INTERNATIONAL DECISIONS

EDITED BY HARLAN GRANT COHEN

World Trade Organization—General Agreement on Tariffs and Trade 1994—security exception —freedom of transit—Russia's Accession Protocol

RUSSIA—MEASURES CONCERNING TRAFFIC IN TRANSIT. WT/DS512/R. *At* https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
World Trade Organization Panel, April 5, 2019 (adopted April 26, 2019).

This dispute, brought by Ukraine against Russia, provides the first discussion in a World Trade Organization (WTO) Panel or Appellate Body Report of the security exception in Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT). Unusually for a WTO dispute, the Panel (chaired by former WTO Appellate Body Member Georges Abi-Saab) found that Russia had not acted inconsistently with any of the claimed obligations under the GATT or Russia's Accession Protocol.[1] Central to that conclusion was the Panel's understanding of the GATT security exception and the circumstances surrounding the imposition of the challenged measures, which related to trade in transit by road and rail through Russian territory. The Panel found that, since 2014, an emergency in international relations existed between Russia and Ukraine within the meaning of GATT Article XXI(b)(iii) and that the challenged measures fell within this exception. If the exception had not applied, according to the Panel, Ukraine would have established a prima facie case of violation of the provisions on freedom of transit in GATT Article V:2 and equivalent provisions in Russia's Accession Protocol. The decision, which neither party chose to appeal, has significant implications for other disputes in which the security exception has been invoked.

The Panel made clear from the outset that the dispute "must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014" (para. 7.5). Yet the parties appeared hesitant to place the details of this broader conflict before the Panel.[2] The Panel also tried to avoid these contentious matters. The Panel simply observed that the deterioration related to the new government's decision to conclude the Association Agreement between the European Union (EU) and Ukraine, designed to facilitate Ukraine's integration with Europe, which gave rise to a Deep and Comprehensive Free Trade Area (DCFTA) between

[1] WTO, Protocol of the Accession of the Russian Federation, WTO Docs. WT/MIN(11)/24, WT/L/839 (Dec. 17, 2011).

[2] *See* Ben Heath, *Guest Post: Trade, Security and Stewardship (Part III): WTO Panels as Factfinders Under Article XXI*, INT'L ECON. L. & POL'Y BLOG (May 7, 2019), *at* https://ielp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-iii-wto-panels-as-factfinders-under-article-xxi.html.

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the EU and Ukraine, signed in June 2014 (paras. 7.7, 7.142). In 2014, the United Nations (UN) General Assembly issued a resolution supporting de-escalation of the situation in Ukraine, and in 2016, another General Assembly resolution condemned the temporary occupation of part of Ukraine by the Russian Federation (para. 7.8). By December 2015, negotiations between the European Commission, Ukraine, and Russia had failed to alleviate Russian concerns about the DCFTA, and the EU and Ukraine provisionally applied the DCFTA from 2016 (para. 7.12).

Ukraine alleged that Russia violated GATT Article V:2 by preventing traffic coming from Ukraine and/or going to Kazakhstan or the Kyrgyz Republic from transiting through Russian territory (para. 7.156). For example, Russia's 2016 Belarus Transit Requirements required that "all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus" (para. 7.357(a)).

GATT Article V:2 states:

> There shall be freedom of transit through the territory of each Member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other Members. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

Ukraine also made claims with respect to other transit-related provisions in Articles V:3, V:4, and V:5, as well as claims regarding the publication and administration of the challenged measures pursuant to GATT Article X. Finally, Ukraine alleged violation of certain parts of Russia's WTO Accession Protocol, which via Russia's Working Party Report[3] (incorporated by reference into the Accession Protocol) extend the application of GATT Articles V and X.

Russia presented no specific arguments in response to any of these claims, instead maintaining that the Panel lacked jurisdiction because Russia had invoked the security exception in GATT Article XXI(b)(iii) (para. 7.23).

In response to Ukraine's complaints, the Panel found that, under the first sentence of GATT Article V:2, WTO members must guarantee freedom of transit through their own territory for traffic in transit *exiting to* the territory of any other member (whatever its destination) and also for traffic in transit *entering from* the territory of any other member (whatever its origin) (paras. 7.168, 7.171–.172). The Panel noted that Article V:1 deems goods to be in transit across territory when the passage across that territory is only a portion of a complete journey beginning and ending outside that territory. Thus, the obligations regarding traffic in transit arise only during that portion of the journey (para. 7.169). A measure will breach this first sentence of Article V:2 if it precludes transit through its territory of traffic entering from any other member or exiting to any other member via the routes most convenient for international transit, which would include a measure prohibiting such traffic at all points along a shared land border (paras. 7.173–.174).

The Panel found that in the absence of an emergency in international relations (as discussed further below), Ukraine would have made out a prima facie case that Russia's

[3] WTO, Report of the Working Party on the Accession of the Russian Federation to the WTO, WTO Docs. WT/ACC/RUS/70, WT/MIN(11)/2 (Nov. 17, 2011).

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measures are inconsistent with the first sentence of Article V:2 because they (1) prohibit traffic in transit from entering Russia from Ukraine; and (2) prohibit traffic in transit from Ukraine from entering Russia from any member other than those specified (para. 7.183). The Panel similarly found that had the measures been taken in normal times, Ukraine would have had a prima facie case that they were inconsistent with the second sentence of Article V:2 because they make various distinctions based on the place of departure (Ukraine), the place of origin (e.g., Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (e.g., Belarus) of traffic in transit (para. 7.196). The measures would also be prima facie inconsistent with paragraph 1161 of Russia's Working Party Report (paras. 7.240, 7.257), as incorporated in Russia's Accession Protocol.

Because of these findings of inconsistency with Article V:2 and the Panel's conclusions regarding the security exception (as elaborated below), the Panel found it unnecessary to rule on Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2, and X:3(a) of the GATT and under Russia's Accession Protocol with respect to publication and administration (para. 7.201). The Panel considered that the claims under Articles V:3, V:4, and V:5 address the same aspects of the measures already found inconsistent with Article V:2; therefore, analyzing those claims would not assist the Appellate Body to complete the analysis or the Dispute Settlement Body (DSB) to make recommendations and rulings in the event that the Appellate Body found a violation of Article V:2 (para. 7.199). The Panel indicated that the claims under Article X and under paragraphs 1426, 1427, and 1428 of Russia's Working Party Report as incorporated into Russia's Accession Protocol all relate to the publication or administration of measures found prima facie inconsistent under Article V:2, and therefore addressing those claims would not assist the Appellate Body or the DSB either.

At the core of the dispute was the security exception in GATT Article XXI, and specifically Article XXI(b)(iii), which provides:

> Nothing in this agreement shall be construed . . .
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests . . .
>
> (iii) taken in time of war or other emergency in international relations . . . .

Russia argued that it had "sole discretion" to determine both its "essential security interests" and any action "necessary" to protect those interests under Article XXI(b) (para. 7.27). The Panel's only role, Russia argued, was to recognize that Russia had invoked Article XXI (para. 7.30). In contrast, Ukraine described Article XXI as an "affirmative defence" for measures otherwise inconsistent with GATT provisions (para. 7.31).

The Panel initially concluded that it had "inherent jurisdiction" as a result of its "adjudicative function" (para. 7.53). It found Russia's invocation of GATT Article XXI within its terms of reference, given that the Dispute Settlement Understanding (DSU) contains no special rules for Article XXI disputes (para. 7.56). It then interpreted Article XXI in order to assess Russia's suggestion that the Panel had no power to review its invocation (para. 7.58). Based on the ordinary meaning of Article XXI in its context and in the light of the object and purpose of the GATT and the Marrakesh Agreement Establishing the WTO, the Panel found that the words "which it considers" in the introductory "chapeau" of Article XXI(b) do not qualify the determination of the circumstances in subparagraph (iii)

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(para. 7.82). In other words, it is not a matter solely for Russia to determine that it is taking action in time of war or other emergency in international relations. That is an "objective fact, subject to objective determination" (para. 7.77). After confirming this interpretation based on the negotiating history of Article XXI, the Panel concluded that Article XXI(b)(iii) is not totally "self-judging" as argued by Russia; nor was Russia's invocation of Article XXI "non-justiciable" as argued by the United States as a third party in the proceedings (paras. 7.102–.103).

In assessing whether the challenged Russian measures were "taken in time of war or other emergency in international relations" within the meaning of GATT Article XXI(b)(iii), the Panel defined an "emergency in international relations" as going beyond political or economic differences (para. 7.75) to "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" (para. 7.111). The Panel found that such an emergency existed between Ukraine and Russia: (1) from March 2014 until the end of 2016, the deterioration in relations was a matter of concern to the international community; (2) "since 2014, a number of countries have imposed sanctions against Russia in connection with this situation"; and (3) the UN General Assembly recognized the situation as involving armed conflict by December 2016 (paras. 7.122–.123). The Panel also found that the challenged measures were "taken in time of" this emergency in international relations (paras. 7.124–.125).

Having determined that the requirements of subparagraph (iii) of Article XXI(b) were satisfied, the Panel also had to consider whether the Russian invocation of this exception met the requirements of the chapeau of Article XXI(b)—namely, whether the challenged measures constituted action that Russia considered necessary for the protection of its essential security interests. The Panel regarded "essential security interests" as referring to "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally" (para. 7.130). Although, in general, each WTO member may define its own essential security interests, this freedom is limited by the obligation to interpret and apply the provision in good faith (para. 7.132) and not "as a means to circumvent their obligations under the GATT 1994" (para. 7.133). The member invoking the exception must articulate these interests sufficiently to "demonstrate their veracity" (para. 7.134), and the challenged measures must not be "implausible as measures protective of these interests" (para. 7.138). Applying this test, the Panel found that Russia could plausibly argue that the measures were implemented to protect its essential security interests arising from the 2014 emergency (para. 7.145). As such, it was up to Russia to determine whether such measures were necessary (para. 7.146), and the measures fell within the exception in Article XXI(b)(iii) (para. 7.149).

The Panel also considered whether the exception in GATT Article XXI(b)(iii) could be invoked to justify alleged inconsistencies with Russia's Working Party Report as incorporated into Russia's Accession Protocol. Here, the Panel relied on prior Appellate Body pronouncements regarding the relationship between general exceptions in GATT Article XX and obligations in China's Accession Protocol.[4] Specifically, the Panel indicated that "the architecture

[4] *See, e.g.*, Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009, *adopted* Jan. 19, 2010); Appellate Body Report, China—Measures Related to the Exportation of Rare Earths,

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of the WTO system confers a single package of rights and obligations upon Russia" and that a close linkage between obligations under Russia's Accession Protocol and those under GATT would create a strong argument that the Article XXI(b)(iii) exception applies to those obligations (para. 7.232). Russia's Working Party Report reiterates the requirements of GATT Article V "and other relevant provisions of the WTO Agreement," which the Panel said would include Article XXI(b)(iii) (para. 7.235). It also reiterates the requirements of GATT Article X among other "applicable requirements of the WTO Agreement," which would similarly include Article XXI(b)(iii) (para. 7.242). It contains obligations to publish laws, which are therefore linked to those under the GATT (para. 7.249), subject explicitly to "cases of emergency" and "measures involving national security," which the Panel said would include an "emergency in international relations" pursuant to Article XXI(b)(iii) (para. 7.248). Finally, it prevents laws from becoming effective before publication, "as provided for in the applicable provisions of the WTO Agreement," an obligation that is distinct from but closely linked to GATT obligations on publication (para. 7.254) and is therefore subject to Article XXI(b)(iii) (para. 7.255).

* * * *

Normally a WTO Panel or the Appellate Body would not consider the applicability of an exception until after it had determined that the challenged measure appeared inconsistent with a substantive obligation. In the absence of such an inconsistency, the respondent would not need to rely on the exception. However, in this case, the Panel considered the security exception before turning to the underlying violations alleged (in GATT Articles V and X and Russia's Accession Protocol). Given its conclusions regarding the security exception, the Panel determined that it did not need to examine the consistency of the challenged measures with Article V at all. The Panel considered consistency with Article V:2 only in case its conclusions regarding the security exception were reversed on appeal and the Appellate Body needed to complete the legal analysis (para. 7.154). (For this reason, the United States complained that the Panel had given twenty pages of "advisory opinions on most of Ukraine's underlying claims.")[5] Had the case been appealed, it is possible that the Appellate Body might have taken issue with the Panel's order of analysis. In previous cases, the Appellate Body has criticized or reversed a Panel for adopting a particular order of analysis, for example by examining the chapeau of GATT Article XX before its subparagraphs.[6]

This Panel Report is likely to be scrutinized closely in ongoing and future disputes in which a respondent has invoked the security exception in GATT Article XXI, or the security exceptions in other WTO Agreements, such as Article XIV*bis* of the General Agreement on Trade in Services (GATS) or Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Strictly speaking, WTO Panel and Appellate Body

Tungsten, and Molybdenum, WTO Docs. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014, *adopted* Aug. 29, 2014).

[5] WTO, Minutes of Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 26 April 2019, para. 8.11, WTO Doc. WT/DSB/M/428 (June 25, 2019).

[6] *See, e.g.*, Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, paras. 117–19, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998, *adopted* Nov. 6, 1998).

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reports are binding only on the parties to the dispute and only in relation to that dispute.[7] Nevertheless, adopted WTO Panel Reports "create legitimate expectations among WTO Members" and should therefore be "taken into account" where relevant.[8] Doing so also supports the "security and predictability" of the "multilateral trading system," one of the objectives of WTO dispute settlement.[9] As the Panel Report was not appealed, a future Panel could still depart from the reasoning of this Panel, whereas a Panel might ordinarily be expected to follow adopted Appellate Body Reports.[10] This Panel's reasoning might also be confined to GATT Article XXI(b)(iii) for the purpose of future disputes, although its findings on the chapeau of paragraph (b) have implications for the other subparagraphs of paragraph (b) as well and for the relationship between those subparagraphs and the chapeau.

As the Panel explained, the circumstances in this dispute were "very close to the 'hard core' of war or armed conflict" (para. 7.136). Other circumstances in which the security exception could be invoked might be less obviously an "emergency in international relations" within the meaning of GATT Article XXI(b)(iii). However, Article XXI provides other exceptions as well, including allowing a member to decline to "furnish . . . information" that, in its view, is "contrary to its essential security interests" (Article XXI(a)), and allowing a member to take action in pursuance of obligations under the UN Charter for the maintenance of international peace and security (Article XXI(c)). Article XXI(b)(i) allows a member to take action it considers necessary for the protection of its essential security interests "relating to fissionable materials or the materials from which they are derived." The provision that is perhaps most likely to create difficulty and uncertainty in interpretation and application is Article XXI(b)(ii), which allows a member to take action it considers necessary for the protection of its essential security interests "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment." A military establishment requires supplies of a great many goods and materials, so a broad interpretation of this provision could create a major loophole for alleged security actions.

The potential ambiguity of an "emergency in international relations" and the direct or indirect supply of a military establishment demonstrate the difficult task facing the Panel in this dispute. By refusing to decline jurisdiction on the basis of Russia's invocation of GATT Article XXI, the Panel closed a major loophole that might have been used to undermine the fundamental obligations of the WTO. By requiring Russia to demonstrate that the elements of subparagraph (iii) of Article XXI(b) were objectively present, the Panel ensured that those subparagraphs were not deprived of *effet utile* (para. 7.65). At the same time, the Panel accorded considerable deference to Russia's sovereignty by imposing a low threshold for satisfying the chapeau of Article XXI(b), requiring Russia to show only that the measures were not "so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency" (para. 7.139). The Panel thus removed some ammunition that might have

[7] Appellate Body Report, United States—Final Anti-dumping Measures on Stainless Steel from Mexico, para. 158, WTO Doc. WT/DS344/AB/R (Apr. 30, 2008, *adopted* May 20, 2008).

[8] Appellate Body Report, 14, Japan—Taxes on Alcoholic Beverages II, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996, *adopted* Nov. 1, 1996).

[9] DSU, Art. 3.2.

[10] Appellate Body Report, Anti-dumping, *supra* note 7, paras. 160–61.

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been used against the WTO by countries, such as the United States, alleging that the dispute settlement system was usurping the role of governments. The United States nonetheless described the Panel Report as "seriously flawed," contending, for example, that since Russia had provided no arguments on Article XXI(b)(iii), the Panel had instead improperly made Russia's case for it as respondent.[11]

The United States, the European Union, China, Canada, and other WTO members are particularly interested in this Panel Report because of its systemic implications, including with respect to ongoing WTO disputes. One of these disputes, brought by Qatar,[12] alleges breaches of the GATT, GATS, and the TRIPS Agreement "in the context of coercive attempts at economic isolation imposed by" the United Arab Emirates (UAE).[13] The UAE has responded that its measures were taken "because of Qatar's refusal to cease supporting and funding terrorism" in order "to protect the UAE's essential security interests."[14] In other ongoing disputes, the United States has invoked the security exception to justify tariffs imposed on steel and aluminum imports from most trading partners pursuant to Section 232 of the Trade Expansion Act of 1962.[15] Other potential disputes that could give rise to security justifications include China's allegation that Australia has engaged in a discriminatory market access prohibition on 5G telecommunications equipment from China.[16]

The political tensions underlying these disputes reflect a departure from longstanding tradition in the global trading system. Recognizing the sensitivity of WTO security exceptions and the problems arising for a Panel in interpreting or applying them, WTO members previously refrained both from challenging security-type measures and from invoking the security exceptions. These potentially explosive disputes arise now at a time when the WTO Appellate Body is already at breaking point, with the United States refusing to agree to appoint any new Appellate Body members and the number of members now at one instead of seven. As the reality of a "trade war" between the United States and China sets in, the security exception risks becoming a fallback defense for whatever retaliatory measure a WTO member wishes to impose. At the same time, the danger that the United States might abandon the organization if the security exception is too strictly construed also seems real. Against this background, facing an almost

[11] Minutes of Dispute Settlement Body, *supra* note 5, para. 8.11.

[12] WTO, United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Constitution of the Panel Established at the Request of Qatar; Note by the Secretariat, para. 3, WTO Doc. WT/DS526/3 (Sept. 3, 2018). *See also* WTO, United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Constitution of the Panel Established at the Request of Qatar; Note by the Secretariat, Addendum, WTO Doc. WT/DS526/3/Add.1 (Apr. 26, 2019).

[13] WTO, United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights: Request for the Establishment of a Panel by Qatar, para. 1, WTO Doc. WT/DS526/2 (Oct. 12, 2017).

[14] WTO, Minutes of Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 22 November 2017, para. 3.3, WTO Doc. WT/DSB/M/404 (Mar. 6, 2018).

[15] *See, e.g.*, WTO, Minutes of Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 21 November 2018, para. 7.3, WTO Doc. WT/DSB/M/421. *See also, e.g.*, WTO, United States—Steel and Aluminium Products (EU), WTO Doc. WT/DS548/15/Rev.1 (Aug. 19, 2019).

[16] WTO, Minutes of the Meeting of the Council for Trade in Goods 11 and 12 April 2019, item 24, WTO Doc. G/C/M/134 (July 24, 2019).

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impossible situation, the Panel in the Russia–Ukraine dispute did the best it could to reach a balanced and defensible position on the meaning of GATT Article XXI(b)(iii).

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ICC Appeals Chamber—no immunity for sitting heads of state—non-compliance—non-referral to the UN Security Council and Assembly of States Parties

PROSECUTOR V. OMAR HASSAN AHMAD AL-BASHIR, JUDGMENT IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL. *At* https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF. International Criminal Court, May 6, 2019.

In 2009, the International Criminal Court (ICC) stepped into uncharted waters as it issued its first arrest warrant for a sitting head of state, then President of Sudan Omar Al-Bashir. Following the UN Security Council's referral of the situation in the Darfur region of Sudan to the ICC, Al-Bashir was charged by the Court with war crimes and crimes against humanity, and in 2010, he was also charged with genocide. As a consequence, all of the states parties to the Rome Statute had a duty to arrest Al-Bashir. Several states have nonetheless failed to arrest him during country visits, allowing Al-Bashir to evade the ICC. This has given rise to a number of cases before the ICC Chambers, including this Appeals Chamber judgment regarding the Hashemite Kingdom of Jordan.

The purpose of this case note is not to revisit years of legal scholarship on this issue but to highlight the core features of the decision, including: its impact on the African Union's (AU) quest for an advisory opinion from the International Court of Justice (ICJ) on the question of head of state immunity; the notion that states are "lending assistance" to the ICC when they arrest wanted individuals; the admission of numerous amici curiae; and the failure to refer acts of non-compliance to the United Nations Security Council (UNSC) and the Assembly of States Parties (ASP).

On May 6, 2019, the ICC Appeals Chamber handed down a highly anticipated judgment regarding: (1) Jordan's failure to comply with its obligations as a state party to the Rome Statute and arrest a person indicted by the ICC; and (2) whether this act of non-compliance warranted a referral to the UNSC and the ASP. In order to adequately answer those questions, the Appeals Chamber was also forced to take on the controversial, contentious question of head of state immunity.

Pre-trial Chamber II was the first to hear the Jordan matter. On December 11, 2017, the Chamber ruled that "Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017."[1] The Chamber also decided to refer the matter, in accordance with Regulation 109(4) of the Regulations of the Court, to the ASP

[1] Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09, at 21 (Dec. 11, 2017), *available at* https://www.legal-tools.org/doc/5bdd7f/pdf.