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 EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

August 9, 2019

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

1. GATT 1994 Article XXI is self-judging. The self-judging nature of Article XXI 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; it 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.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

2. Measures for which a security rationale has been offered have a unique status under the WTO Agreements. Every state has the sovereign right to take action to protect its essential security in the manner it considers necessary. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in GATT 1994 Article XXI(b).

3. The text of Article XXI(b) establishes that it is self-judging, meaning that each WTO Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly. Such action is not subject to review by a WTO panel. This has been the consistently expressed view of the United States for more than 70 years, and this view is confirmed by the context of the provision, a subsequent agreement by the GATT CONTRACTING PARTIES, as well as the negotiating history confirming the intention of the parties. When a responding Member asserts that its action is justified under GATT 1994 Article XXI, the panel may not review that invocation but, consistent with its terms of reference, is limited to reporting to the DSB that the responding Member has invoked that provision.

4. Here, Russia has argued that Decree 1292 is not within the Panel's terms of reference under Article 21.5 of the DSU, because it is a security measure not linked to the measures that were the subject of the recommendations of the DSB. By contrast, the European Union argues that Decree 1292 is within the terms of reference of the Panel because, based on the close relationship with DS475 in timing, nature, and effects, it is an undeclared measure taken to comply that is WTO-inconsistent and negates the effects of Russia's declared measure taken to comply. Certain third parties have likewise focused on the relationship between Decree 1292 and the measures that were the subject of the DSB's recommendations.

5. Although the parties' arguments in this dispute relate to the Panel's terms of reference under Article 21.5, resolution of these arguments would require the Panel to make findings as to the content and operation of Decree 1292 and to determine whether that measure imposes restrictions similar to those imposed by the original WTO-inconsistent SPS measure. That is, in the context of this dispute, resolution of the parties' arguments would require the Panel to make findings regarding the consistency of Decree 1292 with Russia's obligations, both under Article 21.5 of the DSU and under the GATT 1994 and the SPS Agreement.

6. The Panel need not and should not address these issues. Russia has asserted a security rationale under GATT 1994 Article XXI for Decree 1292. The claims of WTO-inconsistency raised by the European Union with respect to Decree 1292 cannot be assessed by the Panel

regardless of that Decree's relationship with the measures that were the subject of DSB recommendations. Therefore, any analysis of this relationship would be superfluous, and would in no way contribute to the resolution of the dispute. Such consideration also would be in contradiction with, and expressly precluded by, the self-judging nature of GATT 1994 Article XXI.

7. Therefore, the Panel may not make findings on the consistency of Decree 1292 with the SPS Agreement or the GATT 1994 but should limit its discussion to an observation that the responding Member asserted a justification under GATT 1994 Article XXI, which is self-judging. Doing so, moreover, does not preclude the European Union from addressing its concerns with respect to that Decree through the pursuit of alternative claims under the GATT 1994 and the DSU.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

8. Answer to Questions 1 to 7: 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.

9. 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"; 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.

10. 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."

11. 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.

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

13. 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 Articles 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.

14. 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.

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

16. 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.

17. Answer to Question 2: With respect to a hypothetical dispute in which GATT 1994 Article XXI was not at issue, 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.

18. Answer to Question 8: 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, a panel must examine whether the issues presented are in fact justiciable.

19. 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. 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.

20. Answer to Questions 9 and 10: 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, defined in Annex A paragraph 1 of the SPS Agreement as measures applied "to 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.

21. 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.

22. 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.

23. 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)." 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)."

24. Such language establishes an express, textual link between the GATT 1994 and obligations under the SPS Agreement, 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 Agreement also establishes that Article XXI is applicable as an exception to claims under the SPS Agreement.

25. Answer to Question 11: 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.

26. Answer to Questions 12 to 14: 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, 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 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. 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.

27. Answer to Question 15: 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 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, 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).

28. Answer to Question 16: 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, 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).

29. 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.

30. 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 (Art. 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.

31. 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.