



The WTO Opened Its 'Pandora's Box.' What Happens Now?

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For years, experts warned of the danger that could arise if the World Trade Organization were to rule on the intersection of trade policy and national security. A Geneva panel did just that this week, ushering in a new era of trade litigation that carries high stakes for the White House.

In a landmark decision, the panel ruled that Russia was within its rights to block road and rail transport from Ukraine in the midst of open conflict on the two countries' shared border, marking the first-ever legal opinion examining the WTO's so-called national security exception.

The exception — contained in Article XXI of the General Agreement on Tariffs and Trade — allows a country to impose trade barriers “which it considers necessary for the protection of its essential security interests.” But without legal guidance as to what constitutes a legitimate national security interest, the exception sat mostly unused for more than two decades, during which it earned a reputation as a “Pandora’s Box” for international trade disputes.

WTO critics worried that a narrow reading of Article XXI would lead to international tribunals dictating the security decisions of sovereign nations. Conversely, free trade backers have feared that if a panel reads Article XXI too broadly, it will allow countries to move ahead with purely economic restrictions masked as security decisions.

At first blush, it would appear this week’s panel took the latter route — deeming Russia’s restriction on Ukrainian goods a legitimate national security action. But looking deeper, the panel also took steps to ensure it wasn’t writing a blank check for countries looking to game the exception.

“It seems like what they are saying is, ‘If you’re just doing this as disguised protectionism, we’re not going to let you get away with it,’” Cato Institute trade policy analyst Simon Lester told Law360. “But they are leaving it to other panels to make that decision on more obvious cases.”

The panel conducted a thorough analysis of the Article XXI terms and the circumstances of the Russia-Ukraine conflict, and determined that while WTO members can obstruct trade for security purposes, they must do so in good faith.

“The obligation of good faith requires that members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994,” it said.

The panel also fleshed out the definition of the nebulous term “emergency in international relations,” which is one of the circumstances that Article XXI deems appropriate for the imposition of otherwise-illegal trade barriers.

Countries looking to exploit Article XXI as a loophole could ostensibly cite any international point of friction or discomfort in their relationships with other countries as a pretense for new trade restrictions. But the panel made clear that such an emergency must fall within certain parameters.

“What the panel said here is that the interest has to be quintessentially a state function, meaning that it’s about protecting the territory of the state or protecting the population of the state from external threats or the maintenance of law and order. It’s not just willy-nilly anything,” former WTO Appellate Body judge Jennifer Hillman told Law360.

Put more plainly, the panel said that mere “political or economic differences between members are not sufficient, of themselves, to constitute an emergency in international relations” for the purposes of Article XXI.

Hillman recalled that the panel’s prescription for the use of the national security exception echoed that of U.S. Trade Representative Robert Lighthizer, who told the House Ways and Means Committee in 2017 that other countries “can’t just willy-nilly use [the security exception].”

The symmetry between Lighthizer and the panel is ironic, given that the U.S. has fiercely opposed the WTO even examining the national security question at all. In third-party submissions to the Russia-Ukraine docket, the Trump administration argued that the national security interests of WTO members were entirely “self-judging” and that the WTO would have no authority to conduct its analysis.

President Donald Trump has considerable skin in the game, as he is facing a wave of WTO challenges to his national security duties on imports of steel and aluminum that will likely turn on another examination of the limits of Article XXI.

While the panel found that the Russia-Ukraine conflict constituted a legitimate emergency that could justify the use of new trade restrictions, it remains to be seen whether a new panel will think the same of the Trump administration’s decision to deem steel and aluminum imports a security threat.

Former Canadian trade official Robert McDougall surmised on Twitter that Trump’s tariffs, imposed under Section 232 of the Trade Expansion Act of 1962, may prove a more awkward fit into the WTO’s more nuanced view of the Article XXI exception.

“[It] will be more challenging to apply this reasoning to 232 disputes not only because it will involve determining good faith but also because [the] political implications are greater,” he wrote. “Many will celebrate this result as confirming the rule of law, but I think celebrations are premature.”