

***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 ORAL STATEMENT OF
THE UNITED STATES OF AMERICA**

July 10, 2019

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I. INTRODUCTION

1. The United States thanks the Panel for this opportunity to present further views on important issues raised in this dispute. This morning, the United States will comment further on the implications of Russia's invocation of Article XXI of GATT 1994¹ in its First Written Submission with respect to Decree 1292.

II. THE PANEL SHOULD LIMIT ITS DISCUSSION OF DECREE 1292 TO THE OBSERVATION THAT RUSSIA HAS ASSERTED A GATT ARTICLE XXI JUSTIFICATION

2. As the United States explained in its third party written submission, 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 Article XXI(b) of the GATT 1994.

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

¹ *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

of reference, is limited to reporting to the DSB that the responding Member has invoked that provision.

4. Here, the Russian Federation has argued that Decree 1292 is not within the Panel’s terms of reference under Article 21.5 of the DSU², because it is a security measure not linked to the measures that were the subject of the recommendations of the DSB^{3,4}. 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.⁵ Certain third parties have likewise focused on the relationship between Decree 1292 and the measures that were the subject of the DSB’s recommendations.⁶

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

² *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

³ Dispute Settlement Body.

⁴ First Written Submission of the Russian Federation, paras. 133-167.

⁵ Second Written Submission by the European Union, paras. 38-151.

⁶ Third Party Submission of Canada; Third Party Submission of Brazil.

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.⁷ 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.

III. CONCLUSION

8. The United States thanks the Panel for this opportunity to comment on legal issues presented in this Article 21.5 proceeding.

⁷ See U.S. Third Party Written Submission, Annex A.