

***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)

**THIRD PARTY COMMENTS OF
THE UNITED STATES OF AMERICA
ON THE REQUEST OF THE RUSSIAN FEDERATION FOR A
PRELIMINARY RULING**

May 2, 2019

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TABLE OF REPORTS

Short Form	Full Citation
<i>Colombia — Textiles (Article 21.5 – Colombia, Panama) (Panel)</i>	Panel Reports, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama</i> , WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018
<i>US – Softwood Lumber IV (Article 21.5 -- Canada) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Zeroing (Article 21.5 – EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Panel on Russia's request for a Preliminary Ruling. In this submission, the United States will comment on certain legal issues raised by Russia's Preliminary Ruling Request (PRR).

II. THE TERMS OF REFERENCE OF AN ARTICLE 21.5 PANEL

A. Whether an Article 21.5 Panel Request complies with Article 6.2 of the DSU calls for Case-by-Case Analysis

2. Russia contends that the Panel Request of the European Union (EU) inadequately identifies the measures at issue in the 21.5 proceeding and fails to offer a summary of the legal basis of the complaint sufficient to present the problem clearly, including by failing to identify the Dispute Settlement Body (DSB) recommendations with which Russia, according to the EU, has not complied.¹

3. Article 6.2 of the DSU provides that:

The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. There is nothing in the DSU that requires this identification to be made in any particular format or manner. With respect to Russia's arguments in its PRR, Article 6.2 does not require specification of the extent to which specific legal instruments, in and of themselves, adjust or fail to adjust the responding Member's legal regime. Rather, Article 6.2 requires identification of the *measures* maintained by the responding Member and a specification of the legal basis of the complaint with respect to those measures.

5. Whether or not a request for panel establishment meets the requirements of Article 6.2 calls for a case-by-case analysis, involving a review of the request and all relevant facts and circumstances. For example, where a complaining Member asserts in an Article 21.5 panel request that the responding Member continues to maintain the same measures at issue in the original proceeding, a reference to the original panel request may be sufficient to identify the measure at issue. Accordingly, the United States suggests that the Panel address Russia's PRR by closely examining the documents at issue, including any references in the EU panel request to documents in the underlying proceeding.

B. A New Legal Basis or Rationale For A Measure Does Not, Standing Alone, Determine Whether It Is Within The Terms Of Reference Of A Compliance Panel

6. Russia takes the position that Decree 1292 is not properly within the terms of reference of the Article 21.5 Panel because the measures at issue in the original proceedings are SPS

¹ Russia's PRR, paras. 1-45.

measures, while Decree 1292 is not.² The EU, by contrast, asserts that Russia is seeking a premature substantive ruling at the PRR stage.³ In its second written submission, the EU takes the position that Decree 1292 is within the terms of reference because Decree 1292 has the same effect as the SPS measures at issue in the original proceedings, and because the timing of Decree 1292's promulgation demonstrates Decree 1292 to be a replacement for the legal instruments at issue in the original proceedings.⁴

7. An assessment of whether a particular measure may fall within the scope of a compliance proceeding, or whether it must be addressed in a new dispute, should be made on a case-by-case basis. Where a measure that is not a responding Member's declared measure taken to comply is asserted to have a relationship to the DSB's recommendations such that it bears on compliance, the measure's timing, nature, and effects should be considered.⁵ The nature of the measure would include its supporting rationale. Thus, the United States understands that the rationale for the new measure is a relevant factor, but that all relevant factors need to be considered. Thus, the fact that the measure in question is no longer supported by a justification under the SPS Agreement is not, standing alone, dispositive of whether that measure can be subject to review in the context of Article 21.5 under a different agreement or obligation.

III. CONCLUSION

8. The United States thanks the Panel for providing an opportunity to comment on legal issues raised by Russia's PRR request.

² Russia's PRR, paras. 46-64.

³ EU Response to Russia's PRR, paras. 40-45.

⁴ EU Second Written Submission, paras. 38-149. The EU incorporates those arguments into its comments on Russia's Comments to the EU's PRR Response. *See* paras. 33-35.

⁵ *See Colombia — Textiles (Article 21.5 – Colombia, Panama) (Panel)*, para. 7.56; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 207; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.