is not uncommon that the importation or entry of a category of products be subject simultaneously to various restrictions based on different grounds. Russia has not explained on which legal base, or through which legal mechanism, the second measure at issue would have superseded the first measure.
8. Russia further contends that, in any event, all the four measures are not inconsistent with the GATT 1994 because they are justified under Article XXI of GATT 1994 and requests the Panel to make a finding to that effect. Rather contradictorily, however, Russia also appears to suggest that the Panel has no jurisdiction over the present dispute.
9. In response to Russia's arguments, the European Union will set out in this submission its views on: 1) the justiciability of Article XXI of GATT 1994; 2) the allocation of the burden of proof under that provision; and 3) the legal standard for the application of Article XXI(b)(iii) of GATT 1994.

3. JUSTICIABILITY OF ARTICLE XXI OF GATT 1994

10. The European Union notes that at paragraph 7 of its written submission Russia states that "neither the Panel nor the WTO as an institution has a jurisdiction over"

the matter raised in this case.¹ Russia does not advance any legal reasoning in support of this assertion and, in fact, accepts the Panel's jurisdiction in the remainder of its submission, in particular by requesting the Panel to make findings in this case.

11. Indeed, Russia does not ask the Panel to decline jurisdiction and refrain from making any findings and recommendations in the present dispute. To the contrary, by way of final conclusion, Russia requests the Panel

to find that Ukraine has failed to sustain any of the claims raised in these proceedings, and that the Russian Federation's measures are not inconsistent with the WTO obligations of the Russian Federation.²

12. The above request suggest that, in fact, Russia does accept the Panel's jurisdiction over the matter raised in the present dispute, including Russia's invocation of Article XXI of GATT 1994.
13. In view of the doubts raised by Russia's first submission, the Panel should ask Russia to clarify whether it contests the Panel's jurisdiction over the matter raised by Ukraine and on which legal grounds. Should Russia's arguments be understood as implying that any dispute raising questions of national security would fall outside the jurisdiction of WTO panels – more precisely, that it would be enough for the defending party to invoke Article XXI of GATT 1994 in order to exclude the jurisdiction of the panel³ – the European Union submits the following observations.
14. *First*, Article XXI of GATT 1994 is an affirmative defence, which may be invoked to justify a measure that would be otherwise inconsistent with any of the obligations imposed by the GATT 1994. But it 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 GATT 1994⁴. Nor do any of those rules provide any basis for arguing that Article

¹ Russia's first written submission, para. 7.

² Russia's first written submission, para. 77.

³ Russia's first written submission, paras. 5-6.

⁴ In fact, the Decision concerning Article XXI of the General Agreement of 30 November 1982 recognizes explicitly, in paragraph 2, that "[w]hen action is taken under Article XXI, all contracting

XXI of GATT 1994, or any other provision of the covered agreements, is to be regarded as non-justiciable. The DSU contains no security exception and applies equally in respect of any provision of the covered agreements, subjecting these to the compulsory jurisdiction which the DSU has created. In turn, Article XXII of GATT 1994 refers to “with respect to any matter affecting the operation of this Agreement”, while Article XXIII of GATT 1994 makes no distinction between different provisions of the GATT 1994.

15. *Second*, interpreting Article XXI of GATT 1994 as a non-justiciable provision in this dispute would be inconsistent with the terms of reference of the Panel. Indeed, it is recalled that the present Panel has the standard terms of reference provided for in Article 7(1) DSU⁵, *i.e.*:

“To examine, in the light of the relevant provisions [in the agreement cited by the parties to the dispute] the matter referred to the DSB [...]”.

16. Article 7(2) of DSU further specifies that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”.
17. Thus, the present dispute differs from the case under the GATT 1947 opposing the United States and Nicaragua mentioned by Russia, where the terms of reference explicitly precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b)(iii) by the United States.⁶
18. *Third*, interpreting Article XXI of GATT 1994 as a non-justiciable provision would make it impossible for the Panel to comply with its obligation under Article 11 of DSU to “make an objective assessment of the matter before it”. Indeed, the “matter” before the Panel also includes in this case the defense under Article XXI of GATT 1994 raised by Russia.

parties affected by such action retain their full rights under the General Agreement.” (L/5426). This today includes the right to have recourse to dispute settlement procedures.

⁵ 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”. (WT/DS512/4)

⁶ GATT Panel Report, *US – Nicaraguan Trade*, para. 5.3 (unadopted).

19. *Fourth*, interpreting Article XXI of GATT 1994 as a non-justiciable provision would undermine one of the fundamental objectives of the DSU, as expressed in Article 3(2) of DSU:

The dispute settlement system is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [...].

20. *Fifth*, Article 23 of DSU mandates Members to have recourse to the rules and procedures of the DSU, *inter alia*, when they seek redress of a violation of obligations under the covered agreement. The same article prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to the dispute settlement in accordance with the DSU. Should Article XXI of GATT 1994 escape a panel's jurisdiction, no determination of a violation could be made in accordance with the DSU, following the mere invocation of Article XXI of GATT 1994 by the defending party. In other words, a WTO Member, rather than the WTO dispute settlement bodies, would be deciding unilaterally the outcome of a dispute. This would run against the objectives of the DSU enshrined in Article 23 of DSU.
21. For the reasons submitted above, the European Union considers that Article XXI of GATT 1994 is a justiciable provision and that its invocation by a defending party does not have the effect of excluding the jurisdiction of a panel.

4. BURDEN OF PROOF UNDER ARTICLE XXI OF GATT 1994

22. The Appellate Body has observed that:

it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.⁷ (emphasis added)

⁷ Appellate Body Report, *US — Wool Shirts and Blouses*, p. 14.

23. The Appellate Body has held that provisions such as Articles XX and XI:(2)(c)(i) are:
- limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.⁸
24. The same is true of Article XXI of GATT 1994. Like Article XX of GATT 1994, Article XXI is described as an "exception" in its title and stipulates that "nothing in this Agreement shall be construed to prevent" measures or actions provided for therein. It can therefore be concluded that Article XXI of GATT 1994 is also in the nature of "affirmative defence". Accordingly, it is for the respondent to invoke this provision and the respondent will bear the burden of proving that the applicable conditions are met.⁹
25. A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case¹⁰. It follows that in case of uncertainty, the party who had the burden of proof in respect of a particular claim or defence, loses the case, as the benefit of the doubt works in favour of the other party.¹¹
26. In the case at hand, Russia has clearly failed to meet its burden of proof by making a *prima facie* case with respect to its alleged defence under Article XXI(b)(iii) of GATT 1994.
27. In its first written submission Russia does not explain in any way what the legal test is under Article XXI(b)(iii) of GATT 1994 and how Russia's measures meets

⁸ *Idem.*

⁹ It is generally accepted in most jurisdictions that the burden of proof rests on a party invoking an exception (*reus in excipiendo fit actor*).

¹⁰ Appellate Body Report, *EC - Hormones*, para. 104.

¹¹ See to that effect Panel Report, *US - Section 301 Trade Act*, para 7.14:

"[...] Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party".

that test in the particular circumstances of the present case. Russia does not even adduce the facts which would allow the Panel to make findings with respect to the applicability of Article XXI(b)(iii). Instead, all that Russia does is citing various unilateral statements by a number of Contracting Parties to the GATT 1947. According to Russia, those unilateral statements would stand for the proposition that Article XXI of GATT 1994 is an entirely 'self-judging' provision, with the consequence that it would be enough for Russia to invoke that provision in order to justify the various WTO inconsistencies alleged by Ukraine.

28. Russia has not explained what is the relevance of those statements in light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Nor can these statements possibly be described to constitute a customary practice followed by the CONTRACTING PARTIES to the GATT 1947. In the European Union's view, those unilateral statements are in reality of very limited relevance, if any, for the interpretation today of Article XXI of GATT 1994, all the more so in view of the new context provided by the WTO Agreement and, in particular, the DSU.
29. For the reasons set out in the next section, the European Union is of the view that while Article XXI of GATT 1994, and in particular Article XXI(b) accords in one of the components of its wording a certain margin of discretion to the invoking Member, Article XXI as a whole (or any of the three subparagraphs of Article XXI(b)) is by no means an entirely self-judging provision.

5. LEGAL STANDARD FOR THE INTERPRETATION AND APPLICATION OF ARTICLE XXI(B)(III) OF GATT 1994

30. As explained above, Article XXI of GATT is in the nature of an "affirmative defence". Its structure and function are analogous to those of Article XX of GATT 1994. Like Article XX of GATT 1994, Article XXI allows Members to derogate from the obligations imposed by other provisions of the GATT in order to protect certain legitimate interests specified in those provisions, subject to certain requirements.
31. Given the structural as well as textual similarities between Article XX and Article XXI, the European Union considers that the analytical framework developed by

- the Appellate Body for applying Article XX may provide useful guidance for interpreting and applying Article XXI.
32. In this regard, it is well established that the evaluation of a defence under Article XX of the GATT involves a "two-tiered analysis":¹²
- first, the panel must examine whether the measure at issue is provisionally justified under at least one of the subparagraphs of Article XX; and
 - second, the panel must determine whether the measure is applied in a manner that satisfies the requirements of the *chapeau* of Article XX.
33. It is also well-established that, under the first tier of the analysis, panels must assess two elements: first, whether the challenged measure "addresses the particular interest specified in that [sub]paragraph"¹³; and, second, whether "there [is] a sufficient nexus between the measure and the interest protected"¹⁴.
34. Article XXI differs from Article XX in that it includes no language equivalent to the *chapeau* of Article XX.¹⁵ This means that the analysis under Article XXI is limited to the "first tier" described above. The analysis under that "first tier", nevertheless, should address the same two elements as under Article XX.
35. The fact that Article XXI does not include language equivalent to the *chapeau* of Article XX suggests that the drafters intended to accord wider discretion to Members when adopting measures based on the security grounds cited in Article XXI. However, this does not mean that Members enjoy unfettered discretion under Article XXI.

¹² See e.g. Appellate Body Report, *US - Gasoline*, p. 22, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 64; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139; and Appellate Body Report, *EC – Seal Products*, para. 5.169.

¹³ See e.g. Appellate Body Report, *India – Solar Cells*, para. 5.57.

¹⁴ *Idem*.

¹⁵ The European Union recalls that general and security exceptions were initially part of a single legal text, subject to the same *chapeau*. See Article 4 of the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions (<http://www.loc.gov/law/help/us-treaties/bevans/must000002-0651.pdf>). Then in the Havana Charter security exceptions (called at the time general exceptions) were separated from the other general exceptions (referred to as general exceptions to chapter IV on commercial policy). See Articles 45 and 99 of the Havana Charter, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf. This separation continued under the GATT 1947 and then under the GATT 1994.

36. The Appellate Body has explained that the *chapeau* of Article XX is aimed at preventing that the right to invoke one of the exceptions included in that provision be abused or misused.¹⁶ The same *rationale* applies also in the case of Article XXI. The *chapeau* is but an specification of the requirements imposed by the customary international law principle of *pacta sunt servanda*, according to which obligations must be performed in good faith¹⁷. That general principle applies in respect of all WTO provisions, including Article XXI of GATT 1994. Therefore, the various elements included in Article XXI(b)(iii) must be applied in light of the principle of good faith.

5.1. THE FIRST ELEMENT OF THE ANALYSIS UNDER ARTICLE XXI(B)(III)

37. As noted above, the first element of the analysis under Article XXI(b)(iii) is whether the measure addresses the interest specified in that subparagraph.
38. More precisely, the European Union considers that, under this first element, the defending party has the burden of demonstrating that:
- the measure is taken "in time of war of other emergency in international relations";
 - the war or other emergency in international relations threatens its "essential security interests"; and
 - the measure is designed "for" the protection of the relevant essential security interests against that threat.
39. Here below, the European Union will provide its views on the legal standard to be applied by the Panel for the purpose of ascertaining each of the above three issues. At the outset, it is important to stress that the terms "which it considers" qualify only the term "necessary" (i.e. the second component of the analysis to be performed by the Panel under Article XXI(b)) and, therefore, are not relevant at this stage of the analysis.

¹⁶ Appellate Body Report, *US – Shrimp*, para. 156.

¹⁷ This principle has been codified in Article 26 of VCLT, which provides that:
"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

5.1.1. Measures taken in time of war or other emergency in international relations

40. The European Union starts by noting that Article XXI, and in particular paragraph (b), does not contain open ended exceptions. It is clear that the intention of the drafters of the GATT 1994 was not to allow for reliance on security exceptions in any circumstance, but only in those circumstances specifically listed in subparagraphs (i) to (iii) of Article XXI. This list is exhaustive and relates to objective as well as verifiable elements.
41. The first two subparagraphs of Article XXI(b) concern fairly specific objects ("fissionable materials" and "traffic in arms"). In addition, they both start with the terms "relating to". There is nothing that prevents a panel from ascertaining whether a specific action concerns in fact "fissionable materials" or "arms" etc. (rather than non-qualifying products) and whether it is genuinely "related to" those materials.
42. The third subparagraph, which is the only one invoked by Russia, refers to "war or other emergency in international relations" ("guerre ou grave tension internationale" and "guerra o grave tensión internacional", in the French and the Spanish versions, respectively). This circumstance is broader than the previous two and is not defined by reference to a particular type of products, but instead by reference to the occurrence of certain events. However, again, there is nothing that prevents a panel from ascertaining whether a situation of "war" or of "other emergency in international relations" exists in a given case.
43. The terms "war" and "other emergency in international relations" refer to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels. This understanding is confirmed by the fact that, as mentioned above, security exceptions are not open-ended, but exhaustively listed in Article XXI(b)(iii) of GATT 1994.
44. The terms "war" and "other emergency in international relations" should be interpreted taken into account relevant international law. In essence, the term "war" describes a situation when one or more States have used armed force against

- each other, irrespective of the reasons or intensity of the conflict.¹⁸ Its scope extends not only to declared war, but to any armed conflict.
45. The notion of "emergency in international relations" is broader than that of "war". In determining whether a particular situation constitutes an "other emergency in international relations", a panel would need to assess in particular the gravity of the situation ("*grave* tension internationale" in French; "*grave* tensión internacional" in Spanish). The interposition of "other" between "war" and "emergency" suggests that the war is one particular example of emergency.
46. Concerning the relationship required between the situations envisaged in the subparagraphs and the action taken, it is significant that unlike subparagraphs i) and ii) (starting with "relating to"), subparagraph iii) starts with the terms "taken in time". It might be argued that those terms only require a temporal coincidence between the action taken and a given situation ("war" or "other emergency"). However, such an interpretation would be untenable, as it would allow for the adoption of measures unrelated (other than by temporal coincidence) to the war/emergency. For this reason, the European Union is of the view that the terms "in time" ("en cas" and "en caso" in the French and Spanish versions, respectively, as regards emergencies) require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations.
47. This interpretation is comforted by the use of the term "protection" in the *chapeau* of Article XXI(b), which implies the existence of a threat to which the action of the invoking Member responds. That threat must consist in one of the situations identified in subparagraph (iii) or result from one of those situations.
48. Furthermore, as the term "emergency" suggests,¹⁹ an emergency situation cannot cover a measure that is taken as a response to an action that occurred long time ago in the past. If years have passed, it is questionable that such a situation may constitute an "emergency", unless the threat is ongoing.

¹⁸ See the UN General Assembly Resolution 3314 (XXIX) (Definition of Aggression), 14 December 1974.

¹⁹ Emergency is defined as "A serious, unexpected, and often dangerous situation requiring immediate action." English Oxford Dictionary, <https://en.oxforddictionaries.com/definition/emergency>.

5.1.2. *Essential security interests*

49. In principle, it is for each Member to identify its own security interests and to choose the level of protection of those interests that it considers more appropriate. This is reflected in the term "its", which precedes the terms "essential security interests"²⁰.
50. However, once again, this does not mean that each Member enjoys unfettered discretion. Not *any* interest would qualify under this exception. The interest must relate genuinely to "security" and be "essential". Purely protectionist interests or security interests of minor importance would not qualify under this exception. Based on the reasons provided by the invoking Member, a panel should review whether the interests at stake can reasonably/plausibly be considered to be "essential security" interests, from that Member's perspective, so as to be able to detect abuses of this exception.
51. It is important to note however that while the review would then concern the nature of the interest ("security") and its importance for the member ("essential") there is no room in Article XXI(b) for a value judgment. In particular, there is no requirement in that provision that the interest be legitimate.²¹

5.1.3. *Designed "for the protection of..."*

52. Finally, the invoking Member must show that the action is "designed" to protect the relevant essential security interests from the threat to those interests posed by the situation of war or emergency in international relations.
53. In line with the case law of the Appellate Body concerning Article XX of GATT 1994, this requires a demonstration that the the measure, having regard to its

²⁰ The European Union recalls that, by the same token, panels have recognised that Members should be accorded a margin of discretion in order to define its public morals for purposes of Article XX(a) of GATT 1994. *See e.g. Panel Report, EC – Seal Products*, para. 7.631.

²¹ The case-law on Article XX of GATT 1994 that has consistently recognized the Members' right to determine the level of protection they consider appropriate. *See for instance Appellate Body Report, EC – Seal Products*, para. 5.200.

- content, structure and expected operation, is "capable" of protecting the relevant essential security interests from that threat.²²
54. If a threshold analysis of the design of the measure reveals that it is "incapable" of addressing the purported objective of protecting essential security interests (for example because it is in fact designed to promote purely protectionist interests), the measure cannot be justified under this exception and this would be the end of the enquiry.²³
55. The requirement to show that the measure is designed for the protection of essential security interests must be interpreted and applied in the light of the principle of good faith, which, as discussed above, must inform the interpretation and application of the various components of the exception, so as to prevent abuses.

5.2. THE SECOND ELEMENT OF THE ANALYSIS UNDER ARTICLE XXI(B)(III)

56. As explained above, the second element of the analysis under Article XXI (just like under Article XX) is whether "there [is] a sufficient nexus between the measure and the interest protected".²⁴
57. In the case of Article XXI(b), the requisite nexus is reflected in the term "necessary".
58. The Appellate Body has explained that the "necessity" of a measure under the various paragraphs of Article XX of GATT 1994 which use that term must be assessed through a "process of weighing and balancing of a series of factors".²⁵ According to the Appellate Body, the relevant factors to be weighed and balanced include, in particular, the following:²⁶
- the relative importance of the objective pursued by the measure;

²² Appellate Body Report, *Colombia – Textiles*, para. 5.68.

²³ See e.g. Appellate Body Report, *India – Solar Cells*, para. 5.58.

²⁴ See e.g. Appellate Body Report, *EC – Seal Products*, para. 5.169.

²⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; and Appellate Body Report, *EC – Seal Products*, para. 5.169.

²⁶ See e.g. Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 156 and 178; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 237-249; Appellate Body Report, *EC – Seals Products*, para. 5.169; Appellate Body Report, *India – Solar Panels*, para. 5.63.

- the contribution of the measure to that objective; and
 - the restrictive effect of the measure on international commerce.
59. Following the above analysis, the challenged measure should, in most cases, be compared with reasonably available alternative measures that are less trade restrictive, while making an equivalent contribution to achieving the desired level of protection of the relevant objective.²⁷
60. There is no reason why the term "necessary" should be given a different meaning in Article XXI(b) than in the context of Article XX. The European Union, therefore, considers that the analytical framework described above is equally relevant for the assessment of the "necessity" of a measure under Article XXI(b).
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.
64. The limited review described above is analogous to the approach followed in *EC-Bananas – Recourse to arbitration by the EC under article 22.6 DSU*, where the

²⁷ See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; and Appellate Body Report, *EC – Seal Products*, paras. 5.169 and 5.261.

arbitrators had to interpret Articles 22.3(b) and 22.3(c) of DSU, which both start with the phrase “if that party considers”:

It follows from the choice of the words "if that party *considers*" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words "in considering what concessions or other obligations to suspend, the complaining party *shall* apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.²⁸

65. Similarly, in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice interpreted the terms "if it considers" in a treaty provision²⁹ as not giving absolute discretion to the party invoking them because the exercise of discretion remained subject to the principle of good faith:

[W]hile it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties [...] This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2. [...] The Court will examine all of these elements.³⁰

²⁸ Decision by the arbitrators, *EC- Bananas III (Ecuador) – (Article 22.6 – EC) – Recourse to arbitration by the EC under article 22.6 DSU*, para.52.

²⁹ The provision at issue was Article 2 (c) of the Convention on Mutual Assistance in Criminal Matters between the Djiboutian Government and the French Government of 27 September 1986, which provided that:

"[T]he requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, . . . security, . . . ordre public or other . . . essential interests."

³⁰ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, para. 145.

66. As an additional illustration that the qualifying terms "which it considers" do not necessarily make a provision self-judging, reference can be made to the case-law of the Court of Justice of the European Union on Article 346(1)(a) and 346(1)(b) of the Treaty on the Functioning of the European Union, two provisions corresponding to Articles XXI(a) and XXI(b) of GATT 1994, respectively.
67. The CJEU has held that the text of Article 346(1)(b) of TFEU does not preclude the matter being examined by the Court.³¹ In interpreting that provision, the Court has found that the language in Article 346(1)(b) TFEU ("it considers necessary") does not mean that that provision can be construed "as conferring on Member States a power to depart from the provisions of the Treaty simply in reliance on those interests". Rather, a Member State must "show that such derogation is necessary in order to protect its essential security interests".³²
68. The CJEU has followed a similar approach when interpreting Article 346(1)(a) of the TFEU:

As regards, more particularly, Article 296 EC, it must be observed that, although that Article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, that Article cannot however be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests. [...]

Consequently it is for the Member State which seeks to take advantage of Article 296 EC to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests. [...]

Furthermore, the level of specificity to be attained in the declarations which Member States must periodically complete and send to the Commission is not such as to lead to damage to the interests of those States in respect of either security or confidentiality. [...]

³¹ Article 346(1)(b) of TFEU provides that:

"The provisions of the Treaties shall not preclude the application of the following rules:

[...] any Member State may take such measures as *it considers necessary for the protection of the essential interests of its security* which are connected with the production of or trade in arms, munitions and war material [...]" (emphasis added).

³² CJEU, Judgment of 4 September 2014, *Schiebel Aircraft GmbH*, EU:C:2014:2139, para. 34 and the case-law cited.

In the light of the foregoing, the Kingdom of Denmark has not shown that the conditions necessary for the application of Article 296 EC are satisfied.³³

69. Finally, the European Union considers that when assessing the necessity of the measure, and more in particular the existence of reasonably available alternatives, the Panel should ascertain whether the interests of third parties which may be affected were properly taken into consideration, as required by the preamble of the Decision of 30 November 1982.³⁴

6. CONCLUSIONS

70. The European Union hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the GATT 1994. The European Union will be happy to provide further reflections on the occasion of the third-party session and to answer any questions the Panel may have.

³³ CJEU, Judgment of the Grand Chamber of 15 December 2009, *European Commission v Kingdom of Denmark*, Case C-461/05, EU:C:2009:783, paras. 53 – 60.

³⁴ Recital 3 of Decision Concerning Article XXI of the General Agreement of 30 November 1982.