RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

(DS475)

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

July 26, 2019

TABLE OF REPORTS

China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Rare Earths (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
Russia – Traffic in Transit	Panel Report, *Russian Federation – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019

I. PRELIMINARY ISSUES

Question 1. Is there any particular order of analysis that the Panel should follow with respect to claims under the SPS Agreement and the GATT and within the GATT itself?[1] [Panel FN1: In your answer please refer to para. 7.108 of the Panel Report in Russia – Traffic in Transit.]

1. The United States responds to Questions 1 through 7 together. In its consideration of Resolution 1292, the Panel should begin its analysis by addressing Russia's invocation of GATT 1994 Article XXI(b). This order of analysis is consistent with the Panel's terms of reference and the function of panels as set forth in the DSU.

2. Under DSU Article 7.1, the standard terms of reference – which were used in this dispute – call on the Panel "[t]o examine . . . the matter referred to the DSB" by the claimant, and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As this text establishes, the Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"[1]; and (2) to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

3. DSU Article 11 confirms this dual function of panels, and similarly provides that the function of panels is to "make an objective assessment of the matter" before it, and "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

4. As DSU Article 19.1 provides, a panel issues these recommendations "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement," and these recommendations are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement." Under DSU Article 21.5, resort to dispute settlement may be had "[w]here there is a disagreement as to the existence or consistency with a covered agreement of the measures taken to comply with the recommendations" of the DSB to bring a WTO-inconsistent measure into conformity with the relevant covered agreement.

5. The text of GATT 1994 Article XXI(b), however, establishes that it is for a responding Member – rather than a WTO panel – to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests under Article XXI(b) as to a measure challenged before the DSB, a panel may make no findings that will assist the DSB in making

[1] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870.

recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1 and 11.

6. Put differently, in light of the self-judging nature of Article XXI(b), a panel would have no basis to make findings and recommendations on a complaining Member's claims once the panel acknowledges that the responding Member has invoked its essential security interests. This result is consistent with DSU Article 19.1 and 19.2 because an essential security measure cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests for a panel or the Appellate Body to purport to find such action inconsistent with a covered agreement. Similarly, the self-judging nature of Article XXI(b) makes clear that a Panel cannot rule on the "existence or consistency" with a covered agreement of measures taken to comply with recommendations and rulings of the DSB within the meaning of DSU Article 21.5.

7. Under these circumstances, because Russia has invoked its essential security interests as to Resolution 1292, the Panel should limit the findings on this issue to a recognition that Russia has invoked GATT 1994 Article XXI(b), which is self-judging.[2]

8. Such a finding by the Panel does not preclude the European Union from addressing its concerns with respect to Resolution 1292 through the pursuit of alternative claims under the GATT 1994 and the DSU. As the United States has explained elsewhere,[3] negotiators of the GATT explicitly discussed that essential security actions would not be reviewable for consistency with the agreement and that the appropriate means of redress for a Member affected by such actions would be to bring a non-violation, nullification or impairment claim. Consistent

[2] The United States would note that in a hypothetical dispute in which GATT 1994 Article XXI was not at issue, and in which claims under the SPS Agreement and GATT 1994 had been raised against a measure, the order of analysis would follow from Article 2.4 of the SPS Agreement, which provides that "[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."

Accordingly, although in this dispute the panel need not and may not reach such issues, in the hypothetical dispute it follows that one would first ascertain whether the measures in question are SPS measures under the terms of Annex A, paragraph 1, of the SPS Agreement. If the measures are SPS measures, then the panel would consider whether the measures are inconsistent with the provisions of the SPS Agreement that the complaining Member alleges the measures breach. If the measures breach one or more SPS Agreement provisions, then the panel could proceed to consider the claims under the GATT 1994. If the measures are not inconsistent with the relevant provisions of the SPS Agreement, the panel could proceed to consider the unlikely possibility that evidence rebuts the resulting presumption of GATT 1994 consistency. In the hypothetical dispute, if one found that the measures were not SPS measures, then one would move directly to consider the claims raised against the measures under the GATT 1994.

[3] *See* U.S. First Written Submission in *United States – Certain Measures on Steel and Aluminum* (DS547), Section III.A.3 (Annex A to U.S. Third Party Submission, *Russian Federation – Measures on the Importation of Live Pigs, Pork, and Other Pig Products from the European Union, Recourse to Article 21.5 of the DSU by the European Union* (DS475)).

with that understanding, the European Union could bring a new dispute alleging that Resolution 1292 nullified or impaired its benefits under the GATT 1994.

9. If a measure is found to nullify or impair benefits under a relevant covered agreement without violation thereof, there would be no obligation on the part of the responding Member to withdraw the measure. Rather, pursuant to Article 26.1(b) of the DSU, the panel considering the dispute would recommend that the Member concerned make a mutually satisfactory adjustment. If a panel made such a recommendation with respect to Resolution 1292, the European Union could then request an arbitrator to determine the level of benefits which have been nullified or impaired, and to suggest ways and means of reaching a mutually satisfactory adjustment.

Question 2. Please comment on the European Union's argument in paragraph 169 of its second written submission that because Russia has not replied to the European Union's arguments on the SPS claims that the Panel "must" find in favour of the European Union with respect to all these claims. In particular, the Panel would be interested in your views on the obligation to make a *prima facie* case and how it relates to claims where a party opts not to respond in substance.

10. Please see response to Question 1.

11. The United States would note, with respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, that the obligation to make out a prima facie case is not obviated by a failure of the responding Member to reply to the claims and arguments presented by the complaining Member. For a panel to find a breach of an obligation under the WTO agreement, the complaining Member must still present evidence and arguments sufficient to make out a prima facie case with respect to the claims at issue sufficient for the DSB to conclude that a responding party Member has not carried out its commitments under the WTO Agreement.

II. MEASURES TAKEN TO COMPLY WITHIN THE MEANING OF ARTICLE 21.5

Question 3. If a measure covers some of the same products that were the subject of an original dispute and has the same effect as the measures challenged in the original dispute, would that be sufficient to establish that the original measures had not been removed? What would be the implication of accepting this approach on the scope of Article 21.5 proceedings?

12. Please see response to Question 1.

13. With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, the United States would refer the panel to paragraphs 6-7 of the U.S. comments on Russia's preliminary ruling request.

Question 4. Can a non-SPS measure be considered a measure taken to comply with rulings and recommendations of the DSB under the SPS Agreement? In other words, can a compliance panel where the original measure was an SPS measure only review SPS

measures as measures taken to comply?

14. Please see response to Question 1.

15. With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, the United States would refer the panel to paragraphs 6-7 of the U.S. comments on Russia's preliminary ruling request.

Question 5. What is the relevance and weight of overlap in product coverage between an alleged measure taken to comply with those in the original panel proceeding to the close nexus analysis?

16. Please see response to Question 1.

17. With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, the United States would refer the panel to paragraphs 6-7 of the U.S. comments on Russia's preliminary ruling request.

Question 6. Are the factors to be examined when applying the close nexus test limited to those described in the Appellate Body Report *US – Softwood Lumber IV (Article 21.5 – Canada)* paragraphs 77-85? In particular, please address the relevance of the factual and legal background of the adoption of the original measure(s), the declared measure(s) taken to comply, and any undeclared measure taken to comply.

18. Please see response to Question 1.

19. With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, the United States would refer the panel to paragraphs 6-7 of the U.S. comments on Russia's preliminary ruling request.

Question 7. The Appellate Body stated in paragraph 87 of the Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)* that:

> **We do not, therefore, understand the Panel to have found, as the United States argues, that every measure that has "some connection" with and that "could have an impact on "or could "possibly undermine" a measure taken to comply may be scrutinized in proceedings under Article 21.5 of the DSU. Indeed, such an approach would be too sweeping. (footnotes omitted)**

Please comment on the relevance of this statement to the application of the close nexus test and the interpretation of the scope of what measures can be considered measures taken to comply.

20. Please see response to Question 1.

21. With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, the United States would refer the panel to paragraphs 6-7 of the U.S. comments on Russia's preliminary ruling request.

III. ARTICLE XXI OF THE GATT 1994

Question 8. If both parties agree that Article XXI is justiciable, should the Panel nevertheless examine the issue?

22. The justiciability of issues presented in a responding Member's invocation of GATT 1994 Article XXI depends on the ordinary meaning of the terms in GATT 1994 Article XXI, in their context, and in the light of the object and purpose of the terms of the treaty. That parties to a particular dispute may agree a matter is justiciable does not alter this analysis, and regardless of any such agreement, the Panel must examine whether the issues presented are in fact justiciable.

23. If, as here, the issues presented in a dispute are not justiciable, the panel should not opine on them, even if both parties have invited the panel to do so. Issuance of dispute settlement reports on non-justiciable issues would prejudice the interests of all WTO Members, including – and especially – those not participating in the dispute. Members did not consent to the issuance of dispute settlement reports on non-justiciable issues. There is no "advisory opinion" authority given under the DSU, as opposed to certain other adjudicatory systems.[4] Members took into account what dispute settlement panels would and would not opine on when agreeing to the Dispute Settlement Understanding and the WTO Agreements as a whole. Issuance of dispute settlement reports on non-justiciable issues would, even if the parties to a dispute consent, therefore contradict the rules to which all WTO Members have agreed.

Question 9. What is the significance, if any, of the Preamble ("desiring therefore to elaborate rules for the application of the provisions of the GATT 1994 which relate to the use of sanitary and phytosanitary measures, in particular the provisions of Article XX(b) of the GATT 1994") and Article 2.4 of the SPS Agreement to an analysis of whether Article XXI is available as a defence to justify measures that are inconsistent with the SPS Agreement?[5] Are there other provisions of the GATT 1994 which relate to the use of sanitary or phytosanitary measures besides Article XX(b)?

24. The United States responds to Questions 9 and 10 together. The Panel need not reach these questions because Resolution 1292 is not an SPS measure and therefore does not fall within the SPS Agreement. The SPS Agreement applies only to measures that are SPS measures,[6] defined in Annex A paragraph 1 of the SPS Agreement as measures applied "to

[4] *See, e.g.,* Statute of the International Court of Justice, arts. 65 to 68 (setting out procedures for advisory opinions).

[5] In your answer please address the findings of the Appellate Body in *China – Publications and Audiovisual Products* with respect to para. 5.1 of China's Protocol of Accession and the findings of the panel in *Russia – Traffic in Transit* with respect to various paragraphs of Russia's Protocol of Accession.

[6] SPS Agreement, Art. 1.1.

protect" animal or plant life or health from risks arising from pests and diseases; to protect human or animal health from risks associated with additives, contaminants, etc. in foods, beverages, and feedstuffs; to protect human life or health from risks arising from animal diseases or plant pests, and to prevent or limit damage from entry or establishment of pests. Crucially, the goal of the measure determines whether it constitutes an SPS measure – a measure promulgated for one purpose can be an SPS measure, while the same measure promulgated for another purpose would not be.

25. Where a Member invokes Article XXI(b) with respect to a measure against which another Member has raised claims under the SPS Agreement, the Member that promulgated the measure is identifying the purpose of the measure. Specifically, the Member is identifying that the measure is a measure "for the protection of its essential security interests," and not for the purposes identified in Annex A of the SPS Agreement. Accordingly, invocation of Article XXI(b) makes the measure one to which the SPS Agreement is not applicable. Here, in light of Russia's invocation of Article XXI(b) as to Resolution 1292, that measure is not an SPS measure.

26. Even setting aside that a measure for which a Member invokes its essential security interests is not an SPS measure, the Preamble and Article 2.4 of the SPS Agreement establish a textual relationship between the SPS Agreement and the GATT 1994. This textual relationship makes clear that GATT 1994 Article XXI applies to claims under the SPS Agreement.

27. As the Panel has observed, according to its Preamble the SPS Agreement serves "to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."[7] Article 2.4 of the SPS Agreement further explains that "Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."

28. Such language establishes an express, textual link between the GATT 1994 and obligations under the SPS Agreement,[8] confirming that Article XXI(b) of the GATT 1994 serves as an exception to obligations under the SPS Agreement. Therefore, the text of the SPS

[7] SPS Agreement, Preamble.

[8] *See China – Rare Earths (AB)*, para. 5.74 (determining whether GATT 1994 Article XX applies to obligations under China's Accession Protocol by analysing "whether there is an objective link between an individual provision in China's Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements"); *China – Publications and Audiovisual Products (AB)*, para. 233 (finding that GATT 1994 Article XX(a) is available as a defense to alleged violations of paragraph 5.1 of China's Accession Protocol based on paragraph 5.1's reference to China's "right to regulate trade in a manner consistent with the WTO Agreement"); *Russia – Traffic in Transit*, paras. 7.229 to 7.258 (deciding that Russia could justify any inconsistency with commitments in its Working Party Report as necessary for the protection of its essential security interests within the meaning of GATT 1994 Article XXI(b)(iii) based on, among other things, the text of each provision and any express textual references to the GATT 1994 or other covered agreements in Russia's Working Party Report).

Agreement also establishes that Article XXI is applicable as an exception to claims under the SPS Agreement.

Question 10. In paragraph 176 of its first written submission Russia notes that the chapeau of Article XXI expressly states that "[n]othing in this Agreement shall be construed . . ." and notes that the SPS Agreement is an elaboration of Article XX(b) of the GATT to support its conclusion that Article XXI can be used to justify an inconsistency with the SPS Agreement:

a. Please comment on the relevance of the phrase "[n]othing in this Agreement shall be construed. . ." in the chapeau of Article XX to this argument.

b. In light of the purpose of the SPS Agreement to elaborate on the application of Article XX(b); would adopting Russia's approach mean that there can be an exception to an exception?

29. Please see response to Question 9.

Question 11. If a Member adopts measures in time of an emergency in international relations and another Member responds with its own measures, are the latter Member's measure taken in time of the same emergency? In other words, can Members adopt measures justified by Article XXI of the GATT 1994 if they are in response to measures adopted by other Members taken in time of an emergency in international relations?

30. If the responding Member considers its measures necessary for the protection of its essential security interests, then pursuant to GATT 1994 Article XXI(b) that judgment cannot be second guessed by a dispute settlement panel. This is true regardless of whether or not the measures in question respond to measures of another Member.

Question 12. With respect to the indicia of an emergency in international relations that the panel referred to in *Russia – Traffic in Transit* (paragraphs 7.119 – 7.123), are there other relevant factors that a panel should consider in determining whether an emergency in international relations exists?

31. The United States responds to Questions 12 to 14 together. GATT 1994 Article XXI(b) is self-judging, as can be seen from the text of the Article itself, read in its context and in light of the object and purpose of the GATT 1994. This conclusion is confirmed by a subsequent agreement between Members, the provision's negotiating history to clarify the provision as self-judging, and longstanding practice in the GATT and WTO. As the United States has explained elsewhere,[9] the *Russia – Traffic in Transit* panel erred when it decided that it had authority to review any aspect of a responding party's invocation of Article XXI(b). As subsequent events

[9] *See* U.S. First Written Submission in *United States – Certain Measures on Steel and Aluminum* (DS547), paras. 128 to 178 (Annex A to U.S. Third Party Submission, *Russian Federation – Measures on the Importation of Live Pigs, Pork, and Other Pig Products from the European Union, Recourse to Article 21.5 of the DSU by the European Union* (DS475)).

are confirming, the approach of that panel would embroil the WTO dispute settlement system in reviewing sensitive political matters, contrary to agreed WTO rules and to the detriment of the WTO as a whole.

32. Accordingly, a dispute settlement panel may not conduct any review of whether an emergency in international relations exists. A Member's judgment of what constitutes a relevant emergency in international relations is inherently linked to its judgment of what actions are necessary for the protection of its essential security interests.

Question 13. Please provide your views on whether the imposition of "unilateral coercive" economic sanctions on a sovereign state is sufficient to constitute an emergency in international relations within the meaning of Article XXI.

33. See response to Question 12.

Question 14. How much deference should be given to Members in defining their essential security interests? Should the Panel take guidance from the jurisprudence on the determination of the level of protection in Article XX(b) and SPS cases and the concept of public morals under Article XX(a) of the GATT 1994 or Article XIV(a) of the GATS?

34. See response to Question 12. Please also see the U.S. third party submission, including Annex A to that submission, and the U.S. third party oral statement in this dispute.

Question 15. Should this Panel adopt an evolutionary approach to the interpretation of the types of issues which can constitute essential security interests? In your answer, please address paragraphs 7.130-7.134 of the Panel Report in *Russia – Traffic in Transit* with respect to the types of situations which can affect essential security interests.

35. Although it is not clear what the Panel is suggesting with its reference to "an evolutionary approach," Article XXI(b) was negotiated and drafted to preclude "interpretation of the types of issues which can constitute essential security interests". The United States submits that the drafters of GATT 1994 Article XXI(b) anticipated that Members' evaluation of their essential security interests would evolve over time. Accordingly, Article XXI(b) permits Members to determine, *for themselves*, what is necessary for the protection of their essential security interests, and to take action accordingly. Under the ordinary meaning of that provision, a Member's determination of its essential security interests may indeed evolve over time. As the United States has explained elsewhere,[10] the *Russia – Traffic in Transit* panel erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI(b).

[10] *See* U.S. First Written Submission in *United States – Certain Measures on Steel and Aluminum* (DS547), paras. 128 to 178 (Annex A to U.S. Third Party Submission, *Russian Federation – Measures on the Importation of Live Pigs, Pork, and Other Pig Products from the European Union, Recourse to Article 21.5 of the DSU by the European Union* (DS475)).

Question 16. With respect to the "minimum requirement of plausibility" referred to in paragraph 7.138 of the Panel Report in *Russia – Traffic in Transit* please provide your views on which party bears the burden of proving the connection between the measures and the essential security interests.

36. The "minimum requirement of plausibility" in the *Russia – Traffic in Transit* panel report relates to an alleged "obligation of good faith" that – according to that panel – applies to a Member's invocation of its rights under the essential security exception. As an initial matter, as the United States has explained elsewhere,[11] the *Russia – Traffic in Transit* panel erred when it decided that it had authority to review any aspect of a responding Member's invocation of Article XXI(b).

37. In addition, contrary to the *Russia – Traffic in Transit* panel's statements, a claim in WTO dispute settlement that a Member has breached an obligation of good faith would need to be based on a specific provision establishing such an obligation under a covered agreement, and not based on a general duty under international law.

38. The duty of good faith reflects general international law, and does not subject all treaty obligations to review by an arbitrator, panel, or other decision-maker. This is especially so in relation to WTO dispute settlement, as the DSU exists for disputes brought under the covered agreements (Article 1.1), "to preserve the rights and obligations of Member under the covered agreements" (Art. 3.2), and not to "add to or diminish the rights and obligations provide in the covered agreements" (Arts. 3.2, 19.2). Thus, a claim in WTO dispute settlement that a Member has breached a duty of good faith would need to be based on a specific provision establishing such an obligation under a covered agreement, and not based on a general duty under international law.

39. Given Russia's invocation of its essential security interests in this dispute, the specific provision under the relevant covered agreement is Article XXI(b) of the GATT 1994. As the plain text of Article XXI(b) establishes, each WTO Member may judge for itself what actions it considers necessary to protect its essential security interests, and take action accordingly. Members have understood this from the very beginning of the international trading system. A general international law duty of good faith does not alter the plain text of this provision and thus does not alter its self-judging nature.

[11] *See* U.S. First Written Submission in *United States – Certain Measures on Steel and Aluminum* (DS547), paras. 128 to 178 (Annex A to U.S. Third Party Submission, *Russian Federation – Measures on the Importation of Live Pigs, Pork, and Other Pig Products from the European Union, Recourse to Article 21.5 of the DSU by the European Union* (DS475)).