

November 7, 2017

Mr. Georges Abi-Saab
Chairperson
Russia – Measures Concerning Traffic in Transit (DS512)
World Trade Organization
Centre William Rappard
154 Rue de Lausanne
1211 Geneva 21

Dear Mr. Chairperson,

The United States is in receipt of the first written submissions of the parties in the above-mentioned dispute. My authorities have requested me to provide the following comments that the matter before the Panel is not capable of resolution through WTO dispute settlement.

1. The United States understands from Russia's submission that Russia has invoked in its defense of all claims raised by Ukraine the essential security exception under Article XXI(b)(iii) of the GATT 1994.¹
2. Issues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI.²
3. GATT Contracting Parties and WTO Members have repeatedly recognized this inherent right of each Member.³ As Russia has stated in its submission, "determination of an action that is necessary for the protection of a Member's essential security interests and determination of such Member's essential security interests is at the sole discretion of that Member."
4. For these reasons, the United States considers that this Panel lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute. Under DSU Article 7.1, the Dispute Settlement Body has established the Panel's terms of reference as to examine the matter referred to the DSB by the complaining party and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in

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

² GATT 1994 Article XXI(b)(iii) ("Nothing in this Agreement shall be construed ... (b) to prevent any contracting party 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.") (italics added).

³ See, e.g., GATT, *Article XXI – Note by the Secretariat*, MTN.GNG/NG7/W/16, paras. 14-23 (reviewing invocations of Article XXI and Council discussions) (18 August 1987).

that/those agreement(s).” In the circumstances of this dispute, there are no findings by the Panel that may assist the DSB in making the recommendations provided for in DSU Article 19.1 because no finding of WTO-inconsistency may be made.⁴ Therefore, the Panel should limit its “findings” to a recognition that GATT 1994 Article XXI has been invoked.

5. In light of DSU Article 11, the Panel may consider encouraging the parties to resolve this issue outside the context of WTO dispute settlement.⁵ This could include requesting assistance from the Director-General through his good offices or from another person or WTO Member in which the parties have confidence.

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The United States thanks the Panel for its consideration of these comments and is providing a copy of this letter directly to the parties and third parties to this dispute.

⁴ DSU Article 19.1: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

⁵ DSU Article 11: “Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”