WORLD TRADE ORGANIZATION

WT/DS512/R

5 April 2019

(19-2105)

Page: 1/137

Original: English

RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

REPORT OF THE PANEL

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
China – Publications and Audiovisual Products	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, DSR 2010:I, p. 3
China – Rare Earths	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, DSR 2014:III, p. 805

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China − Rare Earths	Panel Reports, *China − Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
China − Raw Materials	Appellate Body Reports, *China − Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Dominican Republic − Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic − Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC − Asbestos	Appellate Body Report, *European Communities − Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)	Appellate Body Reports, *European Communities − Regime for the Importation, Sale and Distribution of Bananas − Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities − Regime for the Importation, Sale and Distribution of Bananas − Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC − Bananas III (Ecuador) (Article 22.6 − EC)	Decision by the Arbitrator, *European Communities − Regime for the Importation, Sale and Distribution of Bananas − Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, p. 2237
EC − Chicken Cuts	Appellate Body Report, *European Communities − Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC − Computer Equipment	Appellate Body Report, *European Communities − Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC − IT Products	Panel Reports, *European Communities and its member States − Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC − Poultry	Appellate Body Report, *European Communities − Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC − Selected Customs Matters	Appellate Body Report, *European Communities − Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC − Tariff Preferences	Appellate Body Report, *European Communities − Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC and certain member States − Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States − Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States − Large Civil Aircraft	Panel Report, *European Communities and Certain Member States − Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
Japan − Agricultural Products II	Appellate Body Report, *Japan − Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277

Short Title	Full Case Title and Citation
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R, DSR 2015:VII, p. 3567
Russia – Railway Equipment	Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R and Add.1, circulated to WTO Members 30 July 2018 [appealed by Ukraine 27 August 2018]
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619

Short Title	Full Case Title and Citation
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017 [appealed by the European Union 29 June 2017]
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Nicaraguan Trade	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 (unadopted)
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Orange Juice (Brazil)	Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Sugar Quota	GATT Panel Report, *United States – Imports of Sugar from Nicaragua*, L/5607, adopted 13 March 1984, BISD 31S/67
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

JUDGMENTS OF INTERNATIONAL COURTS AND TRIBUNALS CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Case Concerning the Northern Cameroons	International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons,* (Cameroon v. United Kingdom) (1963) ICJ Reports, p. 15
Case Concerning Oil Platforms	International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 161
Case of Military and Paramilitary Activities in and Against Nicaragua	International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua,* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 14
Certain Expenses of the United Nations	International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations,* (United Nations) (1962) I.C.J. Reports, p. 151
Nuclear Tests Case	International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case,* (Australia v. France) (1974) ICJ Reports, p. 253
Prosecutor v. Tadić	International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, (1995), Case No IT-94-1-A

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1982 Decision	Decision Concerning Article XXI of the General Agreement
2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, or 2014 Belarus-Russia Border Bans	Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods takes place exclusively through the checkpoints across the Russian state border
2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods	Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the Government of Kazakhstan or the Government of the Kyrgyz Republic, which is then authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (below)
2016 Belarus Transit Requirements	Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from the Belarus-Russia border, and comply with a number of additional conditions related to identification and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border
A350	Airbus A350 Aircraft
April 1989 Decision	Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989
BCI	Business Confidential Information
CIS-FTA	Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx
Covered agreements	Agreements listed in Appendix 1 (of the Understanding on Rules and Procedures Governing the Settlement of Disputes)
CU	Customs Union
DCFTA	Deep and Comprehensive Free Trade Area Title IV (Trade and Trade-Related Matters) of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, L 161/13, Vol. 57, 29 May 2014, ISSN 1977-0677

Abbreviation	Description
De facto measure	Restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic
Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
Decree No. 319	Decree of the President of the Russian Federation No. 319, "On Amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 July 2016
Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EaEU	Eurasian Economic Union
EaEU Treaty	Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GLONASS	Global Navigation Satellite System (Russian translation: Globalnaya Navigazionnaya Sputnikovaya Sistema)
Helms-Burton Act	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act
ICJ	International Court of Justice
Import Licensing Agreement	Agreement on Import Licensing Procedures

Abbreviation	Description
ITO	International Trade Organization
LA/MSF	Launch aid / member State financing
PJSC Notice	Public Joint-Stock Company "Russian Railways" Notice on assessing the fee for placing/removal of GLONASS seals at Moskovskaya, Privolzhskaya, Yugo-Vostochnaya (South-Eastern) Railways, dated 17 May 2016
PJSC Order	Public Joint-Stock Company "Russian Railways" Order No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Ramírez – López Treaty	Treaty on Maritime Delimitation in the Caribbean Sea
Resolution No. 1	Resolution No. 1 of the Government of the Russian Federation, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
Rosselkhoznadzor	Russian Federal Service for Veterinary and Phytosanitary Surveillance
Russia's Accession Protocol	Protocol of the Accession of the Russian Federation, WT/MIN(11)/24; WT/L/839, 17 December 2011
Russia's Working Party Report	Report of the Working Party on the Accession of the Russian Federation to the WTO, WT/ACC/RUS/70 and WT/MIN(11)/2, dated 11 November 2011
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Ukraine's 2016 Trade Policy Review Report	Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334
UN Charter	Charter of the United Nations, done at San Francisco, 24 October 1945, UN Treaty Series Vol. 1, p. XVI
UN General Assembly	General Assembly of the United Nations
US Draft Charter	United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946
Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 115, p. 331

Abbreviation	Description
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-1, RUS-1	Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
UKR-2, RUS-2	Decree No. 319	Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016
UKR-3, RUS-4	Resolution No. 1	Resolution of the Government of Russian Federation No. 1, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
UKR-4	Resolution No. 732	Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016
UKR-5	Resolution No. 388	Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016
UKR-6, RUS-5	Resolution No. 147	Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016
UKR-7	PJSC Order	Order of PJSC "Russian Railways" No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
UKR-8, RUS-6	Resolution No. 276	Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016
UKR-9, RUS-3	Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
UKR-10, RUS-7	Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
UKR-11	Resolution No. 830	Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014
UKR-12	Resolution No. 625	Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-13	Resolution No. 842	Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015
UKR-14	Resolution No. 981	Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015
UKR-15	Resolution No. 1397	Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015
UKR-16	Resolution No. 157	Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016
UKR-17	Resolution No. 472	Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016
UKR-18	Resolution No. 608	Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016
UKR-19	Resolution No. 897	Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016
UKR-20	Resolution No. 1086	Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016
UKR-21, RUS-10	Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
UKR-22, RUS-11	Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*) dated 21 November 2014
UKR-47		Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015
UKR-53	European Commission Press Release	Press release "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press-release_IP-15-6398_en.htm
UKR-58		Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, available at: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
UKR-70	Resolution No. 790	Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017
UKR-71	Decree No. 293	Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017
UKR-75		Instruction No. FS-EN-7/19132 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 10 October 2016

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-76		Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015
UKR-78	UNIAN Information Agency Article	UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin-podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html
UKR-80	RBK article	RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4
UKR-84		Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091
UKR-88		Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014
UKR-89	UN General Assembly Resolution No. 68/262, 27 March 2014	UN General Assembly Resolution No. 68/262 "Territorial integrity of Ukraine", 27 March 2014, A/RES/68/262
UKR-91	UN General Assembly Resolution No. 71/205, 19 December 2016	UN General Assembly Resolution No. 71/205 "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205
UKR-94	Resolution No. 1292	Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017
UKR-98, RUS-13	Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
UKR-102	The Regions of Central Asia, Eastern Asia and Caucasus	Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region, Income Group, and Subregion of the World
UKR-111	EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
UKR-112		Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014
RUS-8	Federal Law No. 281-FZ	Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006
RUS-12	Federal Law No. 390-FZ	Federal Law No. 390-FZ of the Russian Federation, "On Security", dated 28 December 2010
RUS-14		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946, dated 6 June 2014

Panel Exhibit	Short Title (where applicable)	Full Title
RUS-15		Print-screen of the website of the State Border Guard Service of Ukraine, retrieved from: https://dpsu.gov.ua/ua/news/na-lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/
RUS-16		Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016
RUS-17		Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015
RUS-18		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/1134, dated 8 July 2014
RUS-19		Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015
RUS-20		Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017
RUS-22		Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018
RUS-23		Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018, 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018
RUS-24	Resolution No. 959	Resolution of the Russian Federation No. 959, "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014

1 INTRODUCTION

1.1 Complaint by Ukraine

1.1. On 14 September 2016, Ukraine requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 10 November 2016 between Ukraine and Russia. These consultations failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 9 February 2017, Ukraine requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, and Article XXIII of the GATT 1994 with standard terms of reference.[3] At its meeting on 21 March 2017, the Dispute Settlement Body (DSB) established a panel pursuant to Ukraine's request in document WT/DS512/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 22 May 2017, Ukraine requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 6 June 2017, the Director-General accordingly composed the Panel as follows[6]:

Chairperson:	Professor Georges Abi-Saab
Members:	Professor Ichiro Araki Dr Mohammad Saeed

1.6. Australia, Bolivia, Brazil, Canada, Chile, China, the European Union, India, Japan, Korea, Moldova, Norway, Paraguay, Saudi Arabia, Singapore, Turkey and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 28 June 2017.

1.8. After consultation with the parties, the Panel adopted its Working Procedures[7] and timetable[8] on 12 July 2017.

1.9. The Panel held a first substantive meeting with the parties on 23 and 25 January 2018. A session with the third parties took place on 25 January 2018. The Panel held a second substantive meeting with the parties on 15 May 2018.

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[1] WT/DS512/1 and WT/DS512/1/Corr.1.
[2] WT/DS512/3.
[3] Ibid.
[4] See WT/DSB/M/394.
[5] WT/DS512/4.
[6] Ibid.
[7] The Panel's Working Procedures were revised on 11 January 2018. See the Panel's Working Procedures, adopted on 12 July 2017, as revised on 11 January 2018, in Annex A-1.
[8] The timetable for the Panel proceedings was revised on 31 January 2018 and on 17 January 2019.

1.10. On 31 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 January 2019. The Panel issued its Final Report to the parties on 28 March 2019.

1.3.2 Additional Working Procedures for the Protection of Business Confidential Information

1.11. After consultation with both parties, the Panel adopted Additional Working Procedures concerning the protection of Business Confidential Information (BCI), on 25 August 2017.[9]

1.3.3 Request for enhanced third party rights by certain third parties

1.12. On 10 November 2017, Australia, Canada and the European Union jointly requested the Panel to grant to all of the third parties certain additional third-party rights in these proceedings. The Panel invited the parties and other third parties, on 20 November 2017, to comment on the joint request. On 1 December 2017, Ukraine, Russia and certain of the other third parties (Brazil, China, Japan, Singapore and the United States) provided comments on the joint request. In a communication dated 9 January 2018, the Panel informed the parties and third parties that it had decided to grant the following enhanced third-party rights to all of the third parties:

a. The right to attend the portions of the party session of the first substantive meeting at which the parties deliver their opening oral statements, and closing oral statements, respectively; and

b. The right to receive the provisional written versions of the parties' opening oral statements and closing oral statements, respectively, at the portions of the party session of the first substantive meeting at which those statements are delivered, as well as the final versions of such oral statements at the end of the day on which they are delivered.

1.13. The Panel's decision is set out in Annex B-1.

1.3.4 Russia's request for a preliminary ruling

1.14. In its first written submission, Russia requested that the Panel issue a ruling, no later than the date for filing the parties' second written submissions, that the category of measures identified in Ukraine's first written submission as the "2014 transit bans and other transit restrictions" is outside the Panel's terms of reference.[10]

1.15. On 13 March 2018, the Panel issued a communication to the parties in which it advised that it had decided to address the issue of whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, together with the merits, and would therefore defer its ruling on that issue until the issuance of the Report.[11]

1.16. The Panel's ruling on whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, and other issues concerning the Panel's terms of reference, is addressed in Section 7.7 of this Report.

1.3.5 Russia's complaint of alleged breaches of confidentiality by a third party

1.17. In a letter to the Panel dated 14 March 2018, Russia complained that the European Union, a third party in this dispute, had violated confidentiality obligations under various provisions of the DSU and of the Working Procedures by publishing the European Union's third-party submission and third-party statement on the website of the European Commission's Directorate-General for Trade.[12] By communication dated 16 March 2018, the Panel invited the European Union and any other third parties, as well as Ukraine, to provide any comments on Russia's complaint by 21 March 2018. Accordingly, on 21 March 2018, the European Union, Australia, Brazil, Canada, the United States

[9] See the Panel's additional Working Procedures concerning BCI in Annex A-2.
[10] Russia's first written submission, para. 31.
[11] Communication of the Panel to the parties, dated 13 March 2018.
[12] Russia's letter to the Chair of the Panel, dated 14 March 2018.

and Ukraine each provided comments on Russia's complaint. On 23 March 2018, the Panel invited Russia to respond to these comments by 4 April 2018. On that date, Russia provided its response.

1.18. On 16 May 2018, the Panel issued a ruling in which it declined to take any action in respect of the published European Union third-party submission and third-party statement on the grounds that it did not consider that such publication violated the confidentiality obligations under Article 18.2 of the DSU, the Working Procedures or any other applicable confidentiality obligations. Particularly, the Panel did not agree with the proposition that legal arguments and opinions of parties in WTO dispute settlement proceedings were inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU. The Panel's ruling is set out in Annex B-2.

1.3.6 Other procedural complaints

1.19. In an email message dated 28 March 2018, Ukraine alleged that Russia had failed to file Exhibit RUS-20 (UKR) in accordance with paragraph 25 of the Working Procedures because it filed this exhibit by means of reference to a web link. In a communication to the parties dated 6 April 2018, the Panel noted that Russia had promptly submitted a paper version of Exhibit RUS-20 (UKR) by 5:00 p.m. on the due date for submission, and that in accordance with paragraph 25(b) of the Working Procedures, Exhibit RUS-20 (UKR) therefore formed part of the factual record in this dispute. The Panel also noted that, due to the size of the exhibit, the PDF file containing Exhibit RUS-20 (UKR) could not be attached to an email message. The Panel therefore requested Russia to provide Exhibit RUS-20 (UKR) to Ukraine in one of the other formats set forth in paragraph 25(b) of the Working Procedures, namely, on a USB key, a CD-ROM or a DVD.

1.20. In an email message dated 18 May 2018, Russia complained that Ukraine had failed to file Exhibits UKR-106 (BCI) through UKR-115 in accordance with subparagraph (a) of the Panel's invitation to the second substantive meeting dated 27 April 2018. Russia submitted that, owing to this failure, the Panel should not accept and consider these exhibits. In a communication to the parties dated 22 May 2018, the Panel declined Russia's request, observing that while the electronic versions of the exhibits were not provided to Russia or submitted to the Dispute Settlement Registry until 18 May 2018, Ukraine had previously served paper copies of Exhibits UKR-106 (BCI) to UKR-115 on Russia and on the Panel on 15 May 2018, at the second substantive meeting. The paper copies of those exhibits constitute the official versions of those exhibits for purposes of the record of the dispute under paragraph 25(b) of the Working Procedures.

1.21. During the second substantive meeting on 15 May 2018, Russia alleged that Ukraine had untimely filed Exhibit UKR-106 (BCI) in a manner inconsistent with paragraph 7 of the Working Procedures. Russia rejected Ukraine's assertion that Exhibit UKR-106 (BCI) was "necessary for purposes of rebuttal" and requested, in a letter dated 13 June 2018, that the Panel strike Exhibit UKR-106 (BCI) from the record. In a communication to the parties dated 23 July 2018, the Panel granted Russia's request, observing that, in the first round of arguments, Ukraine's arguments concerning the existence of the measures in question related to the legal existence of the measures in Russia's legal system without reference to any specific instances of application, i.e., Ukraine's arguments related to the existence of the measures "as such". At the second substantive meeting, Ukraine reiterated its "as such" argument while also submitting the contested exhibit concerning the application of the measure, in one instance, as evidence in support of its main argument. In the Panel's view, this did not make such evidence "necessary for the purposes of rebuttal" within paragraph 7 of the Working Procedures. The Panel's ruling is set out in Annex B-3.

2 FACTUAL ASPECTS

2.1. This dispute concerns various measures imposed by Russia on transit by road and rail through the territory of Russia, as well as the publication and administration of those measures. Additional information concerning the measures and the factual background against which they were adopted is set forth in Sections 7.3 and 7.7 of this Report.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Ukraine requests that the Panel find that the measures at issue are inconsistent with Russia's obligations under the first sentence of Article V:2, the second sentence of Article V:2, Article

V:3, Article V:4 and Article V:5 of the GATT 1994, and with paragraph 2 of Part I of the Protocol of Accession of the Russian Federation (Russia's Accession Protocol)[13], which incorporates commitments in paragraph 1161 of the Report of the Working Party on the Accession of the Russian Federation to the WTO (Russia's Working Party Report)[14]; as well as Article X:1 of the GATT 1994 and commitments in paragraph 1426 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; Article X:2 of the GATT 1994 and commitments in paragraph 1428 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; commitments in paragraph 1427 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; and Article X:3(a) of the GATT 1994. Ukraine further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Russia bring its measures into conformity with its WTO obligations.

3.2. Russia invokes Article XXI(b)(iii) of the GATT 1994 and requests the Panel, for lack of jurisdiction, to limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims. Russia considers that the Panel lacks jurisdiction to evaluate measures in respect of which Article XXI of the GATT 1994 is invoked.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1 and C-4). They are also reiterated where relevant in the Panel's analysis.

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, China, the European Union, Japan, Moldova, Singapore, Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 through D-10). Turkey made oral arguments to the Panel but did not submit written arguments. Bolivia, Chile, India, Korea, Norway, Paraguay and Saudi Arabia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 29 January 2019. Both parties submitted written requests for review of precise aspects of the Interim Report on 14 February 2019. Neither party requested an interim review meeting. On 28 February 2019, both parties submitted written comments on each other's written requests for review.

6.2. The parties' requests made at the interim stage, as well as the Panel's discussion and disposition of those requests, are set out in Annex E-1.

7 FINDINGS

7.1 Overview of Ukraine's complaints

7.1. Ukraine's main complaints may be succinctly stated as follows:

a. Since 1 January 2016, Ukraine has not been able to use road or rail transit routes across the Ukraine-Russia border for all traffic in transit destined for Kazakhstan. Rather, under Russian law, such traffic may only transit from Ukraine across Russia from the Belarus-Russia border, and is also subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border respectively. As of 1 July 2016, all traffic in transit destined for the Kyrgyz Republic has been subject to the same restrictions.

[13] WT/MIN(11)/24 and WT/L/839, dated 17 December 2011.
[14] WT/ACC/RUS/70 and WT/MIN(11)/2, dated 17 November 2011.

b. Since 1 July 2016, traffic in transit by road and rail from Ukraine, which is destined for Kazakhstan and the Kyrgyz Republic, is not permitted to transit across Russia at all (i.e. not even via the Belarus-Russia border) for particular categories of goods. The categories of goods are: (i) those subject to customs duties greater than zero according to the Common Customs Tariff of the Eurasian Economic Union (EaEU), and (ii) goods listed in an annex to Resolution No. 778 of the Government of the Russian Federation (Resolution No. 778)[15] and which originate in specific countries that have imposed economic sanctions on Russia.[16] Although there is a procedure which exceptionally permits transit of these goods from Ukraine to Kazakhstan and to the Kyrgyz Republic (through a derogation procedure involving a request by the Governments of Kazakhstan or the Kyrgyz Republic and an authorization granted by Russian authorities), it is unclear how this derogation procedure operates and to date, no such derogations have been granted.

c. The transit restrictions referred to in paragraph 7.1(a) above, and the transit bans referred to in paragraph 7.1(b) above, are also applied by Russian authorities to traffic in transit by road or rail from Ukraine which is destined not only for Kazakhstan and the Kyrgyz Republic, but also for Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

d. Finally, as of 30 November 2014, transit from Ukraine of goods subject to veterinary surveillance which are listed in Resolution No. 778 is not permitted through Belarus. Rather, such goods with a final destination of Kazakhstan and third countries may transit across Russia only from specific checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and pursuant to permits issued by the Russian Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*). Transit to third countries (including Kazakhstan) of plant goods which are listed in Resolution No. 778 shall also, as of 24 November 2014, take place exclusively through the checkpoints on the Russian state border.[17]

7.2. Ukraine claims that the above-referenced transit restrictions and bans are inconsistent with Russia's obligations under Article V of the GATT 1994 and related commitments in Russia's Accession Protocol. Ukraine also claims that Russia has failed to publish and administer

[15] Resolution No. 778 of the Government of the Russian Federation bans the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution, which originate from the United States, EU Member States, Canada, Australia and Norway, which had imposed economic sanctions on Russia. (Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014, (Resolution No. 778), (Exhibits UKR-10, RUS-7).)

[16] On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015, (Resolution No. 842), (Exhibit UKR-13).) On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amends Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provides that the import bans shall be applied as of 10 days from the date on which the Russian Government is notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement (referred to in Resolution of the Russian Federation No. 959 "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014, (Resolution No. 959), (Exhibit RUS-24)), but by no later than 1 January 2016. Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016. (See Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015, (Resolution No. 1397), (Exhibit UKR-15).) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import bans until 31 December 2018. (See Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017, (Resolution No. 790), (Exhibit UKR-70).) For other amendments to Resolution No. 778, see fn 385 below.

[17] For an explanation of the measures as identified by Ukraine in its panel request and as subsequently identified in its first written submission, see paras. 7.264-7.275 below.

various instruments through which these measures are implemented in the manner required by Article X of the GATT 1994 and by commitments in Russia's Accession Protocol.

7.2 Russia's response

7.3. Russia does not specifically address the factual evidence or legal arguments adduced by Ukraine in support of its substantive claims under the GATT 1994 and Russia's Accession Protocol. Rather, Russia argues that certain claims and measures are outside the Panel's terms of reference, on the bases that: (a) Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU, and (b) Ukraine has failed to establish the existence of one of the challenged measures.

7.4. Principally, however, Russia asserts that the measures are among those that Russia considers necessary for the protection of its essential security interests, which it took, "[i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[18] Russia invokes the provisions of Article XXI(b)(iii) of the GATT 1994, arguing that, as a result, the Panel lacks jurisdiction to further address the matter. Accordingly, Russia submits that the Panel should limit its findings in this dispute to a statement of the fact that Russia has invoked Article XXI(b)(iii), without further engaging on the substance of Ukraine's claims.[19]

7.3 Factual background

7.5. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014. Both parties have avoided referring directly to this change in government and to the events that followed it. It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events.

7.6. Ukraine had, since 18 October 2011, been a party to the Treaty on a Free Trade Area between the members of the Commonwealth of Independent States (CIS-FTA)[20], with Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Moldova and Armenia.[21] On 29 May 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Establishment of the Eurasian Economic Union (EaEU Treaty)[22], with Armenia and the Kyrgyz Republic joining in January and August of 2015, respectively. The EaEU Treaty entered into force on 1 January 2015.[23]

7.7. While it took part in the initial negotiations to establish the EaEU, Ukraine decided, following on the "*Euromaidan* events", not to join the EaEU Treaty. Instead, it elected to seek economic integration with the European Union.[24] Accordingly, on 21 March 2014, the newly sworn-in Ukrainian Government signed the political part of the "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part" (EU-Ukraine Association Agreement).[25] The objectives of the EU-Ukraine Association Agreement are to facilitate Ukraine's closer political and economic integration with Europe.[26] The economic part of the EU-Ukraine

[18] Russia's first written submission, paras. 16, 19, 33 and 74; and closing statement at the first meeting of the Panel, para. 6.

[19] Russia's opening statement at the first meeting of the Panel, paras. 45-47.

[20] Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx.

[21] Ukraine's first written submission, para. 19. The CIS-FTA entered into force on 20 September 2012. (Ibid.)

[22] Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf, (Exhibit UKR-58).

[23] Ukraine's first written submission, para. 21.

[24] Ibid. paras. 16, 20 and 24.

[25] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677, (EU-Ukraine Association Agreement), (Exhibit UKR-111), p. 170. See also Ukraine's first written submission, para. 24.

[26] EU-Ukraine Association Agreement, (Exhibit UKR-111), p. 6.

Association Agreement provides for a Deep and Comprehensive Free Trade Area (DCFTA) between the European Union and Ukraine.[27] This part of the EU-Ukraine Association Agreement was signed on 27 June 2014.

7.8. In March 2014, Ukraine, along with certain other countries, introduced a resolution in the General Assembly of the United Nations (UN General Assembly), which welcomed the continued efforts by the UN Secretary-General and the Organization for Security and Cooperation in Europe, as well as other international and regional organizations, to support "de-escalation of the situation with respect to Ukraine".[28] The UN General Assembly recalled "the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means".[29] A subsequent UN General Assembly Resolution in December 2016 condemned the "temporary occupation of part of the territory of Ukraine", i.e. the "Autonomous Republic of Crimea and the city of Sevastopol" by the Russian Federation, and reaffirmed the non-recognition of its "annexation".[30] This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of declared war or other armed conflict between High Contracting Parties.[31]

7.9. The events in Ukraine in 2014 were followed by the imposition of economic sanctions against Russian entities and persons by certain countries.

7.10. On 7 August 2014, Russia imposed import bans on specified agricultural products, raw materials and food originating from countries that had imposed sanctions against it (initially, the United States, European Union Member States, Canada, Australia and Norway).[32] Russia also imposed certain restrictions in connection with the transit of goods subject to these import bans, prohibiting their transit through Belarus, and permitting their transit across Russia only through

[27] The DCFTA is contained in Title IV of the EU-Ukraine Association Agreement. (EU-Ukraine Association Agreement, (Exhibit UKR-111), pp. 13-137.) This part of the EU-Ukraine Association Agreement provides for the progressive formation of a free trade area covering goods and services. (Ibid. Article 25, p. 13.) In its opening statement at the second meeting of the Panel, Ukraine explains that the "economic part" of the EU-Ukraine Association Agreement contains a "free trade agreement establishing the Deep and Comprehensive Free Trade Area (DCFTA)". (Ukraine's opening statement at the second meeting of the Panel, para. 60.) The Panel refers to the DCFTA unless it specifically means the economic part of the EU-Ukraine Association Agreement.

[28] UN General Assembly Resolution No. 68/262 "Territorial Integrity of Ukraine", 27 March 2014, A/RES/68/262, (UN General Assembly Resolution No. 68/262, 27 March 2014), (Exhibit UKR-89), p. 2. This Resolution—introduced by Ukraine, Germany, Poland, Lithuania, Canada and Costa Rica—was supported by 100 UN Member States, with 11 voting against (including Russia), 58 abstentions and 24 absent. (UN General Assembly Official Records, A/68/PV.80, 80th meeting, 27 March 2014, p. 17.)

[29] UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89), p. 1.

[30] UN General Assembly Resolution No. 71/205 "Situation of Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205, (UN General Assembly Resolution No. 71/205, 19 December 2016), (Exhibit UKR-91). This Resolution received 70 votes in favour, 26 against (including Russia) and 77 abstentions. (UN General Assembly Official Records, A/71/PV.65, 19 December 2016, pp. 40-41.)

[31] Ibid. p. 2. The specific reference is to the prohibitions on the occupying Power compelling protected persons to serve in its armed or auxiliary forces. (See Article 130 of the Convention relative to the Treatment of Prisoners of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 135; and Article 147 of the Convention relative to the Protection of Civilian Persons in Time of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 287.)

[32] These import bans are imposed by Resolution No. 778, (Exhibits UKR-10, RUS-7). The import bans had been authorized by the President of the Russian Federation the previous day through Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure the security of the Russian Federation", dated 6 August 2014, (Decree No. 560), (Exhibits UKR-9, RUS-3). Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the countries that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293 of 30 June 2017. Decree No. 560 was in force until 31 December 2018. (Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017, (Decree No. 293), (Exhibit UKR-71).) Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

designated checkpoints on the Russian side of the external border of the EaEU. These 2014 transit restrictions are among those challenged by Ukraine in this dispute.[33]

7.11. In September 2014, following discussions with Russia, both the European Union and Ukraine agreed to postpone the application of the economic part of the EU-Ukraine Association Agreement until 31 December 2015.[34] Also in September 2014, the Russian Government adopted Resolution No. 959, which provided that Ukrainian goods would be subject to tariffs at the EaEU rates as of 10 days from the date on which the Russian Government was notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement.[35]

7.12. On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amended Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provided that the import bans would be applied from the effective date of Resolution No. 959 (referred to above), but no later than 1 January 2016.[36] Subsequent negotiations between the European Commission, Ukraine and Russia, aimed at achieving solutions to Russia's concerns about the DCFTA, had failed by December 2015.[37] On 21 December 2015, the Russian Government adopted Resolution No. 1397, which provided that the import bans in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016.[38] The European Union and Ukraine have provisionally applied the DCFTA as of 1 January 2016.[39]

7.13. In response to the provisional application by the European Union and Ukraine of the economic part of the EU-Ukraine Association Agreement, the Russian State *Duma* passed a law on 22 December 2015, effective as of 1 January 2016, purporting to suspend the CIS-FTA with respect to Ukraine.[40] The Russian State Legal Department stated that Russia's suspension of the CIS-FTA with respect to Ukraine was due to the entry into force of the economic part of the EU-Ukraine Association Agreement "without reaching a legally binding agreement that would meet

[33] See para. 7.1.d above.

[34] RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4, (RBK article), (Exhibit UKR-80); and Press Release, "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press-release_IP-15-6398_en.htm (European Commission Press Release), (Exhibit UKR-53). As stated above in fn 27, the "economic part" of the EU-Ukraine Association Agreement contains a free trade agreement establishing the DCFTA. (See Ukraine's opening statement at the second meeting of the Panel, para. 60.) The EU-Ukraine Association Agreement entered into force on 1 September 2017, following the deposit of the last instrument of ratification or approval. (See Official Journal of the European Union L 193/1, 25 July 2017.) In October 2015, the Russian Prime Minister was reported as stating that Russia's position was that Ukraine could not simultaneously participate in free trade areas with both Russia and the European Union. Russia considered that this situation would pose a threat of re-export of European goods in the guise of Ukrainian goods. (RBK article, (Exhibit UKR-80).)

[35] Resolution No. 959, (Exhibit RUS-24), p. 2. A Ukrainian news agency report in December 2015 also referred to statements by the Russian Prime Minister that, if Ukraine chose to belong to a trade zone different from the CIS-FTA, it would lose the zero-tariff benefits of the FTA with Russia and that, as of 1 January 2016, tariffs on imports into Russia of Ukrainian goods would be 6% on average. (UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin-podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html, (UNIAN Information Agency Article), (Exhibit UKR-78).)

[36] Resolution No. 842, (Exhibit UKR-13).

[37] RBK article, (Exhibit UKR-80); and UNIAN Information Agency Article, (Exhibit UKR-78).

[38] Resolution No. 1397, (Exhibit UKR-15).

[39] Ukraine's first written submission, para. 25. Ukraine refers to the European Commission Press Release, (Exhibit UKR-53). The political part of the EU-Ukraine Association Agreement, which was signed on 21 March 2014, has been provisionally applied since 1 November 2014. (Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014, (Exhibit UKR-112).)

[40] Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015, (Exhibit UKR-47); and Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015, (Exhibit UKR-76). See also UNIAN Information Agency Article, (Exhibit UKR-78).

the interests of Russia" and the fact that "such an act constitutes a fundamental change of circumstances, which were essential for Russia at the conclusion of the [CIS-FTA]."[41]

7.14. Russia is also alleged by Ukraine to have banned imports of various Ukrainian goods since 2013, according to a request for consultations filed by Ukraine in October 2017[42], in connection with the following alleged Russian measures:

a. a general ban on the importation of Ukrainian juice products, including baby food (since July 2014);

b. a ban on the importation of alcoholic beverages, beer and beer beverages produced by three Ukrainian producers (since August 2014);

c. a ban on the importation of confectionary products produced by a specific confectionary producer (since July 2013) as well as a more general ban on imports of all Ukrainian confectionary products (since September 2014); and

d. a ban on the importation of wallpaper and wall coverings produced by four Ukrainian producers (since April 2015).[43]

7.15. In the same request for consultations, Ukraine also challenges what it refers to as transit bans on Ukrainian juice products and confectionary products, which are said to apply as a result of the import bans, "separately and in addition to" the transit bans at issue in this dispute, which also affect the same products.[44]

7.16. Also, as of 1 January 2016, Russia:

a. imposed customs duties at the EaEU rates on imports of goods from Ukraine[45];

b. included goods of Ukrainian origin within the import bans on agricultural products, raw materials and food that it had imposed since August 2014 under Resolution No. 778 in response to countries that had imposed sanctions against it[46]; and

c. imposed certain restrictions and bans on transit, namely: (i) restrictions on transit by road and rail from Ukraine, destined for Kazakhstan (and subsequently, for the Kyrgyz Republic), requiring that such transit from Ukraine across Russia may occur only from Belarus and subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specified control points on the Belarus-Russia border and the Russia-Kazakhstan border, respectively[47]; and (ii) "temporary" bans on transit by road and rail from Ukraine of:

   i. goods which are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and

[41] Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA Agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091, (Exhibit UKR-84). See also fn 34 above.

[42] WT/DS532/1, dated 19 October 2017. The Panel refers to Ukraine's request for consultations in WT/DS532/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU).

[43] See WT/DS532/1, dated 19 October 2017, paras. 1, 13, 16, 23, 34, 48 and 55. The alleged WTO-inconsistencies include Articles I:1, V, X and XI:1 of the GATT 1994, various provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), provisions of Russia's Accession Protocol, and the Agreement on Trade Facilitation. (Ibid. paras. 13, 15, 22, 31, 33, 43, 45, 47, 54, 65 and 67.)

[44] WT/DS532/1, dated 19 October 2017, paras. 17 and 49.

[45] Resolution No. 959, (Exhibit RUS-24).

[46] Resolution No. 1397, (Exhibit UKR-15).

[47] See para. 7.1.a above.

ii. goods which fall within the scope of the import bans on agricultural products, raw materials and food imposed pursuant to Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.

7.17. The 2016 transit restrictions and bans in item (c) above are among the measures that are challenged by Ukraine in this dispute.[48]

7.18. Russia, for its part, has separately alleged that Ukraine has imposed economic sanctions against Russia since 2015, as is evident from the following:

a. A request for consultations filed by Russia in May 2017[49], which alleges that Ukraine has imposed import bans on Russian food products, spirits and beer, cigarettes, railway and tram track equipment, diesel-electric locomotives, chemicals and certain plant products, which were allegedly adopted by Ukraine on 30 December 2015.[50] The consultations request also covers a number of other measures allegedly adopted by Ukraine in 2016, including: (i) restrictions on the importation or distribution of printed materials, motion pictures, TV programs and other video products originating from Russia[51]; (ii) the exclusion of Russian-used vehicles from an excise duty reduction on used vehicles[52]; (iii) a number of personal, economic, and other sanctions in respect of Russian persons (e.g. preventing movement of capital from Ukraine in respect of legal entities with Russian shareholding, blocking of assets, bans on doing business)[53]; and

[48] See para. 7.1.b above.

[49] WT/DS525/1, dated 1 June 2017. The alleged WTO-inconsistencies include Articles I:1, III:4, X and XI:1 of the GATT 1994; Articles II, III, XI, XVI and XVII of the General Agreement on Trade in Services (GATS); and various provisions of the Agreement on Import Licensing Procedures (Import Licensing Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the TBT Agreement as well as aspects of Ukraine's WTO Accession Protocol. (Ibid. paras. 2 and 4-8.) The Panel refers to Russia's request for consultations in WT/DS525/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU.)

[50] WT/DS525/1, p. 1. Russia refers in its consultations request to Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015, (Exhibit RUS-19), as amended; and Resolution No. 28 of 20 January 2016 "On Amendments to the List of Goods Originating in the Russian Federation and Prohibited for Imports into Ukraine", which has not been submitted as an exhibit in this dispute. (Ibid. p. 1.)

[51] Ibid. pp. 2 and 7. Russia's consultations request refers to Law No. 1780-VII of 8 December 2016, "On Amendments to Certain Laws of Ukraine in relation to Restricting Access to Foreign Printed Materials with Anti-Ukrainian Content to the Ukrainian Market" and Law No. 159-VIII of Ukraine, dated 5 February 2015 and Law No. 1046-VIII of Ukraine, dated 29 March 2016 "On Amendments to Article 15-1 of Law of Ukraine "On Cinematography"". (Ibid.)

[52] Ibid. pp. 3-4. Russia's consultations request refers to Law No. 1389-VIII of 31 May 2016, "On Amendments to Subsection 5 of Section XX "Transitional Provisions" of the Tax Code of Ukraine regarding the Promotion of Development of the Used Vehicles Market". (Ibid. p. 3.)

[53] Ibid. pp. 4-7. Russia's consultations request refers to (a) Resolution No. 829-R of the Cabinet of Ministers of Ukraine, dated 11 September 2014, "On Proposals for application of Personal Special and Other Restrictive Measures"; (b) Law No. 1005-VIII of 16 February 2016 "On Enactment of Certain Laws of Ukraine Aimed at the Improvement of the Privatization Process"; (c) Decree No. 756 of the Ministry of Economic Development and Trade of Ukraine, dated 28 April 2016, "On Application of Special Economic Sanctions − Temporary Suspension of Foreign Economic Activity within the Territory of Ukraine − In Respect of Foreign Economic Entities"; (d) Decree No. 63/2017 of the President of Ukraine, dated 16 March 2017, "On Decision of the National Security and Defence Council of Ukraine of 15 March 2017 'On Application of Personal Special Economic and other Restrictive Measures (Sanctions)'"; (e) Resolution No. 12 of the Board of the National Bank of Ukraine, dated 21 February 2017, "On Amendments to Certain Regulations of the National Bank of Ukraine"; (f) Resolution No. 25 of the National Bank of Ukraine, dated 21 March 2017, "On Amendments to Resolution of the National Bank of Ukraine of 1 October 2015 No. 654"; and (g) Resolution No. 399 of the National Bank of Ukraine, dated 1 November 2016, "On Amendments to Resolution [of] the National Bank of Ukraine of 1 October 2015 No. 654". Russia's consultations request also refers to Decree No. 133/2017 of the President of Ukraine, dated 15 May 2017, "On Decision of the National Security and Defence Council of Ukraine of 28 April 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"". (WT/DS525/1, pp. 4-7.) In its second written submission in this dispute, Russia refers to Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017, (Exhibit RUS-20). Russia states that this Decree contains a consolidated list of special economic measures (i.e. sanctions) applied by Ukraine in respect of Russian legal and natural persons. (Russia's second written submission, para. 28.)

(iv) the suspension of accreditation of journalists and representatives of certain Russian mass media.[54]

b. Russia's contentions that Ukraine has restricted transit of banned Russian goods through designated checkpoints at the Russia-Belarus border.[55]

c. Russia's contentions that sanctions imposed by Ukraine in respect of Russia have expanded in 2018, with Ukraine allegedly banning the exportation of certain Ukrainian civil aviation products, among other things.[56]

7.19. Russia also asserts that Ukraine suspended traffic through certain railway corridors on the Ukraine-Russia border in June 2014, and suspended traffic through certain checkpoints on the Ukraine-Russia border in May and July of 2014 and then in February 2015.[57]

7.4 Order of analysis

7.20. This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 (or the equivalent provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)).[58]

7.21. Ukraine presents its case as an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT 1994 and commitments in Russia's Accession Protocol.

7.22. Russia, on the other hand, considers that the dispute involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO, an organization which is not designed or equipped to handle such matters. Russia cautions that involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system.

7.23. Consistent with this position, Russia does not present arguments or evidence to rebut Ukraine's specific claims of inconsistency with Articles V and X of the GATT 1994, or commitments in Russia's Accession Protocol. Russia's case is confined to arguments that certain measures and claims are outside the Panel's terms of reference, and its overarching argument that the Panel lacks

[54] WT/DS525/1, dated 1 June 2017, p. 7. Russia's consultations request refers to Resolution No. 185-VIII of the Verhovna Rada, "On the Temporary Accreditation Suspension of Journalists and Representatives of Certain Russian Mass Media by Public Authorities", dated 12 February 2015. (Ibid.)

[55] Russia's second written submission, para. 27 (referring to Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016, (Exhibit RUS-16).)

[56] Ibid. para. 29 (referring to Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018, (Exhibit RUS-22); and Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018, (Exhibit RUS-23)).

[57] Ibid. para. 25. Ukraine suspended traffic through railway corridor 8 "Chervona Mohyla" (or "Krasnaya Mogila") by way of a telegram from the Ukrainian railway company *Ukrzaliznytsia*, in which the latter invoked Article 29 of the Railway Code of Ukraine, on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946", dated 6 June 2014, (Exhibit RUS-14).) Ukraine suspended traffic through the Izvaryne checkpoint by the Ministry of Revenue and Duties of Ukraine. (Ibid. (referring to "Print-screen of the website of the State Border Guard Service of Ukraine", retrieved from: https://dpsu.gov.ua/ua/news/na-lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/, (Exhibit RUS-15).) Ukraine suspended traffic through the checkpoint Uspenskaya-Kvashino in accordance with the telegram of *Ukrzaliznytsia*, also on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of 'Ukrzaliznytsia' (Ukrainian Railways) No. CZM-14/1134", dated 8 July 2014, (Exhibit RUS-18).) Finally, the Cabinet of Ministers of Ukraine suspended traffic through 23 checkpoints on the Ukraine-Russia border. (Ibid. (referring to Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015, (Exhibit RUS-17).)

[58] See Article XIV*bis* of the GATS and Article 73 of the TRIPS Agreement.

jurisdiction to address any of the issues in this dispute owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994.

7.24. The novel and exceptional features of this dispute, including Russia's argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute.[59] Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.

7.25. The Panel must therefore determine, first, whether it has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994.[60] If the Panel finds that it does not, then it will be unable to make findings on Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and with commitments in Russia's Accession Protocol.

7.26. As the Panel explains in greater detail in Section 7.5.3 below, Russia's argument that the Panel lacks jurisdiction to address the matter is based on its interpretation of Article XXI(b)(iii) of the GATT 1994, i.e. as being totally "self-judging". Consequently, in order to address Russia's jurisdictional objection, the Panel must first interpret Article XXI(b)(iii) of the GATT 1994.

7.5 Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.5.1 Main arguments of the parties

7.27. Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist.[61] Russia asserts that this emergency presented threats to Russia's essential security interests.[62] Russia argues that, under Article XXI(b)(iii), both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision.[63]

7.28. While Russia acknowledges that the Panel was established with standard terms of reference under Article 7.1 of the DSU[64], it argues that the Panel nevertheless lacks jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994.[65] In Russia's view, the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measures taken pursuant to Article XXI.[66] Russia considers that

[59] The Appellate Body has stated that panels are free to structure the order of their analysis as they see fit, unless there is a "mandatory sequence of analysis which, if not followed, would amount to an error of law" or would "affect the substance of the analysis itself". (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5.)

[60] See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

[61] Russia's first written submission, para. 16; and opening statement at the second meeting of the Panel, para. 26.

[62] Russia's first written submission, para. 16. Russia characterizes the situation that gave rise to the need to impose the transit measures at issue in this dispute as an internationally wrongful act, or an unfriendly act of a foreign state or its bodies and officials, which involved unilateral actions applied in respect of Russia, particularly by the European Union and Ukraine "in violation of the UN Charter and that are impairing the authority of the UN Security Council". (Russia's second written submission, paras. 19 and 21.) Russia also maintains that the original circumstances that led to the imposition of the challenged measures "were publicly available and known to Ukraine". (Russia's opening statement at the first meeting of the Panel, para. 30. See also Russia's second written submission, para. 18.)

[63] Russia's first written submission, para. 47; and closing statement at the first meeting of the Panel, para. 16. See also Russia's opening statement at the second meeting of the Panel, paras. 22-23; and response to Panel question No. 1 after the second meeting of the Panel, paras. 1-3.

[64] Russia's opening statement at the first meeting of the Panel, para. 45. Moreover, Russia alleges that certain measures and claims are outside the Panel's terms of reference owing to alleged defects in Ukraine's panel request and in Ukraine's demonstration of the existence of certain measures. (See ibid. paras. 6-28.)

[65] Russia's opening statement at the first meeting of the Panel, para. 46. See also Russia's first written submission, para. 7.

[66] Russia's opening statement at the first meeting of the Panel, para. 46.

the issues that arise from its invocation of Article XXI(b)(iii) go beyond the scope of trade and economic relations among Members and are outside the scope of the WTO:

> [T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.[67]

7.29. Russia regards Article XXI(b) of the GATT 1994 as preserving the "right" of each Member to react to wars and other emergencies in international relations in the way that the Member itself considers necessary. Any other interpretation of Article XXI(b) would "result in interference in [the] internal and external affairs of a sovereign state".[68] Accordingly, it is sufficient for a Member to state that the measures taken are actions that it considers necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations. A Member's subjective assessment cannot be "doubted or re-evaluated by any other party" or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.[69]

7.30. Russia therefore submits that the Panel should limit its findings to recognizing that Russia has invoked Article XXI of the GATT 1994, "without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT".[70]

7.31. Ukraine interprets Article XXI of the GATT 1994 as laying down an affirmative defence for measures that would otherwise be inconsistent with GATT obligations.[71] Ukraine rejects the notion that Article XXI provides for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU.[72] Ukraine considers that the Panel has jurisdiction to examine and make findings and recommendations with respect to each of the provisions of the covered agreements cited by either Ukraine or Russia, in keeping with the Panel's terms of reference under Article 7 of the DSU and the general standard of review under Article 11 of the DSU.[73] Ukraine also considers that, if Article XXI of the GATT 1994 were non-justiciable, it would imply that in a dispute involving a measure that is WTO-inconsistent, the invoking Member, rather than a panel, would decide the outcome of the dispute by determining that the WTO-inconsistent measure is nonetheless justified. In Ukraine's view, such unilateral determination by an invoking Member would be contrary to Article 23.1 of the DSU.[74]

7.32. Ukraine argues that Russia, by merely referring to an emergency in international relations that occurred in 2014, fails to discharge its burden to show the legal and factual elements of a defence under Article XXI(b)(iii) of the GATT 1994, namely, that there was a serious disruption in international relations constituting an emergency that is alike a war that is sufficiently connected to Russia so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify each and every measure at issue as being necessary to protect those

[67] Russia's closing statement at the first meeting of the Panel, para. 6. Russia also argues that the Panel, and the WTO more generally, "being trade mechanisms are not in a position to determine whether sovereign states are at war. Similar logic applies to 'other emergency in international relations'. Only sovereign states may declare the status of their relations with other sovereign states." (Ibid. para. 13.)

[68] Ibid. para. 12.

[69] Russia's opening statement at the second meeting of the Panel, para. 23. See also Russia's second integrated executive summary, para. 31. Russia therefore considers that Article XXI(b) of the GATT 1994, as well as Article XXI(a) are "self-judging". (Russia's closing statement at the first meeting of the Panel, para. 11.)

[70] Ibid. para. 20.

[71] Ukraine's opening statement at the first meeting of the Panel, para. 95. Ukraine points to the fact that the phrase "[n]othing in this Agreement", which introduces Article XXI, is the same phrase that introduces the general exceptions provision in Article XX. (Ibid.)

[72] Ibid. para. 96. Ukraine also notes that the DSU does not contain a provision providing for a security exception, nor does any other provision of the GATT 1994 or of the other WTO covered agreements offer a basis for excluding Article XXI from the jurisdiction of WTO panels and the Appellate Body. (Ibid.)

[73] Ibid. paras. 98-99.

[74] Ibid. paras. 103-107.

interests.[75] Ukraine also argues that Russia's allegation that the basis for the measures and the original circumstances leading to their imposition were publicly available and known to Ukraine is of no consequence in determining whether Russia has satisfied its burden of proof.[76] Ukraine submits that the facts before the Panel show that Decree No. 1 was adopted due to the entry into force of the economic part of the EU-Ukraine Association Agreement, and that the text of the instruments implementing the 2014 measures shows that these were taken "[i]n view of detection of gross violations during the transit of such goods through the territory of the Republic of Belarus".[77] Finally, Ukraine argues that the determination of whether the action was taken in time of war or other emergency in international relations under subparagraph (iii) of Article XXI(b) is to be objectively made by the Panel.[78]

7.33. Ukraine argues that, although the text of Article XXI(b) expressly states that it is for the invoking Member to decide what action it considers necessary for the protection of its essential security interests, this does not mean that the Member enjoys "total discretion".[79] Had the standard been "total discretion", there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that is otherwise inconsistent with the GATT 1994.[80] Furthermore, a panel's objective assessment must include an examination of whether a Member invoking Article XXI has done so in good faith, notwithstanding the absence of an introductory paragraph similar to the chapeau to Article XX.[81]

7.34. As to the standard of review under Article XXI(b)(iii), Ukraine argues that a panel's objective assessment must include an examination of whether the invoking Member has applied Article XXI in good faith and therefore has not abused the invocation "to pursue protectionist objectives or to apply a disguised restriction on trade".[82] Ukraine argues that, based on the ordinary meaning of the text of Article XXI(b) and similar to the analysis under the subparagraphs of Article XX, justification under Article XXI also requires that there be a rational relationship between the action and the protection of the essential security interest at issue.[83] This analysis involves a consideration of the structure, content and design of the challenged measures. The phrase "for the protection of its essential security interests" should be interpreted in the light of the case law on Article XX of the GATT 1994 (in particular, regarding Article XX(a) on the protection of public morals) to mean that "all WTO Members have the right to determine their own level of protection of essential security interests", from which it would follow that a panel must not second-guess that level of protection.[84] However, it is for panels rather than for Members to interpret the phrases "for the protection of its essential security interests" and "which it considers necessary" in accordance with customary rules of interpretation of public international law.[85] In light of those interpretations, a panel must then establish: (i) whether the interests or reasons advanced by a defendant in connection with the measures at issue can reasonably be considered as falling within the meaning of the phrase "its essential security interests" and (ii) whether the measures at issue are directed at safeguarding

[75] Ukraine's opening statement at the first meeting of the Panel, paras. 150 and 158; and opening statement at the second meeting of the Panel, para. 64. See also Ukraine's second written submission, paras. 133-136 and 138.

[76] Ukraine's closing statement at the first meeting of the Panel, para. 6; and second written submission, para. 137. Moreover, Ukraine argues that Russia may not rely on Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI(b)(iii) of the GATT 1994. (See Ukraine's closing statement at the first meeting of the Panel, para. 11; and second written submission, paras. 159-163.)

[77] Instruction No. FS-NV-7/22886 of the *Rosselkhoznadzor*, dated 21 November 2014, (Veterinary Instruction), (Exhibits UKR-21, RUS-10). See also Ukraine's first written submission, paras. 27, 32-33, and 58; and second written submission, para. 138.

[78] Ukraine's opening statement at the first meeting of the Panel, paras. 148-149.

[79] Ibid. para. 135.

[80] Ibid. paras. 109-110; and Ukraine's response to Panel question No. 1 after the second meeting, para. 5.

[81] Ukraine's opening statement at the first meeting of the Panel, paras. 122-123.

[82] Ibid. paras. 122 and 125. (fn omitted)

[83] Ibid. paras. 137-139.

[84] Ibid. para. 141. Ukraine submits that it is "not contested in these proceedings that it is for each WTO Member to define what matters affect its national security and what level of protection it pursues. Each WTO Member's position might be different and may evolve over time. Both matters fall outside the scope of review of a panel." (Ukraine's response to Panel question No. 2 following the second meeting of the Panel, para. 78.)

[85] Ukraine considers that not every security interest will be an "essential" security interest. (Ukraine's opening statement at the first meeting of the Panel. paras. 143-145.)

the defendant's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.[86] If a panel finds that the Member's measure is taken "for the protection of its essential security interests", a panel would then review whether, based on the facts available, the defendant "could reasonably arrive at the conclusion that the measures taken are necessary for protecting its essential security interests".[87]

7.5.2 Main arguments of the third parties

7.35. Australia argues that Article 7 of the DSU vests the Panel with jurisdiction to examine and make findings with respect to each of the relevant provisions in the covered agreements that Ukraine and Russia have cited.[88] Russia's invocation of Article XXI(b)(iii) of the GATT 1994, which Australia considers to be an exception to Members' obligations under the GATT 1994, places the provision squarely within the Panel's jurisdiction.[89]

7.36. Australia regards the language "which it considers necessary" in the first part of Article XXI(b) to indicate that it is for a Member to determine both its essential security interests and the actions it considers necessary for their protection. However, this deference to the determinations of a Member does not preclude a panel from undertaking any review of a Member's invocation of Article XXI(b).[90] Rather, in reviewing the "necessity" of an action under Article XXI(b), a panel is limited to determining whether the Member in fact considers the action necessary, for example, by reference to the Member's statements and conduct. Australia considers that although the nature and scope of review of the "necessity" aspect is limited, a panel does have a broader role in determining whether that (necessary) action was taken "*for the protection of*" a Member's essential security interests. In Australia's view, to arrive at such a determination, a panel should examine if there is a "sufficient nexus" between the action taken and the Member's essential security interests.[91]

7.37. Brazil argues that, by invoking Article XXI, Russia did the opposite of excluding the Panel's jurisdiction: it obliged the Panel to examine the provision by bringing it into the "matter" at hand.[92] Moreover, an exclusion of jurisdiction would deprive the complainant of its right to a decision and would be contrary to Article 3.3 of the DSU.[93] Brazil considers Article XXI to be an affirmative defence. Brazil interprets Article XXI(b) as containing both a "subjective" component, i.e. a judgment regarding the necessity of a measure, and an "objective component", which relates to the presence of at least one of the circumstances listed in subparagraphs (i) through (iii).[94] Although the language "which it considers" in the first part of Article XXI(b) confers a great deal of

[86] Ukraine's response to Panel question No. 2 following the first meeting of the Panel, paras. 76-80. See also Ukraine's response to Panel question No. 1 following the second meeting of the Panel, paras. 8 and 10.

[87] Ukraine's response to Panel question No. 2 following the first meeting of the Panel, para. 81. Ukraine submits that the wording of the phrase "which it considers necessary" suggests that the standard of review cannot be the same as the standard of review with respect to the necessity test under Article XX of the GATT 1994. (Ibid.) In its closing statement at the second meeting of the Panel (at para. 5) and in its response to Panel question No. 1 following the second meeting of the Panel (at para. 11), Ukraine uses the term "plausibly" (rather than reasonably) to describe this standard of review.

[88] Australia's third-party submission, paras. 8-10.

[89] Australia's third-party statement, paras. 2 and 9.

[90] Ibid. para. 11.

[91] Ibid. paras. 15 and 17. (emphasis original) Australia submits that, if action taken by a Member is not capable of making some contribution to protecting its essential security interests, it would be reasonable for a panel to determine that the action was *not in fact* taken for such a purpose under Article XXI(b). (Ibid. para. 18.)

[92] Brazil's third-party statement, para. 8.

[93] Ibid. para. 9. Brazil refers to "the negotiation history" of Article XXI of the GATT 1994 and state practice to argue that it was never the intention of the Members that the WTO in general or the WTO dispute settlement mechanism in particular would be the proper venue to "discuss security matters". (Brazil's third-party submission, para. 5.) However, Brazil notes that Members were at the same time mindful that Article XXI could be "improperly used to prevent measures of a strictly commercial nature from being challenged in the dispute settlement mechanism". (Ibid. para. 6.) Brazil concludes that, in order to strike a balance, "there was an option to limit the circumstances in which Article XXI may be invoked, which seems to indicate that it was a common understanding that differences regarding the application of Article XXI would not necessarily fall outside the purview of a Panel, should a Member consider that those circumstances were not in place." (Ibid.)

[94] Brazil's third-party statement, para. 16. Brazil argues that a panel should begin its analysis by determining whether one or more of the circumstances in subparagraphs (i) through (iii) are present. If none are present, then the panel need not proceed with the rest of the analysis. (Ibid. para. 17.)

discretion on the Member regarding the necessity of the measure, a panel must nevertheless review the Member's motivation for invoking Article XXI(b)(iii) to ensure that there is some connection between the measure and the state of war or other emergency in international relations, and whether there is a "plausible link" between the measure and the purpose stated in the Member's motivation for imposing the measure.[95]

7.38. Brazil considers that, unlike the determination of whether an action relates to fissionable materials, traffic in arms, or war, in subparagraphs (i), (ii) and (iii) of Article XXI(b), the question of what constitutes an emergency in international relations is "quite subjective and quite difficult to discern without entering into a discussion on what constitutes a Member's national security interest".[96] Nevertheless, Brazil considers that the invoking Member bears the burden of adducing evidence that the challenged measures constitute action taken in time of war or other emergency in international relations.[97] An invoking Member must also demonstrate some degree of connection between the measure and the state of war or other emergency in international relations, and whether there is a plausible link between the measure that the Member wishes to justify and the purpose stated in its motivation.[98]

7.39. Canada argues that if Article XXI of the GATT 1994 is invoked by a Member in a dispute, then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference.[99] Canada further observes that the DSU provides that panels do not have the discretion to decline to exercise the jurisdiction conferred on them by their terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11 of the DSU.[100] While Canada considers that Article XXI is an exception which can be invoked by a Member to justify measures that would otherwise not be consistent with its WTO obligations, it also regards Article XXI as "structurally and textually different from Article XX".[101] It therefore cautions against importing tests developed in the jurisprudence to interpret provisions such as Article XX.[102]

7.40. Canada interprets Article XXI(b)(iii) as providing for a "subjective" standard, according to which the invoking Member determines the interests, actions and necessity of actions, as well as the satisfaction of the conditions in subparagraph (iii).[103] While Canada considers the subjective standard and the particularly sensitive nature of the subject matter of Article XXI to mean that an invoking Member must be accorded a "high level of deference" by a panel, it also considers that an invoking Member must substantiate (albeit at a low standard) its good faith belief that the elements for its invocation of Article XXI(b)(iii) exist.[104]

7.41. China argues that the Panel has jurisdiction to review Russia's invocation of Article XXI of the GATT 1994 on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[105] China considers that Russia has invoked Article XXI as a defence to Ukraine's claims of inconsistency.[106] China urges the Panel to exercise extreme caution in its assessment of Russia's invocation of Article XXI(b)(iii), in order to maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member's right to protect its essential security interests, including a Member's "sole discretion" regarding its own security interests, on the other hand.[107] China refers to the principle of good faith

[95] Brazil's third-party submission, paras. 28-30.
[96] Ibid. para. 8. For this reason, and in light of the absence of a common understanding of the scope of rights and obligations under Article XXI, Brazil cautions the Panel against "any interpretation that could impair a Member's ability to decide on the need to adopt the measures necessary to protect its national security". (Ibid. para. 9.)
[97] Brazil submits that Article XXI(a) of the GATT 1994 should not be interpreted as precluding the need for a Member to motivate its recourse to the exceptions of Article XXI(b). (Brazil's third-party statement, para. 26.)
[98] Ibid. paras. 28-29.
[99] Canada's third-party statement, para. 4.
[100] Canada's letter to the Chairman of the Panel, dated 14 November 2017.
[101] Canada's third-party statement, para. 6.
[102] Ibid. para. 5.
[103] Ibid. para. 6.
[104] Ibid. para. 8.
[105] China's third-party statement, paras. 3-5.
[106] Ibid. para. 6.
[107] China's third-party statement, para. 18.

embodied in Article 26 of the Vienna Convention on the Law of Treaties and argues that Members invoking Article XXI(b) should adhere to the principle of good faith.[108]

7.42. The European Union argues that Article XXI of the GATT 1994 does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of the GATT 1994.[109]

7.43. Given the absence in Article XXI of an equivalent to the chapeau in Article XX, the analysis of Article XXI should consider whether a measure addresses the particular interest specified, and that there is a sufficient nexus between the measure and the interest protected.[110] The European Union argues that the terms "which it considers" in the first part of Article XXI(b) qualify only the term "necessary". Therefore, the existence of a war or other emergency in international relations in subparagraph (iii) should be interpreted to refer to objective factual circumstances which can be fully reviewed by panels.[111] While "essential security interests" should be interpreted so as to allow Members to identify their own security interests and their desired level of protection, a panel should, on the basis of the reasons provided by the invoking Member, review whether the interests at stake can "reasonably" or "plausibly" be considered essential security interests.[112] A panel must also review whether the action is "capable" of protecting a security interest from a threat. The European Union considers that the terms "which it considers" imply that "in principle" each Member may determine for itself whether a measure is "necessary" for the protection of its essential security interests.[113] A panel should nevertheless review this determination, albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is "applied" in good faith. This requires the invoking Member to provide the panel with an explanation as to why it considered the measure necessary.[114] Finally, the European Union argues that, when assessing the necessity of the measure and the existence of reasonably available alternatives, a panel should ascertain whether the interests of third parties which may be affected were properly taken into account.[115]

7.44. Japan argues that consideration of Russia's invocation of Article XXI of the GATT 1994 is within the Panel's terms of reference.[116] However, Japan also considers that Article XXI of the GATT 1994 is an "extraordinary provision" in that it recognizes the vital importance of Members' essential security interests, and the fundamental nature of their sovereign right to pursue such vital interests. This is reflected in the "deferential language" used in the provision. This being so, it may impose an "undue burden" on the WTO dispute settlement system to require panels to review a Member's invocation of Article XXI. Japan therefore urges the parties to make every effort to seek a mutually acceptable solution "in order to maintain the effective functioning of the WTO".[117]

7.45. Japan also notes the critical importance of national security interests to Members' fundamental sovereignty and the risk of the Panel adopting any interpretation that could impair a Member's ability to decide on the need to adopt measures necessary to protect its national security.[118] Japan therefore urges the Panel to "grant appropriate deference to the Members' judgement as to the necessity of taking actions to protect their essential security

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[108] China's third-party statement, para. 19.

[109] European Union's third-party submission, para. 14; and third-party statement, para. 4. The European Union argues that the "matter" before the Panel in this case includes the defence under Article XXI invoked by Russia, as the Panel does not have special terms of reference. (European Union's third-party statement, para. 4.) The European Union further argues that it would be contrary to the objectives of the DSU reflected in Articles 3.2 and 23 to interpret Article XXI of the GATT 1994 as being non-justiciable because it would mean that the invoking Member would unilaterally decide the outcome of a dispute. (Ibid. para. 5.)

[110] Ibid. para. 11.

[111] Ibid. para. 14.

[112] Ibid. para. 17.

[113] Ibid. para. 21. The European Union submits that the term "necessary" in Article XXI(b) should be given the same meaning as in Article XX. (Ibid.)

[114] Ibid.

[115] Ibid. para. 23. The European Union argues that this is required by the preamble of the Decision Concerning Article XXI of the General Agreement (1982 Decision). (Ibid.)

[116] Japan's third-party submission, para. 30.

[117] Japan's third-party statement, paras. 7-8.

[118] Ibid. para. 10 (referring to Australia's third-party submission, para. 25; and Brazil's third-party submission, para. 9).

interests".[119] At the same time, Japan acknowledges that subparagraph (b)(iii) carefully circumscribes the situations that would allow Members to invoke a defence based on each Member's essential security interests. In addition, in Japan's view, considering the object and purpose of the GATT 1994 and the preparatory work for the ITO Charter, the discretion accorded to Members in deciding upon the actions that are necessary to protect their essential security interests is "not unbounded and must be exercised with extreme caution".[120]

7.46. Moldova disagrees with Russia's argument that the mere invocation of Article XXI(b)(iii) prevents WTO panels from reviewing trade issues that would otherwise be WTO-inconsistent.[121] Moldova therefore considers that, while Members have the right to define for themselves their essential security interests, and declare the necessity of protecting those interests, WTO panels have the right to review whether such Members apply WTO-inconsistent measures in good faith and in accordance with the requirements of Article XXI.[122]

7.47. Moldova considers that the Panel needs to assess whether the invoking Member "genuinely believes" that the measure taken is necessary to protect such Member's essential security interests. Moldova argues that the jurisprudence concerning the "necessity" of a measure sought to be justified under Articles XX(a), (b) or (d) of the GATT 1994 could be relevant to a panel's assessment of the necessity of action under Article XXI(b). Accordingly, Moldova argues that a panel assessing whether an action is "necessary" for purposes of Article XXI(b) should undertake a "weighing and balancing exercise", which considers the importance of the essential security interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness, complemented by an analysis of whether the measure is "apt to make a material contribution to the achievement of its objective".[123] Such an exercise should also include a determination of whether a WTO-consistent alternative measure is reasonably available to the invoking Member.[124] A panel should also determine if the measures at issue protect "essential security interests", which must meet a higher standard than, and can be distinguished from, "non-essential security interests".[125] Moldova considers that the invoking Member should demonstrate to a panel that "in addition to establishing the objective prerequisites in Article XXI(b)[] regarding the existence of an essential security interest", the measure does not "intentionally serve protectionist purposes".[126]

7.48. Singapore argues that the Panel has jurisdiction to consider Russia's invocation of Article XXI, on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[127] Singapore considers that the language "it considers necessary" in the first part of Article XXI(b) indicates that the invoking Member is allowed to determine "with a significant degree of subjectivity" what action it considers necessary to protect its essential security interests.[128] Singapore contrasts this "self-judging" aspect of Article XXI(b) with the text of Article XX.[129] Singapore argues that the "key" phrase "it considers necessary" in the first part of Article XXI(b) has been deliberately drafted to give a Member wide latitude to determine both the action necessary for the protection of its

[119] Japan's third-party statement, para. 10.
[120] Ibid. para. 11.
[121] Moldova's third-party submission, para. 18.
[122] Ibid. para. 21. Moldova points to the creation of the WTO as an international organization with a binding dispute settlement system administered by the DSB and the fact that the only mechanism for "opting-out" of the application of the obligations under the covered agreements is through the mechanism envisaged in Article XIII:1 of the WTO Agreement, which Russia did not invoke when it acceded to the WTO. (Ibid. paras. 23-24.)
[123] Moldova's third-party statement, para. 19.
[124] Ibid. para. 22.
[125] Ibid. para. 20.
[126] Ibid. para. 21.
[127] Singapore's third-party statement, paras. 8-11.
[128] Ibid. paras. 13-14. Singapore argues that WTO provisions which involve some margin of appreciation for a Member, such as the determination of the appropriate level of protection under the SPS Agreement, are not "anywhere close" to being as express and definitive regarding their "self-judging" nature as Article XXI(b). Therefore, a higher level of deference—i.e. a "significant margin of appreciation"—should be accorded to a Member's chosen level of protection, assessment of risk and the necessity of the measure taken for the protection of its essential security interests. (Ibid. paras. 18-19.)
[129] Given the textual differences between Articles XX and XXI, Singapore does *not* agree with an interpretation of Article XXI(b) which seeks to apply to that provision the analytical framework or necessity test developed under Article XX. (Singapore's third-party statement, para. 15.)

essential security interests (including the nature, scope and duration of the measure) and the necessity of the measure.[130] Singapore argues that a "significant margin of appreciation" should be accorded to a Member's assessments of its chosen level of protection and risk, as well as the necessity of a measure taken for the protection of its essential security interests.[131]

7.49. On the other hand, Singapore considers that Members should exercise their discretion under Article XXI(b) in accordance with the principle of good faith and the doctrine of abuse of rights. Thus, a Member must, in good faith—albeit subjectively—consider that there is a threat to its essential security interest and that its chosen action is necessary for the protection of that essential security interest.[132] Singapore also argues that the determination of the existence of an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is "inherently subjective", with the sensitivities implicated in a Member's assessment of its security threats being equally applicable to a determination of whether an "emergency in international relations" exists.[133] Singapore submits that, even if the Panel were to conduct a "more intrusive" review of a Member's invocation of Article XXI(b), it should be limited to an examination of whether the disputed measure was implemented in a "non-capricious manner", rather than conducting an examination that "approximates an objective substantive review".[134]

7.50. Turkey argues that the text of Article XXI(b), especially the clause "which it considers necessary" means that "to a very large extent", it is left to the judgment of the invoking Member to determine which measures it considers necessary for the protection of its essential security interests. However, while the language of Article XXI leaves the determination of whether action is necessary for the protection of essential security interests to the Member taking the action, this discretion is not unqualified. Turkey regards the term "essential", which qualifies "security interests", to indicate an intention to draw a boundary to prevent abuses of power such as sheltering commercial measures behind the security exception.[135] Suggesting that the Panel should be guided by the general exception rules of the GATT 1994, Turkey considers that a complaining Member should make its *prima facie* case of inconsistency, and then the responding Member should put forward, *inter alia*, its argument that the measure can be justified under Article XXI. A panel, when reviewing the responding Member's invocation of Article XXI, should consider the "large margin of discretion" accorded to the invoking Member.[136]

7.51. The United States, in a letter to the Chair of the Panel submitted on the due date for third-party submissions, argues that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute".[137] The reason advanced is that every WTO Member retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as "reflected" in the text of Article XXI of the GATT 1994.[138] The United States describes this as an "inherent right" that has been repeatedly recognized by GATT contracting parties and WTO Members.[139]

7.52. In its subsequent submissions, the United States clarifies that it considers the Panel to have jurisdiction in the context of this dispute "in the sense that the DSB established it, and placed the matter raised in Ukraine's complaint within the Panel's terms of reference under Article 7.1 of the DSU".[140] However, it considers that the dispute is "non-justiciable" because there are no legal criteria

[130] Singapore's third-party statement, para. 13.
[131] Ibid. para. 19.
[132] Ibid. para. 21. Singapore also argues that responses to threats to essential security interests involve the subjective judgment of a Member and depend on the particular context and circumstances involved. (Ibid. paras. 16-17.)
[133] Ibid. para. 23.
[134] Ibid. para. 22.
[135] Turkey's third-party statement, para. 7.
[136] Ibid. para. 8.
[137] Letter from the United States to the Chair of the Panel, dated 7 November 2017, para. 4.
[138] Ibid. para. 2.
[139] In addition, the United States asserts that "[i]ssues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement." (Ibid.)
[140] United States' third-party statement, para. 4; and response to Panel question No. 1, para. 17. The United States distinguishes between "jurisdiction"—meaning, in the present context, the "extent of power of the Panel under the DSU to make legal decisions in this dispute"—and "justiciability", in the sense of whether an issue may be subject to findings by the Panel under the DSU. The United States also defines "justiciability"

by which the issue of a Member's consideration of its essential security interests can be judged.[141] The United States bases its position on its interpretation of the text of Article XXI, specifically, the "self-judging" language of the chapeau in Article XXI(b) "*which it considers necessary for* the protection of its essential security interests".[142] For the United States, the "self-judging" nature of Article XXI(b)(iii) establishes that its invocation by a Member is "non-justiciable", and "is therefore not capable of findings by a panel", obviating the possibility of making recommendations under Article 19.1 of the DSU in this dispute.[143]

7.5.3 Whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.53. The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[144] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.[145]

7.54. Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 (the covered agreements). The covered agreements include, *inter alia*, the Multilateral Agreements on Trade in Goods, including the GATT 1994, more particularly Articles XXII and XXIII, as elaborated and applied by the DSU. Article 1.2 of the DSU provides that the rules and procedures of the DSU shall apply subject to such special or additional rules on dispute settlement contained in the covered agreements as are identified in Appendix 2 to the DSU. Appendix 2 of the DSU does not refer to any special or additional rules of procedure applying to disputes in which Article XXI of the GATT 1994 is invoked.

7.55. The Panel recalls that Ukraine requested the DSB to establish a panel pursuant to the provisions of the DSU and Article XXIII of the GATT 1994. On 21 March 2017, the DSB established the Panel in accordance with Article 6 of the DSU, with standard terms of reference as provided in Article 7.1 of the DSU. Article 7.2 of the DSU requires that the Panel address the relevant provisions in any covered agreements cited by the parties to the dispute.[146]

7.56. Given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.

7.57. Russia argues, however, that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii). For Russia, the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel. Russia's argument is based on its

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as whether a matter is capable of being adjudicated, or suitable for adjudication. (United States' third-party statement, para. 3; and response to Panel question No. 1, paras. 16-19.)

[141] United States' response to Panel question No. 1, paras. 18 and 22.

[142] United States' third-party statement, paras. 5, 11-12 and 34-36. (emphasis original) Additionally, in response to a question from the Panel, the United States argues that Members agreed to remove the invocation of the essential security exception from multilateral judgment *when they agreed to the "self-judging" text included in Article XXI*. (United States' response to Panel question No. 1, para. 22; and General US Answer to questions from the Panel and the Russian Federation, paras. 1-15.)

[143] United States' response to Panel question No. 1, para. 17. See also United States' third-party statement, paras. 2-3, 5 and 7.

[144] See International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case* (Australia v. France) (1974) ICJ Reports, pp. 259-260; and International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (1963) ICJ Reports, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function. (See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.)

[145] This is known as the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French. The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, *US – 1916 Act*, fn 30 to para. 54; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

[146] See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. The Appellate Body has also stated that, as a matter of due process and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

interpretation of Article XXI(b)(iii) as "self-judging".[147] According to this argument, Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. Russia's jurisdictional plea is that, based on its interpretation of Article XXI(b)(iii), it has met the conditions for invoking the provision.

7.58. As previously noted, the Panel's evaluation of Russia's jurisdictional plea requires it, in the first place, to interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements.

7.5.3.1 Meaning of Article XXI(b)(iii) of the GATT 1994

7.59. The Panel begins by recalling that Article 3.2 of the DSU recognizes that interpretive issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well established—including in previous WTO disputes—that these rules cover those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.60. Article XXI(b)(iii) of the GATT 1994 is part of the "Security Exceptions" set forth in Article XXI, which provides:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> > (i) relating to fissionable materials or the materials from which they are derived;
> >
> > (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> >
> > (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

7.61. The introduction to Article XXI states that "[n]othing in this Agreement shall be construed" followed by three paragraphs that are separated by the conjunction "or". Paragraph (a) of Article XXI describes action that may not be required of a Member, and paragraphs (b) and (c) describe action which a Member may not be prevented from taking, notwithstanding that Member's obligations under the GATT 1994.

[147] See Russia's first written submission, paras. 5-6 and 40-48; opening statement at the first meeting of the Panel, para. 46; and closing statement at the first meeting of the Panel, paras. 8 and 12.

7.5.3.1.1 Whether the clause in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that "which [the Member] considers necessary for the protection of its essential security interests".

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause "which it considers". The adjectival clause can be read to qualify only the word "necessary", i.e. the necessity of the measures for the protection of "its essential security interests"; or to qualify also the determination of these "essential security interests"; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.[148]

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause "which it considers" qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?

7.66. A similar logical query is whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination. In answering this last question, the Panel will focus on the last set of circumstances, envisaged in subparagraph (iii), to determine whether, given their nature, the evaluation of these circumstances can be left wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel.

7.67. As previously noted, the words of the chapeau of Article XXI(b) are followed by the three enumerated subparagraphs, which are relative clauses qualifying the sentence in the chapeau, separated from each other by semicolons. They provide that the action referred to in the chapeau must be:

i. "relating to fissionable materials or the materials from which they are derived";

ii. "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment";

iii. "taken in time of war or other emergency in international relations".

7.68. Given that these subject matters—i.e. the "fissionable materials ...", "traffic in arms ...", and situations of "war or other emergency in international relations" described in the enumerated subparagraphs—are substantially different, it is obvious that these subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet in order to fall within the ambit of Article XXI(b).

7.69. The connection between the action and the materials or the traffic described in subparagraphs (i) and (ii) is specified by the phrase "relating to". The phrase "relating to", as used

[148] See Section 7.5.6 below.

in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a "close and genuine relationship of ends and means" between the measure and the objective of the Member adopting the measure.[149] This is an objective relationship between the ends and the means, subject to objective determination.

7.70. The phrase "taken in time of" in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understands this phrase to require that the action be taken *during* the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination.

7.71. Moreover, as for the circumstances referred to in subparagraph (iii), the existence of a war, as one characteristic example of a larger category of "emergency in international relations", is clearly capable of objective determination. Although the confines of an "emergency in international relations" are less clear than those of the matters addressed in subparagraphs (i) and (ii), and of "war" under subparagraph (iii), it is clear that an "emergency in international relations" can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination.

7.72. The use of the conjunction "or" with the adjective "other" in "war *or other* emergency in international relations" in subparagraph (iii) indicates that war is one example of the larger category of "emergency in international relations". War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict). The dictionary definition of "emergency" includes a "situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action", and a "pressing need … a condition or danger or disaster throughout a region".[150]

7.73. "International relations" is defined generally to mean "world politics", or "global political interaction, primarily among sovereign states".[151]

7.74. The Panel also takes into account, as context for the interpretation of an "emergency in international relations" in subparagraph (iii), the matters addressed by subparagraphs (i) and (ii) of Article XXI(b), which cover fissionable materials, and traffic in arms, ammunition and implements of war, as well as traffic in goods and materials for the purpose of supplying a military establishment. While the enumerated subparagraphs of Article XXI(b) establish alternative requirements, the matters addressed by those subparagraphs give rise to similar or convergent concerns, which can be formulated in terms of the specific security interests that arise from the matters addressed in each of them. Those interests, like the interests that arise from a situation of war in subparagraph (iii) itself, are all defence and military interests, as well as maintenance of law and public order interests. An "emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b).

7.75. Moreover, the reference to "war" in conjunction with "or other emergency in international relations" in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international

[149] Appellate Body Reports, *US − Shrimp*, para. 136; *China − Raw Materials*, para. 355; and *China − Rare Earths*, para. 5.90.

[150] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press 2007), Vol. 2, p. 819. The Panel observes that in the GATT 1994, the term "emergency" is used in only two places. First, the term is employed in Article XXI(b)(iii) as part of the phrase "other emergency in international relations". Second, the term appears in the title of Article XIX, which refers to "emergency action on imports of particular products". The word "emergency" is not, however, used in the text of Article XIX itself.

[151] *Black's Law Dictionary*, 8th edn, B.A. Garner (ed.) (West Group 2004), p. 836. The same concept is used in Article 2(4) of the UN Charter, which provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." (Charter of the United Nations, done at San Francisco, 26 June 1945, 1 UN Treaty Series XVI, available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.)

relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be "emergencies in international relations" within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.

7.76. An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[152] Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.[153]

7.77. Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was "taken in time of" an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.

7.78. As a next step, the Panel considers whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).

7.79. Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade.[154] At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.

7.80. In the Appendix to this Report, the Panel surveys the pronouncements of the GATT contracting parties and WTO Members to determine whether the conduct of the GATT contracting parties and the WTO Members regarding the application of Article XXI reveals a common understanding of the parties as to the meaning of this provision. The Panel's survey reveals differences in positions and the absence of a common understanding regarding the meaning of Article XXI. In the Panel's view, this record does not reveal any subsequent practice establishing an

[152] This interpretation of an emergency in international relations is consistent with the preparatory work, referred to in paragraph 7.92 below, which indicates that the United States, when proposing the provision of the Geneva Draft of the ITO Charter that was carried over into Article XXI of the GATT 1947, and in referring to an "emergency in international relations", had in mind particularly the situation that existed between 1939 and 1941. During this time, the United States had not yet participated in the Second World War, yet owing to that situation, had still found it necessary to take certain measures for the protection of its essential security interests.

[153] This understanding is well-entrenched historically in diplomatic practice. See, e.g. Article 11 of the Covenant of the League of Nations: "Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League … [i]n case any such emergency should arise …". (Covenant of the League of Nations, done at Paris, 28 June 1919, League of Nations Treaty Series, Vol. 108, p. 188.)

[154] See Appellate Body Reports, *EC – Computer Equipment*, para. 82; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US*), para. 433; *Argentina – Textiles and Apparel*, para. 47; and *EC – Chicken Cuts*, para. 243.

agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.[155]

7.81. It is notable, however, that a significant majority of occasions on which Article XXI(b)(iii) was invoked concerned situations of armed conflict and acute international crisis, where heightened tensions could lead to armed conflict, rather than protectionism under the guise of a security issue. It therefore appears that Members have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes. The Panel does not assign any legal significance to this observation, but merely notes that the conduct of Members attests to the type of circumstance which has historically warranted the invocation of Article XXI(b)(iii).

7.82. In sum, the Panel considers that the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[156]

7.5.3.1.2 Negotiating history of Article XXI of the GATT 1947

7.83. This conclusion that the Panel has reached based on its textual and contextual interpretation of Article XXI(b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, is confirmed by the negotiating history of Article XXI of the GATT 1947.[157]

7.84. The Panel recalls that the GATT 1947 arose out of a proposal by the United States to establish an International Trade Organization (ITO), an organization through which the United States and other countries would harmonize policies in respect of international trade and employment.[158] The

[155] It is to be noted that statements of position of individual GATT contracting parties made prior to April 1989 should be understood in the context of the positive consensus rule that then applied to the establishment of dispute settlement panels, the setting of their terms of reference, and the adoption of panel reports. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989, section F(a) (the April 1989 Decision). See also ibid. section F(b) on the establishment of panels and working parties with standard terms of reference.) For the application of the April 1989 Decision to a 1991 request by Yugoslavia for the establishment of a panel to examine certain measures imposed by the European Communities, see paras. 1.63-1.66 of the Appendix to this Report.

[156] The Panel notes that Ukraine and Russia both referred to the interpretations of the International Court of Justice (ICJ) of security exceptions in bilateral treaties between Nicaragua and the United States (in *Case of Military and Paramilitary Activities in and Against Nicaragua*), and between the Islamic Republic of Iran and the United States (in *Case Concerning Oil Platforms*) in the course of their arguments. (Ukraine's second written submission, paras. 81-91; and Russia's opening statement at the second meeting of the Panel, paras. 28-40.) The Panel considers that the conclusions of the Court in both cases were limited to the specific provisions of the bilateral treaties under consideration. In *Case of Military and Paramilitary Activities in and Against Nicaragua,* the Court did not purport to interpret Article XXI of the GATT 1947, but merely referred to the provision *a contrario* in order to highlight the absence of the adjectival clause "which it considers" from the security exception at issue (International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 116.) Similarly, in *Case Concerning Oil Platforms,* the Court's conclusions were limited to a security exception lacking the same adjectival clause. (International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 183.) Consequently, the Panel does not consider these cases to be material to its interpretation of Article XXI(b)(iii) of the GATT 1994.

[157] The Appellate Body has previously had recourse to the preparatory work of the ITO Charter as a supplementary means of treaty interpretation in order to confirm the meaning of corresponding provisions in the GATT 1994. (See, e.g. Appellate Body Reports, *Japan –Alcoholic Beverages II,* fn 52, DSR 1996:I, 97, p. 104; *Canada – Periodicals,* p. 34, DSR 1997:I, p. 449; and *US – Line Pipe,* para. 175.)

[158] Preparatory work on the ITO Charter began in November 1945 with the issuance by the United States of a document entitled "Proposals for Expansion of World Trade and Employment". (See United States, Department of State, "Proposals for Expansion of World Trade and Employment", Publication 2411, Commercial Policy Series 79, November 1945, p. 1.) In February 1946, the Economic and Social Council of the United Nations adopted a resolution calling for an international conference on trade and

text of the ITO Charter was negotiated over four sessions between October 1946 and March 1948. Towards the end of the first negotiating session (held in London between October and November 1946), the Preparatory Committee decided to give prior effect to the tariff provisions of the ITO Charter by means of a general tariff agreement which would provisionally apply among a subset of ITO members until the ITO Charter entered into force.[159] The provisions of the general tariff agreement were to be taken from the provisions of the ITO Charter then being negotiated.[160] The texts of the ITO Charter and of the general tariff agreement were negotiated in parallel through the second negotiating session (held in New York between January and February 1947) and the third negotiating session (held in Geneva between April and October 1947).

7.85. The United States originally proposed, in a draft submitted to the Preparatory Committee in September 1946, the inclusion of a single general exceptions clause that would apply to the General Commercial Policy chapter of the ITO Charter.[161] The clause began with "[n]othing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures" followed by paragraphs that included a number of the general exceptions later appearing in Article XX of the GATT 1947, as well as others later reflected in Article XXI of the GATT 1947 (specifically paragraphs (c), (d), (e), and (k)).[162]

7.86. The draft of the ITO Charter prepared at the New York negotiating session in February 1947 (the New York Draft) similarly contained a single general exceptions clause in the chapter on General Commercial Policy.[163] Article 37 of the New York Draft provided that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:

employment, and established a Preparatory Committee of 19 countries to prepare a draft charter of the ITO. (See United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946, foreword (US Draft Charter).)

[159] See, e.g. Preparatory Committee on the International Conference on Trade and Employment, Procedures for Giving Effect to Certain Provisions of the Proposed ITO Charter by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee, Report of the Sub-Committee on Procedure to Committee II, E/PC/T/C.II/58, pp. 12-14.

[160] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", section B, p. 48 and section K, p. 51. According to the Report, the General Agreement on Tariffs and Trade "should conform in every way to the principles laid down in the Charter and should not contain any provision which would prevent the operation of any provision of the Charter". (Ibid.)

[161] Article 32 of the US Draft Charter. (US Draft Charter, Chapter IV "General Commercial Policy", section I "General Exceptions", "General Exceptions to Chapter IV", Article 32, p. 24.)

[162] Ibid. The US Draft Charter also included a clause in Chapter VI "Intergovernmental Commodity Arrangements" providing that any "justiciable issue" arising specifically from any ruling of the Conference interpreting Article 32, paragraphs (c), (d), (e) or (k), dealing with security, could be referred as a dispute to the ICJ. (Ibid. Article 76, pp. 45-46.)

[163] The first draft of the ITO Charter resulting from the London round of negotiations in November 1946, the London Draft, merely included a placeholder for a general exceptions clause to Chapter V on General Commercial Policy, Article 37, which was "[t]o be considered and drafted at a later stage". (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Appendix "Charter of the International Trade Organization of the United Nations", p. 33.) The London Draft did, however, contain a general security exception clause in Chapter VII on Inter-Governmental Commodity Arrangements, as well as a clause providing for referral to the ICJ on the security paragraphs of Article 37 specifically. (Ibid. Article 59, p. 37 and Article 86, p. 41.) The partial draft of the general tariff agreement concluded at this stage also included a placeholder envisaging the possibility of a general exceptions clause modelled after Article 37 of the ITO Charter. (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", Article IV, p. 52.)

(a) Necessary to protect public morals;

(b) For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country;

(c) Relating to fissionable materials;

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;

...

(k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.[164]

7.87. The separation of these exceptions into two distinct clauses was first suggested during the third negotiating session in Geneva. In May 1947, the United States proposed that the security exceptions that appeared in the clause be moved to the end of the ITO Charter so that they would be general exceptions to the whole Charter and not just the chapter on General Commercial Policy.[165] The United States also proposed that this new provision contain the introductory language "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures", which would then be followed by the list of paragraphs transferred from Article 37.[166]

7.88. The specific language for the new security exceptions that would apply throughout the whole of the Charter was developed from a proposal submitted by the United States delegation at the Geneva negotiating session in July 1947.[167]

7.89. According to Vandevelde's study of the internal documents of the United States delegation negotiating the ITO Charter, the US delegation arrived at the language of this proposal after deliberating as to whether an ITO member should effectively be able to avoid any Charter obligation by the unilateral invocation of its essential security interests, or whether any element of the security exceptions should be subject to review by the Organization.[168] The members of the delegation were

[164] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34, pp. 31-32. The New York Draft also retained a slightly modified version of the security exception to the chapter on Inter-Governmental Commodity Arrangements, as well as the clause providing for referral to the ICJ on a provisional basis. (Ibid. Article 59, pp. 43-44 and Article 86, pp. 51-52.) The draft of the general tariff agreement concluded at this stage contained substantially the same general exceptions clause in relation to the chapter on General Commercial Policy. (Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft General Agreement on Tariffs and Trade, E/PC/T/C.6/85, Article XX, pp. 31-32.) The draft of the general tariff agreement did not, however, contain a clause providing for referral of security issues to the ICJ. (Ibid. Article XXIV, p. 34.)

[165] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5; and United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/153, Article XIX, p. 9.

[166] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5. The draft of the general tariff agreement concluded as of 24 July 1947 reflected these developments, including a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX of the GATT 1947) and the other containing those justifications later reflected in Article XXI of the GATT 1947 and preceded by the new introductory language proposed by the United States. (Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135, Article XIX, pp. 53-54.)

[167] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5.

[168] See K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 145-154. Vandevelde's study of the history of US postwar FCN Treaties includes a chapter on the ITO Charter. As stated in the introduction to his book,

divided between those who wanted to preserve the United States' freedom of action in relation to its security interests by providing that each ITO member would have independent power to interpret the language of the exception[169], and those who believed that such a means for unilateral action would be abused by some countries and destroy the efficacy of the entire Charter.[170] At issue was whether the proposed draft should provide that nothing in the Charter would preclude any action "which [a member] may consider to be necessary and to relate to" the various enumerated topics, such as fissionable materials, traffic in arms or an emergency in international relations, or whether the original language from Article 37 of the New York Draft, which used the phrase "relating to" should be retained.[171]

7.90. Those favouring the position that some elements of the security exceptions should be subject to review by the Organization considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter.[172] One delegate advocating this position stated that "it would be far better to abandon all work on the Charter" than to place a provision in it that would, "under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter".[173]

7.91. After a vote, those favouring the above position prevailed.[174] Their position, that the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the

Vandevelde's research relied on materials on the negotiating histories of US postwar FCN Treaties and of the ITO Charter which are maintained in the US National Archives and Research Administration (NARA) facility in College Park, Maryland, USA. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 5-9.)

[169] Vandevelde recounts that the US delegation considered and rejected a proposal drafted by the US War Department's representative on the US delegation to add a new paragraph to the proposed security exception. The new paragraph would have provided that each ITO member would have independent power of interpretation of the language of the exception, and that the provisions of Article 86 of the Charter relating to disputes concerning the interpretation and application of the Charter would not apply to the security exception. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

[170] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[171] The language, "and to relate to", was considered to make clear that the invoking member could take unilateral action, while the original language from Article 37 of the New York Draft, which used the phrase "relating to", was considered to indicate that the determination to be made by an ITO member was limited to whether a measure it adopted was necessary, and not also whether the measure related to the enumerated topics. (Ibid. p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

[172] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[173] Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[174] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947"). Vandevelde records that some members of the US delegation reasoned that, as a practical matter, the United States would not need a right to engage in unfettered unilateral action. (Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

provision, was reflected in the United States' proposal of 4 July 1947. The proposed Article 94 of the ITO Charter provided that:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[175]

7.92. The United States delegation's interpretation of its proposal for the security exception is reflected in discussions of the provision during the Geneva negotiating session on 24 July 1947. In response to a question from the delegate for the Netherlands as to the meaning of the term "essential security interests" and "emergency in international relations"[176], the delegate for the United States replied:

> I suppose I ought to try and answer that, because I think the provision [subparagraph (e) of Article 37 of the New York Draft] goes back to the original draft put forward by us and has not been changed since.
>
> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" because, that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same*

[175] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/236, Annex A, p. 13. The United States proposed that this new article replace the national security exceptions applicable to both the chapter on General Commercial Policy and the chapter on Inter-Governmental Commodity Arrangements. (Ibid.)

[176] The delegate's specific questions were:

> What do we mean—"emergency in international relations"? Is that "immediate", through a war?—or what is the "emergency in international relations"?
>
> The second point that is troubling me here is, what are the "essential security interests" of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.
>
> For instance, I might say that at present we have a time of emergency as a number of Peace Treaties have not yet been signed and that therefore it might still be essential to have as much food in my country as possible. This would then force us to do everything to develop our agriculture, notwithstanding all of the provisions of this Charter. This example might be a little far fetched, but I only give it here to prove what is really worrying me about this subparagraph of which I still cannot get the proper meaning.

(Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 19 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2).)

> *time, so far as we could, to limit the exception* so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.
>
> With regard to subparagraph (e), the limitation, I think, is primarily in the time. First, "in time of war". I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to determine for itself—which I think we cannot deny—what its security interests are.
>
> As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.[177]

7.93. Ultimately, the delegate for the United States emphasized the importance of the draft security exceptions, which would allow ITO members to take measures for security reasons, but not as disguised restrictions on international trade:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.
>
> We have given considerable thought to it and this is the best we could produce to preserve that proper balance.[178]

7.94. During that same discussion, the delegate for Australia questioned the possible effect of moving the security exceptions to the end of the Charter, away from the provisions providing for consultations and dispute settlement. In particular, the delegate questioned whether this would mean that the security exceptions would not be subject to consultations and dispute settlement. The delegate for the United States responded as follows:

> … I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35 [predecessor to Articles XXII and XXIII of the GATT 1947]. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.[179]

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[177] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20-21 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, pp. 20-21). (emphasis added) See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.1; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2.

[178] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 21.

[179] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 26-27. See also ibid. p. 30; and Second Session of the Preparatory Committee of the

7.95. The delegate for Australia stated that it should be clear that the terms of the proposed Article 94 would be subject to the provisions of paragraph 2 of Article 35 (predecessor to Article XXIII:1 of the GATT 1947) and on the basis of the assurance from the delegate for the United States that this was so, stated that Australia did not wish to make any reservation to Article 94.[180]

7.96. The version of Article 94 of the Geneva Draft of the ITO Charter, adopted on 22 August 1947, was entitled "General Exceptions" and contained wording nearly identical to that appearing in Article XXI of the GATT 1947:

> Nothing in this Charter shall be construed
>
> (a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[181]

7.97. By September 1947, these developments were also reflected in the draft text of the general tariff agreement in a separate provision entitled "Security Exceptions", which mirrored the language of Article 94 of the Geneva Draft of the ITO Charter.[182]

United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, p. 1 (referring to p. 29 of the Verbatim Report).

[180] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 28; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 33rd Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/SR/33, pp. 4-5. Later in July 1947, the Sub-Committee on Chapters I, II and VII also deleted the clause providing for referral to the ICJ on the security subparagraphs. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Part A – Introduction), E/PC/T/139, pp. 23-34.) Throughout August 1947, the proposed text was subject to several additional amendments by a Legal Drafting Committee and then by Commission A, including restructuring the provision to introduce the three subparagraphs to paragraph (b), as well as adding the words "directly or indirectly" to subparagraph (b)(ii). (See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Including Noting and Membership of the Executive Board), E/PC/T/159, pp. 41-42; Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the Thirty-Sixth Meeting of Commission A Held on Tuesday, 12 August 1947, E/PC/T/A/PV/36, pp. 16-21; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 40th (2) Meeting of Commission A Held on Friday, 15th August 1947, E/PC/T/A/SR/40(2), pp. 9-11.)

[181] Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/186, p. 56.

[182] The draft of the general tariff agreement prepared as of 30 August 1947 included a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX) and the other containing language identical to that in Article 94 of the Geneva Draft of the ITO Charter. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee of the Tariff Agreement Committee on Part II of the General Agreement, E/PC/T/189, Article XIX, pp. 47-49.) In September 1947, these subsections were separated into Articles XX and XXI, and entitled "General Exceptions" and "Security Exceptions", respectively. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Tariff Agreement Committee, Redraft

7.98. The Panel considers that the foregoing negotiating history demonstrates that the drafters considered that:

a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;

b. the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and

c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.

7.99. The Panel is also mindful that the negotiations on the ITO Charter and the GATT 1947 occurred very shortly after the end of the Second World War. The discussions of "security" issues throughout the negotiating history should therefore be understood in that context.

7.100. The negotiating history therefore confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself. In other words, there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.

7.5.3.1.3 Conclusion on whether the clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.101. The Panel concludes that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.

7.5.3.2 Conclusion on whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.102. It follows from the Panel's interpretation of Article XXI(b), as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia.

7.103. Consequently, Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is "non-justiciable", to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision.[183]

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of the Final Act, General Agreement on Tariffs and Trade and Protocols in Light of Discussions Which Have Taken Place in the Committee, E/PC/T/196, pp. 50-53. See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting of the Tariff Agreement Committee, E/PC/T/TAC/PV/11, pp. 23-26.)

[183] Another way of making the argument that a Member's invocation of Article XXI(b)(iii) is non-justiciable is by characterizing the problem as a "political question", as was also advanced by the United States. The ICJ has rejected the "political question" argument, concluding that, as long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. (See, for example, International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations*, (United Nations) (1962) I.C.J. Reports, p. 155. See also International Criminal Tribunal for the Former

7.104. Russia's invocation of Article XXI(b)(iii) being within the Panel's terms of reference under Article XXIII of the GATT 1994, as further elaborated and modified by the DSU, the Panel finds that it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

7.5.4 The measures at issue and their existence

7.105. In the preceding Section, the Panel found that it has jurisdiction to review Russia's invocation of Article XXI(b)(iii). The Panel recalls that Russia also argues that certain measures and claims are outside the Panel's terms of reference because Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU.

7.106. For presentational purposes, and in order not to interrupt the analysis of Article XXI, the Panel defers the exposition of its examination of the terms of reference to Section 7.7 of the Report. For the reasons provided in that Section, the Panel finds that the following measures are within its terms of reference (the measures at issue):

a. 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[184]

b. 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (ii) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.[185] Transit of such goods may only occur pursuant to a derogation requested by the Governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.[186]

7.107. Ukraine has presented evidence of the existence of the above-referenced measures, and the Panel is satisfied that these measures exist.[187] This being so, the next question is whether these measures are inconsistent with Russia's obligations under Articles V and X of the GATT 1994 and commitments in Russia's Accession Protocol, or whether there can be no such inconsistency in the circumstances, because the measures were "taken in time of war or other emergency in international relations", and meet the other possible conditions of the chapeau of Article XXI(b).

Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (1995), Case No. IT-94-1-A, paras. 23-25.) Moreover, the Panel notes that in *Mexico –Taxes on Soft Drinks*, the Appellate Body expressed the view that a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU, or the right of a Member to seek redress of a violation of obligations within the meaning of Article 23 of the DSU. The Panel therefore considers that this way of characterizing the problem as a basis for the Panel to decline to review Russia's invocation of Article XXI(b)(iii) is also untenable. (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.)

[184] See para. 7.357.a below.

[185] See para. 7.357.b below.

[186] See para. 7.357.c below.

[187] See fns 381-383, 385 and 387 below, and paras. 7.265-7.267, 7.269.a and 7.353 below.

7.108. The Panel notes in this regard the particularity of the exception specified in Article XXI(b)(iii). This provision acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated. The Panel considers that an evaluation of whether measures are covered by Article XXI(b)(iii), as measures "taken in time of war or other emergency in international relations" (unlike measures covered by the exceptions under Article XX) does not necessitate a prior determination that they would be WTO-inconsistent if they had been taken in normal times, i.e. if they were not taken in time of war or other emergency in international relations. This is because, for the reasons explained in Section 7.5.6, there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure, i.e. that there is no reasonably available alternative measure to achieve the protection of the legitimate interests covered by the exception which is not violative, or is less violative, of the prescribed norm.

7.109. The Panel thus considers that, once it has found that the measures at issue are within its terms of reference and that Ukraine has demonstrated their existence, the most logical next step in its analysis is to determine whether the measures are covered by subparagraph (iii) of Article XXI(b), i.e. whether the measures were in fact taken during time of war or other emergency in international relations. Only if the Panel finds that the measures were not taken in time of war or other emergency in international relations would it become necessary to determine the consistency of the measures with the provisions of Articles V and X of the GATT 1994, which are the subject of Ukraine's claims.

7.110. Accordingly, the Panel next determines whether the measures at issue fall within the scope of subparagraph (iii) of Article XXI(b), as measures taken in time of war or other emergency in international relations.

7.5.5 Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

7.111. The Panel recalls its interpretation of "emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b) as a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[188]

7.112. Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue.[189] Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security.[190] It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to "keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters".[191]

7.113. Ukraine argues that Russia has not adequately identified or described the 2014 emergency, and has therefore not discharged its burden of proof.[192]

7.114. In its opening statement at the second meeting of the Panel, Russia posed a "hypothetical question" as to whether circumstances similar to those listed would amount to an

[188] See para. 7.76 above.
[189] Russia's first written submission, para. 16.
[190] See, e.g. Russia's closing statement at the first meeting of the Panel, para. 6; and closing statement at the second meeting of the Panel, para. 3.
[191] Russia's closing statement at the second meeting of the Panel, para. 5.
[192] Ukraine professes not to know what Russia means when it refers to an emergency in international relations that arose in 2014, stating that Ukraine and the Panel "are still left in the dark as to what particular emergency in international relations causes the Russian Federation to adopt the measures at issue in order to protect its essential security interests". (Ukraine's second written submission, para. 142. See also Ukraine's opening statement at the second meeting of the Panel, para. 64.) Russia, on the other hand, insists that Ukraine knows very well what emergency it is referring to. (Russia's opening statement at the first meeting of the Panel, para. 30; and closing statement at the second meeting of the Panel, para. 4.)

emergency in international relations under subparagraph (iii) of Article XXI(b).[193] These hypothetical circumstances, as formulated by Russia, are:

a. Unrest within the territory of a country neighbouring a Member, occurring in the immediate vicinity of the Member's border;

b. The loss of control by that neighbouring country over its border;

c. Movement of refugees from that neighbouring country to the Member's territory; and

d. Unilateral measures and sanctions imposed by that neighbouring country or by other countries, which are not authorized by the United Nations, similar to those imposed against Russia by Ukraine.[194]

7.115. When asked by the Panel how closely the hypothetical situation described above reflected the actual situation on the ground, the Russian representative explained that Russia had referred to the hypothetical "in order not to introduce again some information that Russia cannot disclose".[195] The Russian representative then referred to a paragraph from Ukraine's 2016 Trade Policy Review Report[196] which, according to the Russian representative, explains, in Ukraine's words, "what is going on and how real these whole hypothetical questions are".[197] The paragraph refers to "the annexation of the Autonomous Republic of Crimea and the military conflict in the east" as factors that had adversely affected Ukraine's economic performance in 2014 and 2015.[198]

7.116. Ukraine objects to Russia's use of Ukraine's 2016 Trade Policy Review Report, noting that prior panels have refused to attach importance to the Trade Policy Review Mechanism (TPRM) of Members in considering the arguments of a party in dispute settlement proceedings.[199]

7.117. Paragraph A(i) of the TPRM states that the TPRM is "not … intended to serve as a basis for the enforcement of specific obligations under the covered Agreements or for dispute settlement procedures". In two prior disputes, panels have rejected a complainant's reference to the report drawn up by the WTO Secretariat as part of the respondent's Trade Policy Review. In both instances, the reference was used as the basis for an argument that a measure was WTO-inconsistent.[200]

[193] Russia's opening statement at the second meeting of the Panel, para. 24.

[194] Ibid.

[195] Russian representative's oral response to the second question at the second meeting of the Panel.

[196] Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334. Trade Policy Reviews are conducted by the Trade Policy Review Body based on two documents: a policy statement (report) by the Member under review and a comprehensive report drawn up by the WTO Secretariat on its own responsibility.

[197] Russian representative's oral response to the second question at the second meeting of the Panel.

[198] Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334, para. 1.13.

[199] Ukrainian representative's oral comments on Russian representative's oral response to the Panel's second question at the second meeting of the Panel; and Ukraine's combined response to Panel question Nos. 2 and 3 after the second meeting, para. 16 (referring, in particular, to paragraph A(i) of Annex 3 to the WTO Agreement).

[200] In *Canada – Aircraft*, the complainant referred to the report drawn up by the WTO Secretariat in connection with Canada's Trade Policy Review to argue that *Investissement-Québec* assistance to the regional aircraft industry conferred a "benefit" by "provid[ing] export guarantees for projects considered too risky by private financial institutions". Recounting the objective in paragraph A(i) of the TPRM, the panel "attach[ed] no importance to the [TPR] of Canada in considering [the complainant's] arguments concerning *Investissement-Québec* assistance to the regional aircraft industry". (Panel Report, *Canada – Aircraft*, paras. 9.267 (quoting Trade Policy Review Body, Trade Policy Review, Canada, Report by the Secretariat, WT/TPR/S/53, p. 59), and 9.274-9.275). In *Chile – Price Band System*, the complainant argued that the Price Band System at issue was in the nature of a variable tariff, and for this purpose, referred to the report drawn up by the WTO Secretariat in connection with Chile's Trade Policy Review, which stated that "[t]he price stabilization mechanism works as a variable levy since the duty imposed on these goods varies according to their import price." (Panel Report, *Chile – Price Band System*, para. 4.47.) The panel stated that, in the light of paragraph A(i) of the TPRM, "such a Report should not be taken into account in the context of dispute settlement proceedings." (Ibid. fn 664 to para. 7.95.)

7.118. The Panel notes that the Russian representative referred to the relevant paragraph from Ukraine's 2016 Trade Policy Review Report in order to show that the hypothetical situation put forward in Russia's opening statement at the second meeting of the Panel has been referred to by Ukraine—in another context, it is true—as being "the annexation of the Autonomous Republic of Crimea and the military conflict in the east". Russia therefore used the reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report solely to further identify the situation that it had presented in its first written submission in the following general terms: "the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[201] Russia had also previously asserted that the circumstances that led to the imposition of the measures at issue were publicly available and known to Ukraine.[202] Russia did *not* refer to the relevant paragraph of Ukraine's 2016 Trade Policy Review Report as evidence that Ukraine (or Russia, for that matter) characterizes that situation as an emergency in international relations for the purposes of the present proceedings. The Panel therefore does not consider that paragraph A(i) of the TPRM applies to this situation, or that the Panel is thereby precluded from taking into account Russia's reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report.

7.119. Accordingly, Russia has identified the situation that it considers to be an emergency in international relations by reference to the following factors: (a) the time-period in which it arose and continues to exist, (b) that the situation involves Ukraine, (c) that it affects the security of Russia's border with Ukraine in various ways, (d) that it has resulted in other countries imposing sanctions against Russia, and (e) that the situation in question is publicly known. The Panel regards this as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring, and which it argues is an emergency in international relations.

7.120. Therefore, the Panel must determine whether this situation between Ukraine and Russia that has existed since 2014 constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b).

7.121. The Panel notes that it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general.

7.122. There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community.[203] By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict.[204] Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.[205]

7.123. Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

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[201] Russia's first written submission, para. 16.

[202] Russia's opening statement at the first meeting of the Panel, para. 30.

[203] UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89).

[204] UN General Assembly Resolution No. 71/205, 19 December 2016, (Exhibit UKR-91). This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of *declared war or other armed conflict* between High Contracting Parties. (Ibid. p. 2.)

[205] Russia responded to these actions on 7 August 2014 by passing Resolution No. 778 and imposing sanctions on countries that had imposed sanctions against Russia. (Resolution No. 778, (Exhibits UKR-10, RUS-7).) Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the states that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. (Decree No. 560, (Exhibits UKR-9, RUS-3).) Resolution No. 778 originally imposed import bans on listed agricultural products, raw materials and food originating from the United States, EU Member States, Canada, Australia and Norway. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293, (Exhibit UKR-71). It was in force until 31 December 2018. Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

7.124. It thus remains for the Panel to determine whether the measures taken by Russia with respect to Ukraine were "taken in time of" the emergency in international relations. In this regard, the Panel notes that the 2016 Belarus Transit Requirements were introduced by Russia on 1 January 2016, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were introduced on 1 July 2016, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were introduced by Russia in November 2014. All of the measures were therefore introduced during the emergency in international relations and thus were "taken in time of" such emergency for purposes of subparagraph (iii).

7.125. On the basis of the foregoing considerations, the Panel concludes that each of the measures at issue was "taken in time of" an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.5.1 Conclusion

7.126. The Panel finds as follows:

a. As of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; and

b. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.6 Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

7.127. The Panel recalls that, in paragraph 7.63 above, it posited that the adjectival clause "which it considers" in the chapeau of Article XXI(b) can be read to qualify only the "necessity" of the measures for the protection of the invoking Member's essential security interests, or also the determination of these "essential security interests", or finally and maximally, to qualify as well the determination of the sets of circumstances described in each of the subparagraphs of Article XXI(b). In paragraph 7.101 above, the Panel rejected the last of these possible interpretations.

7.128. The Panel has yet to address the remaining two possible interpretations of Article XXI(b). In other words, the question remains whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking Member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.

7.129. Russia argues that the adjectival clause means that both the determination of a Member's essential security interests, and the determination of the necessity of the action taken for the protection of those interests, is left entirely to the discretion of the invoking Member. Several of the third parties also consider that Members have wide discretion to identify for themselves their essential security interests.[206] Ukraine argues that, while all Members have the right to determine their own level of protection of essential security interests, that does not mean that a Member may unilaterally define what are essential security interests.[207] According to Ukraine, it is for panels, rather than for Members, to interpret the term "essential security interests", which forms part of the WTO covered agreements, in accordance with customary rules of interpretation of public international law.[208] Consistent with its interpretation of Article XXI(b)(iii), Ukraine argues

[206] See Australia's third-party statement, paras. 9-21; Brazil's third-party submission, paras. 4-5 and 8-9; third-party statement, paras. 21-30; and response to Panel question No. 6; Canada's third-party statement, paras. 6-8; and response to Panel question No. 6, para. 8; China's third-party statement, paras. 18-19; and response to Panel question No. 6, para. 6; Japan's third-party submission, paras. 32-38; Singapore's third-party statement, paras. 14-19; United States' third-party statement, paras. 1, 11-12, 34-35; and response to Panel question No. 6, para. 31.

[207] Ukraine's opening statement at the first meeting of the Panel, paras. 141-142.

[208] Ibid. para. 142. For similar views expressed by third parties, see European Union's third-party submission, paras. 49-55 and 61-63; and third-party statement, paras. 17-23; Moldova's third-party

that Russia has failed to identify the essential security interests that are threatened by the 2014 emergency, and has not explained or demonstrated the connection between the measures and its essential security interests.[209] While Russia also argued that, pursuant to Article XXI(a) of the GATT 1994, it cannot be required to further explain its actions, beyond what it has declared in its first written submission and opening statement at the first meeting of the Panel, Ukraine considers that Russia cannot invoke Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI(b)(iii).[210]

7.130. "Essential security interests"[211], which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.

7.131. The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.

7.132. However, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Rather, the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith …") and Article 26 ("[e]very treaty … must be performed [by the parties] in good faith") of the Vienna Convention.[212]

7.133. The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system[213] simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.

submission, paras. 21, 27-35 and 37-41; third-party statement, paras. 10-18 and 20-22; and response to Panel question No. 6, paras. 18 and 20-24.

[209] Ukraine's second written submission, para. 156. Ukraine argues that it is not enough for Russia to assert that, as measures affecting transit rather than imports, there is no protectionist motive behind the measures. According to Ukraine, Russia must show that the issues are designed to protect Russia's essential security interests. (Ukraine's second written submission, para. 158.)

[210] See Russia's opening statement at the first meeting of the Panel, paras. 43-44; closing statement at the first meeting of the Panel, paras. 6, 10-11 and 18; and opening statement at the second meeting of the Panel, paras. 21-23. See also Ukraine's second written submission, para. 161. Ukraine notes also that none of the measures which Russia seeks to justify under Article XXI(b)(iii) was notified to Members in accordance with paragraph 1 of the 1982 Decision. (Ibid. para. 162.) The 1982 Decision is discussed in para. 1.28 of the Appendix to this Report.

[211] The term "essential security interests" appears in Article XXI of the GATT 1994, Article XIV*bis* of the GATS, Article 73 of the TRIPS Agreement, Article 10.8.3 of the TBT Agreement and Article III:1 of the Revised Agreement on Government Procurement. The term "national security" appears in Articles 2.2, 2.10, 5.4 and 5.7 of the TBT Agreement, and Article III:1 of the Revised Agreement on Government Procurement.

[212] See generally, Appellate Body Reports, *US − Shrimp*, para. 158; *US − FSC*, para. 166; *US − Cotton Yarn*, para. 81; and *US − Hot-Rolled Steel*, para. 101. The Appellate Body has provided specific examples of the reflection of the principle of good faith, for example, in the chapeau to Article XX of the GATT 1994 (Appellate Body Report, *US - Shrimp*, para. 158); in the exercise of a Member's judgment in good faith under Articles 3.7 and 3.10 of the DSU (Appellate Body Reports, *Peru − Agricultural Products*, paras. 5.15-5.28; and *US − FSC*, para. 166); in the concept of reasonableness in paragraph 2 of Annex II of the Anti-Dumping Agreement (Appellate Body Report, *US − Hot-Rolled Steel*, para. 101); and in the general applicability of Article 26 of the Vienna Convention to all WTO obligations (Appellate Body Report, *US − Cotton Yarn*, para. 81).

[213] See the third recital of the preamble of the WTO Agreement and the second recital of the preamble of the GATT 1994.

7.134. It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.

7.135. What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.

7.136. In the case at hand, the emergency in international relations is very close to the "hard core" of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.[214]

7.137. Given the character of the 2014 emergency, as one that has been recognized by the UN General Assembly as involving armed conflict, and which affects the security of the border with an adjacent country and exhibits the other features identified by Russia, the essential security interests that thereby arise for Russia cannot be considered obscure or indeterminate.[215] Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances. Moreover, there is nothing in Russia's expression of those interests to suggest that Russia invokes Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994.

7.138. The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.

7.139. The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency.

7.140. The Panel recalls that the 2016 measures (i.e. the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods): (a) restrict transit by road and rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic from transiting directly across the Ukraine-Russia border, requiring instead that such traffic detour through Belarus, and meet additional conditions relating to identification seals and registration cards at specific control points; and (b) prohibit altogether such transit for certain classes of goods unless such transit is exceptionally authorized.[216]

[214] See para. 7.114 above.

[215] Russia also attempts to show that it genuinely has national security interests that it considers to be under threat. For example, Russia emphasizes that the 2016 measures were expressly enacted in accordance with a 2006 law authorizing the imposition of economic sanctions for national security reasons, Federal Law No. 281-FZ. This 2006 law, entitled "On the Special Economic Measures" authorizes the President of the Russian Federation, acting on the basis of proposals of the Security Council of the Russian Federation, to impose economic sanctions where circumstances require the "immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state …, when such act poses a threat to the interests and security of the Russian Federation". (Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006, (Federal Law No. 281-FZ), (Exhibit RUS-8).) The Panel considers that this demonstrates that the 2016 measures were adopted by Russia as a response to acts considered by the President of the Russian Federation and the Security Council of the Russian Federation to pose a threat to Russia's interests and security.

[216] See paras. 7.1.a, 7.1.b, 7.16.c, 7.106.a and 7.106.b above.

7.141. Ukraine characterizes the 2016 measures as retaliation by Russia for Ukraine's decision to pursue economic integration with the European Union (through the EU-Ukraine Association Agreement which includes a DCFTA) rather than with Russia through the EaEU. Ukraine does not indicate whether it considers that decision, and consequently the 2016 measures, to be related also to the emergency in international relations that had arisen in early 2014.[217] While the evidence presented by Ukraine establishes that the 2016 measures were direct or immediate responses to the entry into force of the DCFTA between the European Union and Ukraine, this is only a partial explanation of the background to Russia's adoption of the 2016 measures.

7.142. The Panel considers that there is a clear correlation between the change in government in Ukraine in early 2014, the newly sworn-in government's decision to sign the EU-Ukraine Association Agreement in March 2014, the deterioration in Ukraine's relations with Russia (as evidenced by the March 2014 UN General Assembly resolution concerning the territorial integrity of Ukraine), and the sanctions that have been imposed against Russia by several countries.[218] In other words, Ukraine's decision to pursue economic integration with the European Union rather than with the EaEU cannot reasonably be seen as unrelated to the events that followed, and led to the emergency in international relations, during which Russia took a number of actions in respect of Ukraine, including the adoption of the 2016 measures.

7.143. The 2014 measures (i.e. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods) operate to ban transit of goods subject to Russian sanctions from transiting across Russia from its border with Belarus.[219] These bans were imposed specifically to prevent circumvention of the import bans that Russia had imposed under Resolution No. 778.[220] The Resolution No. 778 import bans were responses taken by Russia in August 2014 to the sanctions that other countries had imposed against it earlier in 2014 in response to the emergency in international relations.

7.144. Moreover, all of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia's relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict.

7.145. In these circumstances, the measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency. This conclusion is not undermined by evidence on the record that the general instability of the Ukraine-Russia border did not prevent some bilateral trade from taking place along parts of the border.[221]

7.146. This being so, it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause "which it considers" is to be given legal effect.[222]

7.147. The Panel has been referred to *EC – Bananas III (Ecuador) (Article 22.6 – EC)* in which the arbitrators interpreted the phrase "if that party considers" in Articles 22.3(b) and 22.3(c) of the DSU as providing a margin of appreciation to the party which was nevertheless subject to review by the arbitrators.[223] The arbitrator's decision regarding the scope of review under Article 22.3 of the DSU was based on the fact that the discretion accorded to the complaining party under the relevant subparagraphs of that provision was subject to the obligation in the introductory words to Article 22.3 of the DSU, which provides that "[i]n considering what concessions or other obligations

[217] Ukraine's first written submission, paras. 24 and 26-31.
[218] See paras. 7.7-7.12 above.
[219] For a description of the 2014 measures, see para. 7.106.c. above and paras. 7.326-7.327 below.
[220] For an explanation of the relationship between the sanctions imposed against Russia and the Resolution No. 778 import bans, see paras. 7.9-7.12 and 7.16.b and fns 15, 16 and 32 above.
[221] See, e.g. Ukraine's opening statement at the second meeting of the Panel, para. 36; and response to Panel question No. 4 after the second meeting of the Panel, para. 27.
[222] This is also confirmed by the negotiating history of Article XXI. (See para. 7.92 above.)
[223] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*. See Ukraine's opening statement at the first meeting of the Panel, para. 133; and second written submission, para. 168; European Union's third-party submission, paras. 62-64; and third-party statement, paras. 21-22; and United States' third-party statement, para. 16.

to suspend, the complaining party shall apply the following principles and procedures".[224] There is no equivalent obligation anywhere in the text of Article XXI that expressly conditions the discretion accorded to an invoking Member under the chapeau of Article XXI(b).

7.5.6.1 Conclusion

7.148. The Panel finds that Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.

7.5.7 Overall conclusion

7.149. Accordingly, the Panel finds that Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b)(iii) of the GATT 1994.

7.6 Ukraine's claims of WTO-inconsistency of the measures at issue

7.6.1 Introduction

7.150. In this Section, the Panel addresses Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and commitments in Russia's Working Party Report, as incorporated into its Accession Protocol by reference.

7.151. Russia does not present rebuttal arguments or evidence regarding Ukraine's claims, as it considers that the measures at issue are "consistent with the provisions of the WTO Agreement, including the GATT and the Accession Protocol" on the basis of its invocation of Article XXI(b)(iii) of the GATT 1994.[225]

7.152. The Panel recalls the statement of the Appellate Body in *US − Wool Shirts and Blouses* that nothing in the DSU requires panels to consider or decide issues that are not "absolutely necessary to dispose of the particular dispute" between the parties.[226] Indeed, the Appellate Body cautioned that to do so would "not be consistent with the aim of the WTO dispute settlement system" to secure a "positive solution to a dispute" under Article 3.7 of the DSU.[227]

7.153. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel does not consider it necessary to additionally examine their WTO-consistency in a different factual context and on a different legal basis, i.e. as if the measures at issue had not been taken in time of an "emergency in international relations".

7.154. However, the Panel is mindful that, should its findings on Russia's invocation of Article XXI(b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis. Accordingly, in Section 7.6.2, the Panel proceeds to analyse those aspects of Ukraine's claims which, were it not for the fact that the measures were taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), would enable the Appellate Body to complete the legal analysis.[228]

7.155. Additionally, Russia has invoked Article XXI(b)(iii) of the GATT 1994 in relation to all contested provisions of the WTO Agreement, including commitments in its Accession Protocol. Accordingly, in Section 7.6.4, the Panel addresses whether Article XXI(b)(iii) may be invoked by Russia in relation to commitments in its Accession Protocol.[229]

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[224] See Decision by the Arbitrator, *EC − Bananas III (Ecuador) (Article 22.6 − EC)*, para. 52.
[225] Russia's first written submission, paras. 9 and 76. See ibid. paras. 33, 37, 48 and 74.
[226] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 19, DSR 1996:I, 323, p. 339.
[227] Ibid.
[228] See, e.g. Appellate Body Reports, *US − Shrimp*, para. 124; and *EC − Asbestos*, para. 78.
[229] In this Section, when referring to Ukraine's claims of inconsistency with particular commitments in Russia's Accession Protocol, the Panel will, for ease of reference, refer to such claims according to the paragraph of Russia's Working Party Report which sets forth the commitment. Paragraph 2 of Part I of

7.6.2 Article V:2 of the GATT 1994

7.6.2.1 Article V:2, first sentence

7.6.2.1.1 Main arguments of the parties

7.156. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods do not guarantee freedom of transit through the territory of Russia for traffic in transit coming from Ukraine and/or going to Kazakhstan or the Kyrgyz Republic, and therefore, that the measures are inconsistent with the first sentence of Article V:2.

7.157. Ukraine argues that the measures at issue violate the first sentence of Article V:2 of the GATT 1994 by restricting freedom of transit in an "absolute manner".[230] In Ukraine's view, where a Member completely prohibits traffic in transit from a neighbouring country from transiting through its territory, such a measure will "necessarily" be inconsistent with the first sentence of Article V:2.[231] Ukraine additionally contends that the 2016 Belarus Transit Requirements and 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of all routes across the Ukraine-Russia border, routes that are "direct" and therefore necessarily qualify as "routes most convenient for international transit".[232] Ukraine considers that the following factors may be relevant to the determination of which routes are most convenient for international transit: (a) the mode of transport; (b) the length of the transit route; (c) access to the transit route; (d) any administrative formalities and charges associated with the route; (e) the operator's right to choose a mode of transport; (f) the cost of using a transit route; and (g) the provenance, destination and characteristics of the goods.[233]

7.158. Ukraine also claims that the restriction on entry and exit through certain checkpoints along the Belarus-Russia border and the Russia-Kazakhstan border under the 2016 Belarus Transit Requirements is inconsistent with the first sentence of Article V:2. Ukraine argues that the restriction on entry and exit removes the "freedom to choose the most convenient route".[234] Ukraine also considers that the additional conditions related to identification seals and registration cards that form part of the 2016 Belarus Transit Requirements "impose an additional burden" on traffic in transit and thereby do not guarantee freedom of transit as required by the first sentence of Article V:2.[235]

7.159. Ukraine similarly considers that the authorization requirement under the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit as required by the first sentence of Article V:2.[236] Ukraine considers that transit of the non-zero duty goods and Resolution No. 778 goods "is as good as prohibited" due to the burdensome nature of this requirement.[237] Ukraine also argues that the restriction on entry and exit through certain checkpoints along the Estonia-Russia, Finland-Russia and Latvia-Russia borders under the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods is inconsistent with the first sentence of Article V:2 because it makes "certain most convenient routes unavailable for traffic in transit".[238]

7.160. Finally, the Panel notes Ukraine's interpretive argument, developed at the first meeting of the Panel, that "where a measure is applied to goods transiting via the most convenient routes of

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Russia's Accession Protocol incorporates by reference the paragraphs of Russia's Working Party Report that are listed in paragraph 1450 of that Report, including paragraphs 1161, 1426, 1427 and 1428.

[230] Ukraine's first written submission, para. 236.

[231] Ibid. paras. 237 and 240.

[232] Ibid. paras. 237-238; and Ukraine's opening statement at the first meeting of the Panel, para. 77. Ukraine recalls Canada's statement that what constitutes the most convenient route(s) "can … only be determined having regard to all of the circumstances relevant to the traffic in transit, including, for example, the 'conditions of the traffic'". (Ukraine's opening statement at the first meeting of the Panel, para. 78.)

[233] Ibid.

[234] Ukraine's first written submission, para. 249.

[235] Ibid. para. 252.

[236] Ibid. paras. 253-255.

[237] Ibid. para. 254.

[238] Ibid. para. 246.

passage and is found to violate other parts of Article V of the GATT 1994, including the second sentence of Article V:2, then such a measure is also inconsistent with the obligation of a Member to guarantee the freedom of transit via the most convenient routes" pursuant to the first sentence of Article V:2.[239] Ukraine has nonetheless advanced several independent arguments alleging inconsistency with the first sentence of Article V:2.

7.161. As previously noted[240], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the first sentence of Article V:2.

7.6.2.1.2 Main arguments of third parties

7.162. Brazil disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V of the GATT 1994.[241] For example, Brazil suggests that inconsistency with the obligation in Article V:4 to ensure that "[a]ll charges and regulations … shall be reasonable" will not necessarily entail inconsistency with the first sentence of Article V:2.[242] Brazil also does not believe that the imposition of certain procedural controls or restrictions on traffic in transit will automatically result in inconsistency with Article V:2.[243]

7.163. Canada agrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, as these other paragraphs "more precisely define the scope and limits of the right, and therefore the corresponding obligations embodied in that freedom".[244] Canada submits that Article V:2 does not prevent Members from imposing certain restrictions and burdens on traffic in transit, and does not equate to an unqualified right of free passage.[245] Canada also considers that it is at least "conceivable" that a transit route that involves entry and transit via the territory of a third country could nevertheless amount to a route that is the "most convenient" route.[246]

7.164. The European Union disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, and points to disparities in scope between the first sentence of Article V:2 and other paragraphs of Article V.[247] The European Union also considers that the Panel need not, and should not, decide this question in the abstract for the purpose of resolving this dispute.[248] The European Union considers that the following factors may be relevant to the determination of which routes are "most convenient for international transit": geography; the mode of transport (by road, rail, water, air, or pipelines); the specificity of the different types of goods that are in transit; the total number of transit routes; their varying convenience for international transit from the perspective of a reasonable trader; and criteria such as distance, time, safety, as well as road and infrastructure quality.[249] The European Union also states that the first sentence of Article V:2 not only requires the availability of the most convenient routes but also the absence of restrictions for using these routes.[250] Finally, the European Union considers it to be "hardly conceivable" that an indirect route requiring a detour through Belarus for Ukrainian carriers destined for Kazakhstan and the Kyrgyz Republic could qualify as a route "most convenient for international transit".[251]

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[239] Ukraine's second written submission, para. 32. See also Ukraine's opening statement at the first meeting of the Panel, para. 72; and first written submission, para. 191.

[240] See paras. 7.3 and 7.22-7.23 above.

[241] Brazil's response to Panel question No. 8, p. 5.

[242] Ibid.

[243] Brazil's third-party submission, paras. 13-14.

[244] Canada's third-party submission, paras. 10 and 17; and response to Panel question No. 8, para. 10.

[245] Canada's third-party submission, para. 21.

[246] Canada's third-party statement, para. 12. Canada additionally stated that a determination of which route constitutes the "most convenient" route should have regard to all of the circumstances, such as the means of transit, the products in transit, differentials in the distances using different routes, any resulting differentials in cost and time, and any other "conditions of traffic". (Ibid. para. 11 (referring to Japan's third-party submission, para. 12).)

[247] European Union's response to Panel question No. 8, paras. 25-28.

[248] Ibid. para. 29.

[249] European Union's third-party statement, paras. 31-38.

[250] Ibid. para. 37.

[251] Ibid. para. 38.

7.165. Japan disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V.[252] However, Japan agrees with Ukraine that a measure that blocks all access into the territory of a Member would likely be inconsistent with Article V:2 unless the measure could be justified on some basis other than Article V of the GATT 1994.[253] Japan clarifies, however, that the first sentence of Article V:2 does not require unqualified, unrestricted access, but only guarantees freedom of transit via those routes most convenient for international transit.[254] Japan also proposes that once a complaining Member makes a *prima facie* case that there are other routes that are more convenient than those designated by the respondent Member, the burden of proof should shift to the respondent Member to explain why it considers the designated routes "most convenient" for international transit.[255] Japan submits that whether a given route is "most convenient" must be determined having regard to objective factors such as "the means of transit, available routes, distances or costs".[256]

7.6.2.1.3 Analysis

7.166. The first sentence of Article V:2 of the GATT 1994 provides that:

> There shall be freedom of transit through the territory of each [Member], via the routes most convenient for international transit, for traffic in transit to or from the territory of other [Members].

7.167. Ukraine advances several arguments in support of its claims of inconsistency with the first sentence of Article V:2 of the GATT 1994.[257] The Panel will only address those arguments necessary to enable the Appellate Body to complete the analysis.[258] The Panel first examines Ukraine's argument that "where a WTO Member prohibits traffic in transit from the territory of another country with which it shares a border, such a measure necessarily does not guarantee freedom of transit" as required by the first sentence of Article V:2.[259]

7.168. The Panel notes that the first sentence of Article V:2 creates an obligation for each Member to guarantee freedom of transit "through the territory of each [Member] … for traffic in transit to *or* from the territory of other [Members]".[260] The use of the conjunction "or" logically creates two separate obligations under the first sentence of Article V:2. Namely, each Member is required to

[252] Japan's response to Panel question No. 8, para. 17.
[253] Japan's third-party submission, para. 4.
[254] Ibid. para. 5.
[255] Ibid. para. 9.
[256] Ibid. para. 12.
[257] Ukraine advances the following alternative arguments:
(a) inconsistency with any other paragraph of Article V of the GATT 1994 will necessarily result in inconsistency with Article V:2 (Ukraine's first written submission, paras. 198 and 224);
(b) the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of the "direct" and therefore "most convenient" routes (Ukraine's first written submission, paras. 230, 232 and 236-238);
(c) the cumulative effect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods is to block all transit over the Belarus-Russia border (Ukraine's first written submission, para. 238);
(d) the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods are, in effect, bans on all traffic in transit because the scope of the bans and the government authorization requirement are so burdensome as to render such transit near impossible (Ukraine's first written submission, paras. 253-255);
(e) the requirement to enter via certain checkpoints under each measure makes certain "most convenient routes" unavailable for traffic in transit (Ukraine's first written submission, paras. 246 and 249);
(f) the additional conditions related to identification seals and registration cards attached to the 2016 Belarus Transit Requirements impose an additional "burden" on traffic in transit and thereby do not guarantee freedom of transit (Ukraine's first written submission, paras. 251-252); and
(g) the authorization requirement attached to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit. (Ukraine's first written submission, para. 254.)
[258] The Panel recalls that a panel has the "discretion to address only those *arguments* it deems necessary to resolve a particular claim". (Appellate Body Report, *EC – Poultry*, para. 135. (emphasis original) See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 124-125; and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 134-135.)
[259] Ukraine's first written submission, para. 237.
[260] Emphasis added.

guarantee freedom of transit through its own territory for traffic in transit *to* the territory of any other Member, or *from* the territory of any other Member.

7.169. The immediate context provided by the other provisions of Article V also informs the interpretation of the first sentence of Article V:2. The Panel recalls that Article V:1 defines the term "traffic in transit" as any "goods … [whose] passage across such territory … is only a portion of a complete journey beginning and terminating beyond the frontier of the [Member] across whose territory the traffic passes". This informs the scope of Article V:2 by suggesting that each Member incurs obligations in relation to "traffic in transit" only during the portion of the journey when such traffic passes through that Member's territory.

7.170. Similar to Article V:2, Articles V:3, V:4 and V:5 also employ the terms "traffic in transit" and the terms "to" or "from" in relation to the territory of other Members.[261] However, Article V:6 distinctly creates an obligation to accord to "products which have been in transit" treatment no less favourable than that which would have been accorded had the products been transported "from their place of origin to their destination". The difference in terminology between Article V:6 and the other paragraphs of Article V suggests that the terms "from" and "to" as used in Articles V:2 through V:5 have a distinct meaning from the terms "from [the] place of origin" and "to [the place of] destination" as used in Article V:6. This is also supported by the text of the second sentence of Article V:2, which draws an explicit distinction between places of "origin", "departure", "entry", "exit" and "destination".

7.171. The text and context of Article V:2 thus suggest that the phrases "from the territory" and "to … the territory" in the first sentence of Article V:2 should be construed as referring to the place of *entry* and place of *exit* of the traffic in transit, and not the place of *origin* or *destination*.

7.172. Accordingly, under the first sentence of Article V:2:

a. Each Member is required to guarantee freedom of transit through its territory for any traffic in transit *entering from* any other Member, and

b. Each Member is required to guarantee freedom of transit through its territory for traffic in transit *to exit* to any other Member.

7.173. To establish inconsistency with the first sentence of Article V:2, it will consequently be sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit.

7.174. As a result, where a measure prohibits traffic in transit from another Member from entering at *all point*s along a shared land border, the measure will necessarily be inconsistent with the first sentence of Article V:2.

7.175. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic shall be carried out exclusively from Belarus and comply with a number of additional conditions related to identification

[261] See Article V:3 ("traffic coming from or going to the territory" of other Members), Article V:4 ("traffic in transit to or from the territories" of other Members) and Article V:5 ("traffic in transit to or from the territory" of other Members) of the GATT 1994.

seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[262]

7.176. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778 of the Government of the Russian Federation, unless such transit is requested by Kazakh or Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.[263]

7.177. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints.[264]

7.178. For reasons explained in Section 7.7, the only aspect of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods within the Panel's terms of reference is the application of the bans to transit from Ukraine.[265] The Panel recalls that all transit departing from Ukraine and destined for Kazakhstan and the Kyrgyz Republic has, since 2016, been subject to the 2016 Belarus Transit Requirements. Nevertheless, the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods would still, according to the terms of the instruments implementing the measure, apply to transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.

7.179. Applying the aforementioned definition of "traffic in transit" as outlined in Article V:1[266], the goods covered by the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods qualify as "traffic in transit" for the purposes of Article V:2 of the GATT 1994.

7.180. Addressing next whether the measures prohibit traffic in transit from another Member from entering at *all point*s along a shared land border, the 2016 Belarus Transit Requirements, by

[262] See para. 7.357.a below. For additional information regarding these measures, see paras. 7.265-7.267 below. The primary legal instruments implementing these measures are Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016, (Decree No. 1), (Exhibits UKR-1, RUS-1) as amended by Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016, (Decree No. 319), (Exhibits UKR-2, RUS-2). Section 1(a) of Decree No. 1, as amended by Decree No. 319, applies to road and rail cargo transportation "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation". The Panel construes section 1(a) of Decree No. 1 as applying to both (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic, and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic.

[263] See para. 7.357.b below. For additional information regarding these measures, see paras. 7.266-7.267 and paras. 7.347-7.349 below. As the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods also apply to road and rail transit "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic", the Panel similarly construes this measure as applying to both: (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic; and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic. (See fn 262 above.)

[264] See para. 7.357.c below. For additional information regarding these measures, see paras. 7.269.a, 7.326-7.328 and 7.341-7.354 below, as well as fns 385, 387, 456, 458 and 482 below.

[265] See paras. 7.354-7.355 and 7.357.c below.

[266] See para. 7.169 above.

mandating that traffic in transit may only enter Russia from Belarus, expressly prohibit traffic in transit from entering Russia from Ukraine.

7.181. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly prohibit traffic in transit from entering Russia from Ukraine. Additionally, even where transit is exceptionally authorized under the derogation procedure, such traffic in transit is still required to enter Russia exclusively from Belarus, and is therefore expressly prohibited from entering Russia from Ukraine.

7.182. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, prohibit traffic in transit from entering Russia from the territory of any Member other than those countries from which entry is exclusively permitted, as listed in the measure.[267]

7.6.2.1.4 Conclusions

7.183. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the following measures were inconsistent with the first sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures prohibit traffic in transit from entering Russia from Ukraine;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

7.184. The Panel declines to address Ukraine's additional arguments that the measures are inconsistent with the first sentence of Article V:2.

7.6.2.2 Article V:2, second sentence

7.6.2.2.1 Main arguments of the parties

7.185. Ukraine argues that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of "origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or other means of transport".[268] Ukraine argues that the 2016 Belarus Transit Requirements violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of departure and entry (the Ukraine-Russia border), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[269] Ukraine argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine, and goods that are subject to an import duty other than zero under the Common Customs Code of the EaEU), the place of departure and entry (the Belarus-Russia border, under the derogation procedure), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[270] Ukraine also considers that the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods violate the second sentence of Article V:2 because they make

[267] Under the Veterinary Instruction, (Exhibits UKR-21, RUS-10), entry for such goods is exclusively permitted at nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. For more detail, see paras. 7.269.a and 7.341-7.354 below and fns 456 and 458 below.

[268] Ukraine's first written submission, para. 259.

[269] Ibid. paras. 281-282.

[270] Ukraine's first written submission, paras. 283-284.

impermissible distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine)[271], the place of entry (a limited number of checkpoints on the external border of the EaEU), and the place of destination (imposing different permit requirements depending on whether the goods are destined for Kazakhstan or third countries) of the traffic in transit.[272]

7.186. As previously noted[273], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the second sentence of Article V:2.

7.6.2.2.2 Main arguments of third parties

7.187. Canada agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels, or other means of transport.[274] Canada additionally submits that the closed list in the second sentence of Article V:2 suggests that any measures that discriminate based on *other* criteria should instead be dealt with under Article V:5.[275]

7.188. Japan also agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels or other means of transport.[276] Japan also proposes that the objective structure, design and operation of the measure, and not the subjective judgment of the Member imposing the measure, should be examined to conclude whether any such distinctions have been made.[277]

7.6.2.2.3 Analysis

7.189. The second sentence of Article V:2 provides that:

> No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.

7.190. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic must enter Russia exclusively from Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

7.191. The 2016 Belarus Transit Requirements expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination) and require that such traffic enter Russia only from Belarus (thereby making distinctions based on the place of entry). The additional conditions related to identification seals and registration cards apply only to traffic in transit that is subject to the 2016 Belarus Transit Requirements. These conditions also involve the same prohibited distinctions.

7.192. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, unless

[271] Ukraine's first written submission, paras. 275 and 280.
[272] Ibid. paras. 276-279; and response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[273] See paras. 7.3 and 7.22-7.23 above.
[274] See Canada's third-party submission, para. 24.
[275] Ibid. para. 25.
[276] Japan's third-party submission, paras. 18-19.
[277] Ibid. para. 19.

such transit is requested by Kazakh and Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.

7.193. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination). The 2016 Transit Bans apply to the transit of particular goods, namely, goods that are subject to customs duties on their importation to the EaEU and goods that originate in countries that are listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). Additionally, even if traders exceptionally receive authorization, such traffic in transit is still subject to the 2016 Belarus Transit Requirements and thus required to enter Russia exclusively from Belarus (thereby making distinctions based on the place of entry).

7.194. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods (to the extent that they fall within the Panel's terms of reference) apply to traffic in transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.[278]

7.195. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, require such traffic in transit to enter Russia from certain countries on the external border of the EaEU (thereby making distinctions based on the place of entry).[279] The measure applies to goods originating from countries listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). The additional conditions relating to entry through designated checkpoints and clearance apply only to traffic in transit subject to the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. These conditions also involve the same prohibited distinctions.

7.6.2.2.4 Conclusions

7.196. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the following measures were inconsistent with the second sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures make distinctions based on the place of entry (certain countries from which entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

[278] See paras. 7.177-7.178 above. For more detail, see paras. 7.341-7.353 below.
[279] See fn 267 above.

7.6.3 Remaining claims under the GATT 1994 and Russia's Accession Protocol

7.6.3.1 Introduction

7.197. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel has not considered it necessary to examine the WTO-consistency of the measures as if they had been taken in a different factual context or on a different legal basis.[280] However, in the event of the Panel's findings on Article XXI(b)(iii) being reversed on appeal, the Panel has considered those aspects of Ukraine's claims which would enable the Appellate Body to complete the legal analysis.

7.198. In particular, the Panel has examined whether, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures at issue were inconsistent with the first and second sentences of Article V:2 of the GATT 1994. The Panel has outlined the key features of the measures at issue, and concluded that the measures would have been *prima facie* inconsistent with these provisions, for the reasons outlined in Section 7.6.2.

7.199. The Panel has already concluded that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Ukraine's claims under Articles V:3, V:4 and V:5 challenge the same aspects of the measures.[281] The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[282] in the event that the Appellate Body were to make findings of inconsistency with either the first or second sentence of Article V:2, or both.

7.200. In relation to Ukraine's remaining claims, the Panel recalls the statement of the Appellate Body in *Argentina – Import Measures* that it failed to see how a finding relating to "the publication of [a] WTO-inconsistent measure would contribute to securing a positive solution to this dispute".[283] Accordingly, where a measure is found to be WTO-inconsistent, findings relating to the publication or administration of the same measure are unlikely to be necessary or useful in resolving the matter.[284] Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994 challenge the same measures, or constituent legal instruments implementing aspects of these measures. The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[285] in the event that the Appellate Body were to make findings of inconsistency with the first or second sentence of Article V:2, or both. These considerations are equally applicable to Ukraine's claims under paragraphs 1426, 1427 and 1428 of Russia's Working Party Report, which all relate to the publication or administration of the same contested measures.

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[280] See paras. 7.153-7.154 above.

[281] See summary of Ukraine's arguments below.

[282] Appellate Body Report, *Australia – Salmon,* para. 223 (quoted in Appellate Body Reports, *US – Wheat Gluten,* para. 180; and *US – Lamb,* para. 191). See also Appellate Body Report, *Argentina – Footwear (EC),* para. 98.

[283] Appellate Body Reports, *Argentina – Import Measures*, para. 5.200. The panel in *Argentina – Import Measures* elected to exercise judicial economy in respect of Japan's claims under Article X:1 of the GATT 1994 in circumstances where it had already determined that the challenged measures were inconsistent with Articles III:4 and XI:1 of the GATT 1994, reasoning that it did not consider additional findings of inconsistency in relation to the same measure under Article X:1 "necessary or useful in resolving the matter at issue". (See ibid. para. 5.188.) The Appellate Body upheld the panel's exercise of judicial economy and the panel's reasoning, noting that as Argentina would "have to modify or withdraw the TRRs measures to comply with the recommendations under Articles III:4 and XI:1, the TRRs measure—in its current form and with its current content—will cease to exist". (Ibid. para. 5.200.)

[284] Since *Argentina – Import Measures,* several panels have exercised judicial economy over claims under Article X:3(a) where a measure has already been held to violate other substantive provisions of the GATT 1994. (See, e.g. Panel Reports, *Peru – Agricultural Products,* para. 7.501; and *Russia – Railway Equipment,* para. 7.939.)

[285] See fn 282 above.

7.201. As a result, the Panel does not consider it necessary to address Ukraine's remaining claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report. Accordingly, the Panel has only summarized the relevant arguments of the parties and third parties in the following Section of the Report.[286]

7.6.3.2 Article V:3

7.6.3.2.1 Main arguments of the parties

7.202. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods impose "unnecessary delays or restrictions" on traffic in transit, and therefore, that these measures are inconsistent with Article V:3.

7.203. In Ukraine's view, a measure will be inconsistent with Article V:3 whenever it subjects traffic in transit to any delays or restrictions which that are go beyond what is necessary "to put traffic in transit under a transit procedure in order to ensure that the goods move through the territory (and eventually leave the territory)".[287] Ukraine contends that, in examining whether such delays or restrictions are "unnecessary", the Panel should consider: (a) the trade restrictiveness of the measure, (b) the degree of contribution of the measure to the achievement of its objective, and (c) whether less restrictive alternative measures are reasonably available.[288]

7.204. Ukraine consequently argues that the following aspects of the measures at issue subject traffic in transit to "unnecessary delays or restrictions" in the sense of Article V:3.[289] First, Ukraine argues that the limitation to certain designated checkpoints under the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is unnecessary to ensure that goods are put under an appropriate transit procedure, as this objective could be equally achieved at other existing control points.[290] Second, Ukraine argues that the requirement of government authorization under the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is an "unnecessary" restriction because it has no clear relationship to the objective of ensuring that goods undergo an appropriate transit procedure.[291] Finally, Ukraine argues that the identification seals and registration card conditions attached to the 2016 Belarus Transit Requirements constitute "unnecessary" restrictions and delays because such traffic in transit must already undergo the identification procedures required by the EaEU.[292]

7.205. As previously noted[293], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with Articles V:3, V:4 and V:5 of the GATT 1994.

7.6.3.2.2 Main arguments of third parties

7.206. Brazil proposes that whether delays or restrictions are "necessary" under Article V:3 must be examined on a case-by-case basis, including assessing "the trade restrictiveness of the procedures, its degree of contribution to the public interest at stake and the risk of non-fulfilment".[294] Brazil also considers that restrictions or delays can be "necessary" to achieve legitimate objectives that are not exclusively related to transit regulation, such as in "force majeure" circumstances.[295]

[286] The Panel has, however, addressed the relationship between paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994 in Section 7.6.4.2.2. Nonetheless, the relevant arguments of the parties and third parties in relation to this paragraph are summarized in the following section.

[287] Ukraine's first written submission, para. 303. See also Ukraine's second written submission, para. 46.

[288] Ukraine's first written submission, para. 319.

[289] Ukraine argues that each of the measures place "restrictions" on transit and cause "delays" related to re-routing. (Ibid. paras. 342-344.)

[290] Ibid. paras. 345-349.

[291] Ibid. para. 350.

[292] Ibid. paras. 351-364. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

[293] See paras. 7.3 and 7.22-7.23 above.

[294] Brazil's third-party submission, paras. 14-15.

[295] Brazil's third-party submission, para. 14; and response to Panel question No. 10.

7.207. Canada disagrees with Ukraine's interpretation of the scope of Article V:3.[296] Canada argues that the delays and restrictions covered under Article V:3 are those imposed as part of requiring "that traffic in transit be registered with [Members'] customs authorities", including "the formalities and documentation requirements that are part of entering the traffic at the proper customs house".[297]

7.208. The European Union also disagrees with Ukraine's interpretation of the scope of Article V:3. The European Union argues that the delays and restrictions covered under Article V:3 are those that specifically result from the application of customs laws and regulations.[298]

7.6.3.3 Article V:4

7.6.3.3.1 Main arguments of the parties

7.209. Ukraine's claims of inconsistency with Article V:4 are confined to one aspect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Specifically, Ukraine argues that the authorization requirement under the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods constitutes an "unreasonable regulation" imposed on traffic in the sense of Article V:4.[299]

7.210. In Ukraine's view, whether a regulation is "unreasonable" should involve an analysis of: (a) the rationale or purpose of the measure, and (b) whether the means used to achieve that rationale are "adequate and fair".[300] Ukraine consequently argues that: (a) it is unreasonable to make access for traffic in transit entirely dependent on the discretion of the government of the country of destination, (b) it is unreasonable to implement a measure that does not provide any information about what conditions need to be satisfied in order to secure authorization, and (c) the measure goes beyond what is required to ensure that goods move through and eventually leave the territory of the transit Member.[301]

7.6.3.4 Article V:5

7.6.3.4.1 Main arguments of the parties

7.211. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods accord less favourable treatment to traffic in transit from Ukraine compared to third countries, and therefore, that the measures are inconsistent with Article V:5.

7.212. Ukraine proposes that, to establish inconsistency with Article V:5, it must be shown that: (a) the measure is a "regulation" that is "related to or associated with" traffic in transit; (b) there has been differential treatment accorded to traffic in transit from or to any Member as compared to third countries; (c) there has been "less favourable treatment", or a detrimental impact on the conditions of competition, for traffic in transit from the contesting Member; and (d) there is a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities.[302]

7.213. Applying the foregoing analysis, Ukraine argues that each of the measures is inconsistent with Article V:5. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods accord differential treatment on the basis of whether the traffic in transit has come from Ukraine and is going to Kazakhstan and the Kyrgyz Republic.[303] Ukraine also argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods

[296] Canada's third-party submission, paras. 31-32.
[297] Ibid. paras. 33 and 36. (footnotes omitted)
[298] European Union's response to Panel question No. 10, para. 32.
[299] Ukraine's first written submission, paras. 366 and 393.
[300] Ibid. paras. 384-385.
[301] Ibid. paras. 400-404.
[302] See ibid. paras. 409-431.
[303] Ukraine's first written submission, paras. 444 and 448-449.

accord differential treatment on the basis of whether the traffic in transit has originated from a Resolution No. 778 country, as amended to include Ukraine, or is destined for Kazakhstan.[304] Ukraine argues that this differential treatment alters the conditions of competition for traffic in transit from Ukraine as compared to third countries, and therefore accords "less favourable treatment" by: (a) creating delays and additional costs related to rerouting, (b) imposing additional costs such as those related to identification and registration cards, and (c) impeding access to the export market for which the goods are destined.[305]

7.6.3.5 Article X of the GATT 1994

7.6.3.5.1 Main arguments of the parties

7.214. Ukraine's claims of inconsistency with Article X of the GATT 1994 are confined to certain instruments that implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these measures fall within the scope of Article X:1 because they affect the transportation of goods, and fall within the scope of Article X:2 because they have "regard to" or are "connected with" importation or exportation.[306]

7.215. More specifically, Ukraine claims that the following legal instruments implementing aspects of the measures above were not published promptly as required by Article X:1 of the GATT 1994:

a. Public Joint-Stock Company "Russian Railways" Order No. 529r of 28 March 2016 (PJSC Order)[307] and the Public Joint-Stock Company "Russian Railways" Notice of 17 May 2016 (PJSC Notice)[308], both of which implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these legal instruments were inadequately published for the purposes of Article X:1, as they were only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[309]

b. Decree No. 319[310], which extended the geographical scope of the 2016 Belarus Transit Requirements to traffic in transit from Ukraine destined for the Kyrgyz Republic, and imposed the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was not published promptly for the purposes of

[304] Ukraine's first written submission, paras. 445-447 and 449.

[305] Ibid. paras. 451 and 453-454. The Panel also notes that Ukraine initially proposed that any inconsistency with the second sentence of Article V:2 would necessarily demonstrate "less favourable treatment" for the purposes of Article V:5; however, Ukraine later appears to have withdrawn this argument. (See Ukraine's second written submission, para. 61.)

[306] Ukraine's first written submission, paras. 521, 523-524 and 564.

[307] Order of PJSC "Russian Railways" No. 529, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016, (PJSC Order), (Exhibit UKR-7). The PJSC Order implements the requirements of the 2016 Belarus Transit Requirements (set forth in paragraph 1(b) of Decree No. 1) to affix identification seals on road and railway transport of traffic in transit from Ukraine destined for Kazakhstan (and the Kyrgyz Republic) on entry into Russia and to remove such seals on exit from Russia, as elaborated by Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016, (Resolution No. 276), (Exhibits UKR-8, RUS-6) (as amended by Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016, (Resolution No. 732), (Exhibit UKR-4)). (Ukraine's first written submission, para. 107.) See also Decree No. 1, (Exhibits UKR-1, RUS-1).

[308] This notice sets forth the fee for the placement and removal of the GLONASS identification seals, as required by the instruments listed in fn 307 above. (Ukraine's first written submission, para. 105.)

[309] See ibid. paras. 530-539.

[310] Decree No. 319, (Exhibits UKR-2, RUS-2).

Article X:1, as this instrument was brought into effect on 1 January 2016, while it was published only on 3 July 2016.[311]

7.216. Ukraine claims that the following legal instruments were enforced prior to their official publication, contrary to Article X:2 of the GATT 1994:

a. The PJSC Order[312], because this legal instrument was inadequately published for the purposes of Article X:2, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[313]

b. Decree No. 319[314], because this instrument was enforced on 1 January 2016, while it was officially published only on 3 July 2016.[315]

c. Decree No. 643[316], which amended Decree No. 1[317], so as to extend the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because this instrument was enforced on 30 December 2017, while it was only officially published on 4 January 2018.[318]

7.217. Ukraine claims that the following legal instruments are administered in an unreasonable manner, contrary to Article X:3(a) of the GATT 1994:

a. Decree No. 1, as amended by Decree No. 319 and Decree No. 643, which imposes the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because Russia has administered these instruments at the Belarus-Russia border without providing reasoned explanations to traders.[319]

b. Decree No. 319[320], because the derogation procedure under this instrument contains no criteria governing the exercise of Russia's discretion to permit derogations from the bans, thereby permitting the possibility of arbitrary administration.[321]

7.218. Russia argues that the scope of Article X is limited to "issues of importation, exportation, internal sale and transportation", and does not intersect with "the scope of Article V of the GATT which is limited to issues of transit".[322]

[311] See Ukraine's first written submission. paras. 541-543. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[312] PJSC Order, (Exhibit UKR-7).
[313] Ukraine's first written submission, para. 581.
[314] Decree No. 319, (Exhibits UKR-2, RUS-2).
[315] Ukraine's first written submission, paras. 583-584.
[316] Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 30 December 2017, (Decree No. 643), (Exhibits UKR-98, RUS-13). Decree No. 643 extended the duration of Decree No. 1, and therefore the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods.
[317] Decree No. 1, (Exhibits UKR-1, RUS-1).
[318] Ukraine's opening statement at the first meeting of the Panel, paras. 61-63; and second written submission, para. 64. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[319] Ukraine's first written submission, paras. 643-647.
[320] Decree No. 319, (Exhibits UKR-2, RUS-2).
[321] Ukraine's first written submission, paras. 648-650 and 653-654. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[322] Russia's response to Panel question No. 11 after the first meeting of the Panel, p. 4.

7.6.3.5.2 Main arguments of third parties

7.219. Brazil argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1.[323]

7.220. Canada argues that the term "affecting their … transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", as included in the phrase "classification or the valuation of products for customs purposes", not "imports or exports" as included in the preceding phrase "requirements, restrictions or prohibitions on imports or exports".[324] Canada argues that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is to promote transparency in relation to measures of general application relating to trade.[325]

7.221. The European Union also argues that the term "affecting their … transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", not "imports or exports".[326] The EU agrees that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is to promote transparency in relation to measures of general application relating to trade.[327] The European Union notes in support of this proposition the title of Article X, which reads "Publication and Administration of Trade Regulations".[328] The European Union additionally argues that, in the specific context of Article X, the term "imports" should be interpreted as "covering any goods that physically enter into the territory of the Member concerned", although conceding that in other provisions of the GATT, the term "imports" must be understood as excluding traffic in transit.[329]

7.222. Japan argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1, or alternately, as measures affecting the "distribution" or "transportation" of imports or exports.[330]

7.6.3.6 Russia's Accession Protocol

7.6.3.6.1 Paragraph 1161 of Russia's Working Party Report

7.6.3.6.1.1 Main arguments of the parties

7.223. Ukraine argues that the first sentence of paragraph 1161 of Russia's Working Party Report "confirms the application of Article V of the GATT 1994" to any Russian measures governing the transit of goods.[331] Consequently, Ukraine argues that it will be sufficient to establish that Russia has acted inconsistently with Article V to demonstrate inconsistency with paragraph 1161.[332]

7.224. Russia does not present any arguments in response to Ukraine's claims of inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.

7.6.3.6.2 Paragraph 1426 of Russia's Working Party Report

7.6.3.6.2.1 Main arguments of the parties

7.225. Ukraine argues that paragraph 1426 of Russia's Working Party Report applies to a broader category of legal instruments than Article X:1 of the GATT 1994 in that it applies to any measures "pertaining to or affecting trade in goods, services, or intellectual property rights".[333] Nonetheless,

[323] Brazil's response to Panel question No. 14, p. 7.
[324] Canada's response to Panel question No. 14, paras. 22-23.
[325] Ibid. para. 24.
[326] European Union's response to Panel question No. 14, para. 42.
[327] Ibid. paras. 37 and 40.
[328] Ibid. para. 39.
[329] Ibid. para. 43.
[330] Japan's response to Panel question No. 14, para. 33.
[331] Ukraine's first written submission, para. 164.
[332] Ibid.
[333] Ibid. paras. 490-491 and 517.

Ukraine submits that measures that fall within the scope of Articles V and X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1426.[334] Ukraine further argues that paragraph 1426 of Russia's Working Party Report and Article X:1 of the GATT 1994 "contain the same substantive obligation of prompt publication", and consequently that inconsistency with Article X:1 of the GATT 1994 will automatically imply inconsistency with paragraph 1426 of Russia's Working Party Report.[335]

7.6.3.6.3 Paragraph 1427 of Russia's Working Party Report

7.6.3.6.3.1 Main arguments of the parties

7.226. Ukraine argues that Russia has violated the commitments in paragraph 1427 of Russia's Working Party Report because it has failed to publish, prior to their adoption, 20 legal instruments that implement aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods.

7.227. More specifically, Ukraine claims that the following legal instruments were not published before adoption as required by paragraph 1427 of Russia's Working Party Report:

a. The PJSC Order[336], which implements aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was inadequately published for the purposes of paragraph 1427, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[337]

[334] Ukraine's first written submission, para. 518; and response to Panel question No. 11 after the first meeting of the Panel, para. 127.
[335] Ukraine's first written submission, paras. 499 and 516-518.
[336] PJSC Order, (Exhibit UKR-7).
[337] Ukraine's first written submission, paras. 603 and 605.

b. Several resolutions implementing the measures at issue[338], as well as Decree No. 643.[339] These instruments implement various aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. Ukraine argues that each of these legal instruments was published either after or on the date of their adoption, which Ukraine defines as the date on which the finalized measures were approved within the territory of the Russian Federation.[340]

7.6.3.6.4 Paragraph 1428 of Russia's Working Party Report

7.6.3.6.4.1 Main arguments of the parties

7.228. Ukraine argues that, as with paragraph 1426 of Russia's Working Party Report, measures that fall within the scope of Article V and Article X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1428.[341] Ukraine further claims that paragraph 1428 "expands the scope of application and the substantive publication requirement of Article X:2 of the

[338] These resolutions are:
(a) Resolution No. 778, (Exhibits UKR-10, RUS-7);
(b) Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014, (Resolution No. 830), (Exhibit UKR-11);
(c) Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015, (Resolution No. 625), (Exhibit UKR-12);
(d) Resolution No. 842, (Exhibit UKR-13);
(e) Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015, (Resolution No. 981), (Exhibit UKR-14);
(f) Resolution No. 1397, (Exhibit UKR-15);
(g) Resolution of the Government of the Russian Federation No. 1 "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016" , dated 1 January 2016, (Resolution No. 1), (Exhibits UKR-3, RUS-4);
(h) Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (Seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016, (Resolution No. 147), (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4);
(i) Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016, (Resolution No. 157), (Exhibit UKR-16);
(j) Resolution No. 276, (Exhibits UKR-8, RUS-6);
(k) Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016, (Resolution No. 388), (Exhibit UKR-5);
(l) Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016, (Resolution No. 472), (Exhibit UKR-17);
(m) Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016, (Resolution No. 608), (Exhibit UKR-18);
(n) Resolution No. 732, (Exhibit UKR-4);
(o) Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016, (Resolution No. 897), (Exhibit UKR-19);
(p) Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016, (Resolution No. 1086), (Exhibit UKR-20);
(q) Resolution No. 790, (Exhibit UKR-70); and
(r) Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017, (Resolution No. 1292), (Exhibit UKR-94).

[339] Decree No. 643, (Exhibits UKR-98, RUS-13). (Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.)

[340] Ukraine's first written submission, paras. 595 and 604-606; and opening statement at the first meeting of the Panel, para. 63.

[341] Ukraine's first written submission, para. 548.

GATT 1994" because paragraph 1428 prohibits measures from becoming "effective" prior to publication while Article X:2 prohibits measures from being "enforced" prior to "official" publication.[342] As Ukraine considers that a measure can only be "enforced" once it has been made "effective", Ukraine consequently contends that "a violation of Article X:2 automatically implies a violation of paragraph 1428."[343] Ukraine proceeds to argue that the contested instruments are inconsistent with paragraph 1428 of Russia's Working Party Report for the same reasons that they are inconsistent with Article X:2 of the GATT 1994.[344]

7.6.4 Applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in Russia's Accession Protocol

7.6.4.1 Introduction

7.229. Ukraine makes several claims of inconsistency with Russia's Accession Protocol based on commitments contained in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.[345] The Panel has already concluded that the measures at issue are covered by Article XXI(b)(iii), and consequently that it is not necessary to address each of Ukraine's claims of inconsistency with Articles V and X of the GATT 1994. The applicability of Article XXI(b)(iii) to those provisions of the GATT 1994 is explicitly contemplated by the introduction to Article XXI, which provides that "[n]othing in this Agreement shall be construed".

7.230. Conversely, neither panels nor the Appellate Body have previously considered the applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in the Accession Protocol of any acceding Member.[346] Several disputes have, however, previously considered the applicability of Article XX of the GATT 1994 to individual commitments in China's Accession Protocol. The Panel considers these disputes to be relevant insofar as they inform its analysis of the relationship between a Member's Accession Protocol and provisions of the GATT 1994.

7.231. The Appellate Body has held that the relationship between provisions in China's Accession Protocol and provisions in the WTO Agreement must be determined on a case-by-case basis.[347] In some disputes, this analysis has led to a determination that Article XX of the GATT 1994 could be invoked to justify a breach of an independent obligation under China's Accession Protocol[348], while in others, the same analysis led to a determination that Article XX could not be invoked in relation to the contested provision.[349] In *China – Rare Earths,*

[342] Ukraine's first written submission, paras. 569-570.

[343] Ibid. para. 571.

[344] Ibid. para. 585.

[345] As noted in footnote 229, these paragraphs are incorporated into Russia's Accession Protocol by reference. (See Russia's Accession Protocol, para. 2 of Part I; and Working Party Report, para. 1450.)

[346] The Panel recalls that in prior disputes involving the interpretation of China's Accession Protocol, panels and the Appellate Body proceeded on the assumption that paragraph 1.2 of that Protocol served to make certain obligations enforceable under the DSU where this issue was not contested by the parties. (Appellate Body Reports, *China – Rare Earths,* fn 422. See also Appellate Body Reports, *China – Auto Parts,* paras. 213-214; and Panel Reports, *China – Rare Earths,* para. 7.85.) The Panel observes that paragraph 2 of Part I of Russia's Accession Protocol is identical in all relevant respects to paragraph 1.2 of China's Accession Protocol. Both paragraphs provide that the WTO Agreement to which each Member accedes "shall be the WTO Agreement" as "rectified, amended or otherwise modified by such legal instruments as may have entered into force" before the relevant date of accession, and also provide that the Protocol "shall be an integral part of the WTO Agreement". Moreover, neither Ukraine nor Russia has contested the enforceability of the provisions of Russia's Accession Protocol and Working Party Report under the DSU. Consequently, the Panel proceeds on the premise that the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report are enforceable under the DSU.

[347] Appellate Body Reports, *China – Rare Earths,* paras. 5.50 and 5.57.

[348] For instance, in *China – Publications and Audiovisual Products,* the Appellate Body addressed whether Article XX(a) of the GATT 1994 applied to a provision on trading rights in paragraph 5.1 of China's Accession Protocol. (Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 214-215.) The Appellate Body concluded that China could rely upon the introductory clause of paragraph 5.1 of its Accession Protocol to justify any violation as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. (Ibid. para. 233.) For the analysis of the Appellate Body on this issue, see ibid. paras. 216-233.

[349] For instance, in *China – Raw Materials,* the Appellate Body examined whether Articles XX(b) and XX(g) of the GATT 1994 applied to paragraph 11.3 of China's Accession Protocol, which obliged China to eliminate export taxes and charges. (Appellate Body Reports, *China – Raw Materials*, para. 278.) The

the Appellate Body held that the specific relationship between individual provisions in China's Accession Protocol and provisions of the GATT 1994 must be ascertained "through scrutiny of the provisions concerned, read in the light of their context and object and purpose, *with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations*, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".[350] The Appellate Body also noted that such an assessment must be predicated on a "thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute".[351]

7.232. The Panel considers that the approach outlined by the Appellate Body in *China – Rare Earths* is equally applicable to the relationship between Russia's Accession Protocol and Article XXI(b)(iii) of the GATT 1994. In the Panel's view, the architecture of the WTO system confers a single package of rights and obligations upon Russia, of which the GATT 1994 and its Accession Protocol are constituent parts. In particular, where obligations under Russia's Accession Protocol are closely linked to obligations under the GATT 1994, the Panel considers that this constitutes a strong argument for the applicability of Article XXI(b)(iii) to such commitments.

7.233. The Panel proceeds to apply the analytical framework outlined by the Appellate Body to determine the applicability of Article XXI(b)(iii) to the commitments in individual provisions of Russia's Working Party Report.[352] In doing so, the Panel considers: (a) the text of each provision, as well as any express textual references, or lack thereof, to the GATT 1994 or other covered agreements; (b) the context provided by other relevant provisions in Russia's Accession Protocol and Working Party Report; (c) the content of each provision and its relationship to obligations under the GATT 1994; (d) the overall architecture of the WTO system as a single package of rights and obligations; and (e) the specific circumstances of this dispute.[353]

7.6.4.2 Paragraph 1161 of Russia's Working Party Report

7.6.4.2.1 Paragraph 1161 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.234. Paragraph 1161 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that the Russian Federation would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit by road, rail and air, as well as other charges and customs fees imposed in connection with transit, including those mentioned in paragraphs 1155 and 1156 in conformity with the provision of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement.

7.235. Paragraph 1161 requires Russia to apply certain measures in "conformity with the provisions of Article V of the GATT 1994 *and other relevant provisions of the WTO Agreement*".[354] The explicit textual reference to "other relevant provisions of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. Additionally, the ordinary meaning of the term "relevant" is whether such provisions have a "bearing on" or are "connected with" the matter, or are "legally pertinent or sufficient".[355] Applying this definition, the Panel considers that other provisions of the covered agreements will be "relevant" to paragraph 1161 provided that they have a demonstrable legal bearing upon Article V of the GATT 1994. Article XXI(b)(iii) clearly falls

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Appellate Body concluded that China could not rely on Articles XX(b) and XX(g) in relation to paragraph 11.3. (Appellate Body Reports, *China – Raw Materials*, para. 307.) For the analysis of the Appellate Body on this issue, see ibid. paras. 279-306.

[350] Appellate Body Reports, *China – Rare Earths,* para. 5.55. (emphasis added)

[351] Ibid. para. 5.57.

[352] Ibid. paras. 5.50 and 5.57.

[353] Ibid. para. 5.74.

[354] Emphasis added.

[355] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.), (Oxford University Press, 2003), Vol. 2, p. 2522.

within this definition, as it is directly applicable to Article V of the GATT 1994 through the phrase "[n]othing in this Agreement shall be construed".

7.236. The immediate context provided by the other provisions of Russia's Working Party Report also informs the interpretation of paragraph 1161, particularly those discussions under the shared subheading "Regulation of Trade in Transit". The Panel observes that, for instance, in paragraph 1160 of Russia's Working Party Report, the representative for Russia confirmed that in relation to certain bans on transit, "in general, such provisions were applied for reasons of safety, health or *national security*."[356] There is no record of any Members contesting or objecting to this assertion.

7.237. Finally, the content of paragraph 1161 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis.[357] The Panel observes that the commitments in paragraph 1161 and obligations under the GATT 1994 are closely linked in that paragraph 1161 requires Russia to apply measures governing transit of goods "in conformity" with Article V of the GATT 1994. If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

7.238. For these reasons, the Panel considers that Russia can rely on the phrase "other relevant provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1161 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.2.2 Paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994

7.239. The Panel recalls its conclusion that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Based on the foregoing analysis, the Panel considers that paragraph 1161 of Russia's Working Party Report merely reiterates Russia's commitments under Article V of the GATT 1994. Moreover, the Panel recalls that Ukraine's claims under paragraph 1161 of Russia's Working Party Report are substantively identical to Ukraine's claims under Article V.[358]

7.240. The Panel therefore considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), the measures would have also been *prima facie* inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.6.4.3 Paragraph 1426 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.241. Paragraph 1426 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that from the date of accession, all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of

[356] Emphasis added.

[357] The Panel recalls that in *China – Publications and Audiovisual Products*, the Appellate Body observed the close interlinkage between the obligations assumed under paragraph 5.1 of China's Accession Protocol and the GATT 1994, given that paragraph 5.1 was "clearly concerned with trade in *goods*". (Appellate Body Report, *China – Publications and Audiovisual Products,* para. 226. (emphasis original)) The Appellate Body additionally noted that paragraph 5.1 should not "be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures". (Ibid. para. 229.) This was material to the Appellate Body's conclusion that China could rely on Article XX(a) as a defence to its obligations under paragraph 5.1 of its Accession Protocol. (Ibid. para. 233.)

[358] Ukraine's only argument of inconsistency with paragraph 1161 of Russia's Working Party Report is that a demonstration of inconsistency with Article V of the GATT 1994 will also demonstrate inconsistency with paragraph 1161. (See Ukraine's first written submission, para. 164.)

> general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would be published promptly in a manner that fulfils applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994, WTO GATS Agreement, and the WTO TRIPS Agreement.

7.242. Paragraph 1426 requires Russia to publish certain measures promptly in a manner that "*fulfils applicable requirements of the WTO Agreement*, including those of Article X of the GATT 1994".[359] The explicit textual reference to "applicable requirements of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. The text of paragraph 1426 also explicitly refers to Article X of the GATT 1994 as an example of a provision containing such "applicable requirements". The ordinary meaning of the term "applicable" is whether such requirements are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[360] The ordinary meaning of the term "requirement" is "[s]omething called for or demanded", or "a condition which must be complied with".[361] In the Panel's view, just as Article X of the GATT 1994 is specified to contain "applicable requirements" to paragraph 1426, Article XXI(b)(iii) clearly contains "applicable requirements" to Article X of the GATT 1994. This follows from the fact that Article X is subject to Article XXI(b)(iii) through the phrase "[n]othing in this Agreement shall be construed".

7.243. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1426. In particular, the Panel contrasts the language used in paragraph 1426 with that used in paragraph 1427. Paragraphs 1426 and 1427 both create obligations relating to the publication of certain measures "pertaining to or affecting trade in goods, services, or intellectual property rights". However, unlike paragraphs 1161, 1426 and 1428, paragraph 1427 specifically omits any textual reference to "relevant provisions" or "applicable requirements" of the "WTO Agreement", and instead includes its own specific reference to "cases of emergency" and "measures involving national security". In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 further underpins the significance of the phrase "applicable requirements of the WTO Agreement" in paragraph 1426.

7.244. Finally, the content of paragraph 1426 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. The Panel observes that the commitments in paragraph 1426 and obligations under the GATT 1994 are closely linked in that paragraph 1426 contains the same requirement to ensure that measures relating to trade in goods are "published promptly" as that contained in Article X:1 of the GATT 1994.[362] If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

7.245. For these reasons, the Panel considers that Russia can rely on the phrase "in a manner that fulfils applicable requirements of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1426 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

[359] Emphasis added.

[360] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 1, p. 102. (emphasis original)

[361] Ibid. Vol. 2, p. 2542.

[362] Paragraph 1426 creates a commitment to publish promptly "all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:1 of the GATT 1994 creates an obligation to publish promptly "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use". While the scope of the provisions differs, both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.6.4.4 Paragraph 1427 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.246. Paragraph 1427 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation further confirmed that, except in cases of emergency, measures involving national security, specific measures setting monetary policy, measures the publication of which would impede law enforcement, or otherwise be contrary to the public interest, or prejudice the legitimate commercial interest of particular enterprises, public or private, the Russian Federation would publish all laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, prior to their adoption and would provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to the responsible authorities before the relevant measure was finalized or submitted to the competent CU bodies.

7.247. Paragraph 1427 omits any reference to "relevant provisions" or "applicable requirements" of "the WTO Agreement" or the GATT 1994, but instead refers specifically to exceptions to the obligations undertaken in that paragraph for "cases of emergency" and "measures involving national security".

7.248. The context provided by the other provisions of the Multilateral Trade Agreements informs the Panel's interpretation of paragraph 1427.[363] In particular, paragraph 1427 creates obligations relating to measures "pertaining to or affecting trade in goods, services, or intellectual property rights". Consequently, the Panel considers the use of the term "emergency" across those covered agreements relating to trade in goods, services and intellectual property rights to be material to its understanding of the phrase "cases of emergency" in paragraph 1427. In this respect, Panel notes that the only context in which the word "emergency" is consistently used across the GATT 1994, the GATS and the TRIPS Agreement is in creating a general exception for actions taken by a Member which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations".[364] This suggests that an "emergency in international relations" is the type of "emergency" contemplated in paragraph 1427 of Russia's Working Party Report.

7.249. The content of paragraph 1427 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1427 distinctly creates several commitments which have no direct counterpart in the GATT 1994.[365] The scope of the measures covered by paragraph 1427 also differs from Articles X:1 and X:2 of the GATT 1994.[366]

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[363] The Panel recalls that, in *China − Rare Earths,* the Appellate Body concluded that paragraph 1.2 of China's Accession Protocol served to make that Protocol and the Multilateral Trade Agreements part of "a single package of rights and obligations with respect to China as a WTO Member". (Appellate Body Reports, *China − Rare Earths,* para. 5.72.) The Appellate Body consequently noted that any analysis of the individual provisions in China's Accession Protocol should take into account "the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements". (Ibid. para. 5.74.)

[364] See Article XXI(b)(iii) of the GATT 1994 ("taken in time of war or other emergency in international relations"); Article 31(b) of the TRIPS Agreement ("in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use"), and Article 73(b)(iii) of the TRIPS Agreement ("taken in time of war or other emergency in international relations"); and Article III:1 of the GATS ("except in emergency situations"), Article X:1 of the GATS ("on the question of emergency safeguard measures"), and Article XIVbis:1(b)(iii) of the GATS ("taken in time of war or other emergency in international relations").

[365] The text of paragraph 1427 creates at least three separate obligations to: (a) publish the covered measures prior to their adoption; (b) provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to responsible authorities before such measures are finalized or submitted to the competent CU bodies; and (c) take any such comments into account. However, in the specific circumstances of this dispute, Ukraine has only argued that Russia has acted inconsistently with its obligation to publish certain legal instruments prior to their adoption. (See Section 7.6.3.6.3 above.)

[366] Paragraph 1427 concerns any "laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:2 of the GATT 1994 only concerns any measures of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1 of the GATT 1994, see fn 362 above.)

However, the commitments in paragraph 1427 and obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.250. For these reasons, the Panel considers that Russia can rely on the phrase "except in cases of emergency" in order to justify any inconsistency with paragraph 1427 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.5 Paragraph 1428 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.251. Paragraph 1428 of Russia's Working Party Report provides that:

> The representative of the Russian Federation confirmed that, from the date of accession, no law, regulation, decree, decision or administrative ruling of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the [Customs Union (CU)], would become effective prior to publication, as provided for in the applicable provisions of the WTO Agreement, including the GATT 1994, the WTO GATS Agreement, and the WTO TRIPS Agreement. The Working Party took note of this commitment.

7.252. Paragraph 1428 requires Russia to ensure that certain measures do not become effective before publication "*as provided for in the applicable provisions of the WTO Agreement*, including the GATT 1994".[367] As mentioned above, the ordinary meaning of the term "applicable" is whether such provisions are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[368] The ordinary meaning of the term "provided" is "on the condition, supposition, or understanding that" or "it being stipulated, or arranged that".[369] Consequently, the Panel considers that the ordinary meaning of the text of paragraph 1428 could support two possible interpretations. First, the phrase "as provided for" could be construed as merely stating that obligations equivalent to paragraph 1428 are *also* stipulated in "applicable provisions of the WTO Agreement". Conversely, the phrase "as provided for" could be construed as specifying that other provisions of the WTO Agreement are "applicable" to the obligations in paragraph 1428.

7.253. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1428. In particular, the Panel has already examined the textual differences between paragraphs 1426 and 1427.[370] The Panel considers that this analysis is equally applicable to the differences between paragraphs 1427 and 1428. In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 underpins the significance of the phrase "the applicable provisions of the WTO Agreement" in paragraph 1428.

7.254. Finally, the content of paragraph 1428 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1428 distinctly commits Russia to ensure that the covered measures are not made effective before publication, which has no explicit counterpart in the GATT 1994. The scope of the measures covered by paragraph 1428 also differs from Articles X:1 and X:2 of the GATT 1994.[371] However, the commitments in paragraph 1428 of Russia's Working Party Report and the obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

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[367] Emphasis added.

[368] See para. 7.242 and fn 360 above.

[369] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 2, p. 2382.

[370] See para. 7.243 above.

[371] Paragraph 1428 concerns any "laws, regulations, decrees, decisions or administrative rulings of general application pertaining to or affecting trade in goods, services or intellectual property rights", whereas Article X:2 of the GATT 1994 concerns any measures of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1, see fn 362 above.)

7.255. For these reasons, the Panel considers that Russia can rely on the phrase "as provided for in the applicable provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.6 Conclusion

7.256. The Panel considers that Russia could justify any inconsistency with the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.257. The Panel also considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.258. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

7.7 Panel's terms of reference and the existence of the measures

7.259. In this Section of the Report, the Panel addresses a number of issues related to its terms of reference and to the existence of the measures at issue.

7.7.1 Identification of the measures and claims, and their relationship to each other

7.260. In its opening statement at the first meeting of the Panel, Russia argued that Ukraine's panel request fails to meet the requirements of Article 6.2 of the DSU in a number of respects:

a. Ukraine's panel request fails to make clear how the measures in each of the two distinct groups set forth in the panel request operate together.[372]

b. The panel request does not adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two distinct groups.[373]

c. Ukraine's first written submission presents the challenged measures in a completely different manner from the presentation in its panel request, i.e. "as four individual measures that are not connected and do not operate together". Russia considers that, as respondent, it was placed in an uncertain situation in presenting its defence because it was required to guess what the Panel would identify as the measures at issue on the basis of the Panel's interpretation of the substance of the alleged violation.[374]

7.261. Russia thus argued that Ukraine's panel request, both in general, and in particular with respect to the identification of the specific measures, fails to satisfy the requirements of Article 6.2 of the DSU.[375]

7.262. Ukraine responded that its presentation of the specific measures at issue in two separate sections of its panel request does not necessarily mean that the measures identified within each

[372] Russia's opening statement at the first meeting of the Panel, paras. 15-16. More specifically, Russia argues that Ukraine's panel request fails to establish the "nexus" between the measures within each distinct group. (Ibid. para. 21. See also Russia's opening statement at the second meeting of the Panel, paras. 7-8.)

[373] Russia's opening statement at the first meeting of the Panel, paras. 15-16. See also Russia's opening statement at the second meeting of the Panel, para. 8.

[374] Russia's opening statement at the first meeting of the Panel, paras. 19-20 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 136). See also Russia's opening statement at the second meeting of the Panel, para. 9.

[375] See Russia's opening statement at the first meeting of the Panel, para. 23.

section must be presumed to operate together.[376] Nor is there any requirement in Article 6.2 of the DSU for a complainant to identify how all of the measures at issue operate together unless it is necessary in order to present the problem clearly.[377] In addition, Ukraine argued that Russia's complaint regarding the reorganization of the presentation of the measures in Ukraine's first written submission does not address why the descriptions of the measures in the panel request were not sufficiently clear. Ukraine argued that the measures as described in its first written submission correspond fully to the measures as identified in its panel request.[378] Finally, Ukraine argued that the panel request plainly connects the specific measures at issue with the relevant provisions of the covered agreements that Ukraine claims have been infringed.[379]

7.263. In what follows, the Panel first describes the presentation of the measures and claims in Ukraine's panel request, and in Ukraine's first written submission, respectively, before addressing Russia's arguments that the panel request does not satisfy the requirements of Article 6.2 of the DSU.

7.7.1.1 Presentation of the measures and claims in Ukraine's panel request

7.264. Ukraine's panel request refers separately to a "first group of measures" and the "legal basis for the complaint" in respect of those measures (section II of the panel request), and a "second group of measures" and the "legal basis for the complaint" in respect of those measures (section III of the panel request).

7.265. Section II.A. of Ukraine's panel request, which is entitled "First Group of Measures", states that Russia has imposed measures concerning traffic in transit from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia. These measures mandate that all international cargo transit by road and rail transport from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints. It is also noted in this section that the above-referenced measures apply as well to traffic in transit from Ukraine destined for the Kyrgyz Republic, as of 1 July 2016.[380]

7.266. Section II.A. of Ukraine's panel request further identifies as a measure a ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling under the 2014 import bans set forth in the list annexed to Resolution No. 778.[381]

7.267. Section II.A. of Ukraine's panel request then sets forth the legal instruments through which it understands the above-referenced measures to be imposed. These instruments include Russian Presidential Decrees (Decree No. 1 and Decree No. 319, which amends Decree No. 1), as

[376] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42; and opening statement at the second meeting of the Panel, para. 18.
[377] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42.
[378] Ibid. para. 63.
[379] Ibid. paras. 65-68.
[380] Request for the establishment of a panel by Ukraine, WT/DS512/3 (Ukraine's panel request), section II.A., p. 2.
[381] Resolution No. 778 imposes bans on the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution and originating from the United States, EU Member States, Canada, Australia, and Norway. (See Resolution No. 778, (Exhibits UKR-10, RUS-7).) On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution No. 842, (Exhibit UKR-13).) Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would be applied to Ukraine as of 1 January 2016. (See Resolution No. 1397, (Exhibit UKR-15). See also Russia's opening statement at the first meeting of the Panel, para. 6.) On 1 January 2016, the date of the amendment of Resolution No. 778, the European Union and Ukraine had agreed to apply provisions of the DCFTA that are part of the EU-Ukraine Association Agreement. (Ukraine's first written submission, para. 25.) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import ban until 31 December 2018. (See Resolution No. 790, (Exhibit UKR-70).)

well as a resolution of the Russian Government implementing Decree No. 1 (Resolution No. 1, also dated 1 January 2016).[382, 383]

7.268. With respect to the "legal basis of the complaint", section II.B. of Ukraine's panel request states that the measures identified in section II.A. are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[384] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.269. Section III.A. of Ukraine's panel request identifies a second group of measures, which it describes as "other measures concerning traffic in transit from the territory of Ukraine through the territory of the Russian Federation". These other measures are further described in three sub-categories.

a. The first sub-category encompasses measures requiring that, from 30 November 2014, transit of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, dated 7 August 2014, and subsequent amendments, be generally prohibited through checkpoints of the Republic of Belarus.[385] Additionally, transit of such goods destined for Kazakhstan may only take place upon permits issued by the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of the Republic of Kazakhstan (indicating the Russian checkpoints on the external border of the EaEU), while transit of the same goods destined for third countries can take place only upon permits issued by the *Rosselkhoznadzor*.[386] Ukraine's panel request then provides a list of the various legal instruments by which it understands Russia to impose the measures in this first sub-category.[387]

b. The second sub-category is described as "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[388]

c. The third sub-category refers to "any other related measures adopted and/or applied by the Russian Federation concerning traffic in transit from the territory of Ukraine to

[382] Decree No. 1, (Exhibits UKR-1, RUS-1); Decree No. 319, (Exhibits UKR-2, RUS-2); Resolution No. 1, (Exhibits UKR-3, RUS-4) (as amended by Resolution No. 388, (Exhibit UKR-5); and Resolution No. 732, (Exhibit UKR-4)).

[383] Section II.A. of Ukraine's panel request also identifies the following legal instruments through which the measures identified in section II.A. are imposed: Decree No. 560, (Exhibits UKR-9, RUS-3), (as subsequently extended by Decree No. 320 of 24 June 2015 and Decree No. 305 of 29 June 2016); Resolution No. 147, (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4)); PJSC Order, (Exhibit UKR-7); and Resolution No. 276, (Exhibits UKR-8, RUS-6) (as amended by Resolution No. 732, (Exhibit UKR-4)). Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018. Section II.A also identifies Resolution No. 778, (Exhibits UKR-10, RUS-7) and its amendments. (See fn 385 below for a full list of amendments to Resolution No. 778.)

[384] Ukraine's panel request, section II.B., pp. 3-4.

[385] Resolution No. 778 is amended by the following resolutions of the Government of the Russian Federation: (a) Resolution No. 830, (Exhibit UKR-11); (b) Resolution No. 625, (Exhibit UKR-12); (c) Resolution No. 842, (Exhibit UKR-13); (d) Resolution No. 981, (Exhibit UKR-14); (e) Resolution No. 1397, (Exhibit UKR-15); (f) Resolution No. 157, (Exhibit UKR-16); (g) Resolution No. 472, (Exhibit UKR-17); (h) Resolution No. 608, (Exhibit UKR-18); (i) Resolution No. 897, (Exhibit UKR-19); (j) Resolution No. 1086, (Exhibit UKR-20); and (k) Resolution No. 790, (Exhibit UKR-70).

[386] Ukraine's panel request, section III.A., p. 4.

[387] Ibid. p. 5. Ukraine's panel request identifies the following legal instruments through which Russia imposes these measures: Veterinary Instruction, (Exhibits UKR-21, RUS-10); Instruction No. FS-AS-3/22903 of the *Rosselkhoznadzor* dated 21 November 2014, (Plant Instruction), (Exhibits UKR-22, RUS-11); and any additional measures that prolong, replace, amend, implement, extend or apply these measures, as well as other related measures. (Ukraine's panel request, section III.A., p. 5.)

[388] Ibid.

countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation, including measures that implement, complement, add to, apply, amend or replace any of the measures mentioned in section II.A. or section III.A".[389] The introductory words to this sub-category of the panel request indicate that this sub-category is necessitated by Russia's alleged "fundamental lack of transparency concerning some of the measures at issue" and "failure to observe the transparency and publication obligations" under the GATT 1994 and its Accession Protocol.[390]

7.270. With respect to the "legal basis of the complaint" for the second group of measures so identified, section III.B of Ukraine's panel request states that these measures are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with various paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[391] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.7.1.2 Presentation of the measures and claims in Ukraine's first written submission

7.271. In section IV of its first written submission, Ukraine presents four "categories" of measures, as opposed to the arrangement under two "groups of measures" in its panel request.[392] The four categories of measures in section IV of Ukraine's first written submission (and the terminology chosen by the Panel to describe these categories of measures) are:

a. "2016 general transit ban and other transit restrictions" (the 2016 Belarus Transit Requirements);

b. "2016 product-specific transit ban and other transit restrictions" (the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods);

c. "De facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" (the *de facto* measure); and

d. "2014 transit bans and other transit restrictions" (the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods).[393]

7.272. Ukraine considers that the first category of measures, which the Panel refers to as the 2016 Belarus Transit Requirements, corresponds fully to the measures identified in section II.A. of Ukraine's panel request as the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan and the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.[394]

7.273. The second category of measures, which the Panel refers to as the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, Ukraine considers to correspond fully to the measures identified in section II.A. of Ukraine's panel request as the ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, including the exceptional derogation procedure for such goods.[395]

7.274. The third category of measures, the *de facto* measure, Ukraine considers to correspond to the measures identified in the second sub-category of the second group of measures in section III.A.

[389] Ukraine's panel request, section III.A., p. 5.
[390] Ibid.
[391] Ibid. section III.B., pp. 5-6.
[392] Ukraine's first written submission, section IV, entitled "The measures at issue".
[393] Ibid. para. 54.
[394] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.
[395] Ibid.

of Ukraine's panel request, namely, "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[396]

7.275. The fourth category of measures, which the Panel refers to as the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, Ukraine considers to correspond to the measures identified in the first sub-category of the second group of measures in section III.A of Ukraine's panel request, namely, the 2014 prohibitions on the "transit of goods subject to veterinary and phytosanitary surveillance and which are included in the list approved by Resolution … No. 778 … through the checkpoints of the Republic of Belarus", along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[397]

7.276. In section V of its first written submission, Ukraine presents its arguments of WTO-inconsistency of each of the categories of measures.[398] This discussion is arranged on the basis of the claims of inconsistency with: (a) Article V of the GATT 1994 and paragraph 1161 of Russia's Working Party Report; (b) Articles X:1 and X:2 of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report; and (c) Article X:3(a) of the GATT 1994.[399] Within the discussion of the claims of inconsistency with the specific provisions (and subparagraphs of those provisions), Ukraine discusses serially the relevant categories of measures alleged to infringe the specific provisions.[400]

7.7.2 Whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.277. The relevant portion of Article 6.2 of the DSU reads:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.278. Article 6.2 of the DSU has two distinct requirements, namely: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint.[401] Article 6.2 defines the scope of the dispute between the parties, thereby establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent, and the third parties, of the nature of the case.[402] Moreover, in order to "present the problem clearly", within the meaning of Article 6.2, a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can "know what case it has to answer, and … begin preparing its defence".[403] Compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. Consequently, defects in the panel request cannot be cured by the subsequent submissions of the parties.[404]

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[396] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 43 and 63.
[397] Ibid. para. 63.
[398] Ukraine's first written submission, section V, entitled "WTO-inconsistency of the measures at issue".
[399] Ukraine did not pursue its claims under Article XI:1 of the GATT 1994 in its first written submission.
[400] Ukraine's first written submission, para. 156 *et seq*.
[401] As the Appellate Body has held in previous disputes, these two requirements constitute the "matter referred to the DSB", which forms the basis of a panel's terms of reference under Article 7.1 of the DSU. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.)
[402] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.
[403] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162. (fns omitted)
[404] Nevertheless, subsequent submissions, such as the complainant's first written submission, may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *Argentina – Import Measures*, para. 5.42; and *US – Carbon Steel*, para. 127.)

7.279. In what follows, for each of the measures identified in Ukraine's panel request in the first and second groups of measures, the Panel determines whether the identification of the measures and claims satisfies the requirements of Article 6.2.

7.7.2.1 First group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.280. Section II.A. of Ukraine's panel request identifies the following measures:

a. Requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan or the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.

b. A ban on all road and rail transit of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (ii) goods that fall within the scope of the import ban imposed by Resolution No. 778.

7.281. The specific measures within this group appear to be connected by the fact that they are implemented through a common set of legal instruments, namely, Decree No. 1, and Decree No. 319, which amended Decree No. 1 in material respects.[405]

7.282. The Panel considers that the identification of each of the measures within the first group of measures in section II.A. satisfies the requirements of Article 6.2 of the DSU.

7.283. Russia contends that the legal basis for the complaint in respect of the above-mentioned measures is provided only in respect of the group of measures, rather than for each of the measures within the group.[406] Russia does not explain why it reads Ukraine's panel request in this manner and the Panel does not share that reading. The opening words of section II.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section II.A. are inconsistent with the following WTO provisions". Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the first group of measures identified in section II.A. of Ukraine's panel request.

7.284. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B. of Ukraine's panel request.

7.7.2.2 Second group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.285. As previously noted[407], the measures identified in the second group of measures in section III.A. of Ukraine's panel request comprise:

a. 2014 prohibitions on transit, from Ukraine across the territory of Russia and through checkpoints of the Republic of Belarus, of goods that are subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778, along with requirements that the transit of any such goods destined for Kazakhstan and other third countries occur on the basis of permits issued by the appropriate Kazakh or Russian veterinary and phytosanitary surveillance authorities and through designated checkpoints;

[405] See para. 7.267 above.
[406] Russia's second written submission, para. 10.
[407] See para. 7.269 above.

b. the "de facto application of Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic"; and

c. related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request, of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.

7.286. The Panel agrees with Russia that it is difficult to discern a relationship among the measures within this second group that would warrant them being grouped together, especially since the third sub-category of measures (in item c. above) also covers measures related to those within the first group of measures in section II.A. of the panel request. However, Ukraine's decision to group these measures together in its panel request does not of itself render the identification of the measures unclear.

7.287. The Panel next considers whether the identification of the measures within each sub-category of the second group of measures in section III.A. of Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU.

7.7.2.2.1 First sub-category of measures

7.288. The first sub-category of the second group of measures (item a. in paragraph 7.285 above) are prohibitions, put in place in November 2014, on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and that are subject to the import ban implemented by Resolution No. 778, along with related requirements that the transit of any such goods destined for Kazakhstan or other third countries occur through designated Russian checkpoints and that all such goods be subject to clearance and on the basis of permits issued by the appropriate Russian or Kazakh veterinary and phytosanitary surveillance authorities. Specifically, Ukraine challenges these measures *as they affect transit from the territory of Ukraine* through the territory of Russia.[408]

7.289. The Panel concludes that Ukraine's panel request clearly identifies the first sub-category of the second group of measures.

7.7.2.2.2 Second sub-category of measures

7.290. In its panel request, Ukraine describes the measure in item b. in paragraph 7.285 above as the de facto application of "Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The Panel refers to this measure as the "*de facto* measure" in the remainder of this discussion.

7.291. At the Panel's request, the parties engaged specifically on whether the identification of the *de facto* measure in Ukraine's panel request satisfied the requirements of Article 6.2 of the DSU.[409] Therefore, although the Panel is addressing this issue in the context of evaluating Russia's more general objection that none of the measures or claims was sufficiently precisely identified, it is necessary to refer to arguments that the parties made more specifically about the *de facto* measure.

[408] See the first sentence in section III.A. of Ukraine's panel request, and the underscored sentence prior to the paragraph beginning "Second" in section III.A. of Ukraine's panel request. (Ukraine's panel request, pp. 4-5.)

[409] The Panel raised this issue on its own motion, through a question that it posed to the parties in advance of the first meeting. (See Communication to the parties, "Request for discussion of specific issues to be included in the parties' oral statements", dated 12 January 2018, Question No. 2.) The Appellate Body has previously referred to the widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any dispute that comes before it. (Appellate Body Reports, *US – 1916 Act*, para. 54 and fn 30 thereto; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and *EC and certain member States – Large Civil Aircraft*, para. 791; and Panel Reports, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.19-7.20; *EC – IT Products*, para. 7.196; *China – Broiler Products*, para. 7.515; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.358.)

7.7.2.2.2.1 Arguments of Russia

7.292. Russia argues that Ukraine's description of the *de facto* measure in its panel request is insufficiently clear for purposes of Article 6.2 of the DSU.[410] Russia considers that it is not possible to determine the geographical scope of application of the *de facto* measure from the reference in the panel request to "countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan", taking into account the number of countries covered by such a description.[411] In addition, the description of the *de facto* measure in the second sub-category of the second group of measures (set forth in paragraph 7.269.b above), in combination with the third sub-category of the second group of measures (set forth in paragraph 7.269.c above) does not enable the respondent to discern whether the measure is written or unwritten, or whether it is being challenged on an "as such" or "as applied" basis.[412] Russia considers that the measure in question constitutes "an imprecise open-ended list with the possibility for the claimant to put any new element on the table".[413]

7.7.2.2.2.2 Arguments of Ukraine

7.293. Ukraine argues that the measure that it challenges, which it describes in its first written submission as the "de facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" was identified in its panel request in a manner that satisfies the requirements of Article 6.2 of the DSU.[414] Ukraine argues that there is no requirement under Article 6.2 of the DSU to identify in a panel request whether a measure is written or unwritten, or is challenged on an "as such" or "as applied" basis.[415] Moreover, the measure as described in the second sub-category of the second group of measures (in section III.A. of the panel request) is clearly distinct from the general and product-specific transit bans and other restrictions identified in the first group of measures in section II.A. of the panel request.[416] According to Ukraine, the measure described in the second sub-category of the second group of measures in section III.A. of the panel request, through the phrase "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic" was clearly identified as a distinct measure comprising "the application in fact of the measures introduced by Decree No. 1 and Resolution No. 1 to traffic in transit destined for territories other than those covered by Decree No. 1 and Resolution No. 1".[417]

7.294. Ukraine also rejects the argument that the reference in the panel request to the legal instruments in question being applied to transit destined for territories in "Central and Eastern Asia and the Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic" amounts to an "open-ended list" of measures that fails to meet the requirements of Article 6.2 of the DSU.[418] In Ukraine's view, on the basis of the United Nation's definitions of the regions in question, the geographical specification in the second sub-category of the second group of measures identified in section III.A. of the panel request clearly referred to traffic destined for "Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia".[419]

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[410] Russia's opening statement at the first meeting of the Panel, para. 23.

[411] Ibid. para. 22. See also Russia's second written submission, paras. 14-15.

[412] Russia's opening statement at the first meeting of the Panel, para. 22.

[413] Ibid. See also Russia's opening statement at the second meeting of the Panel, para. 13.

[414] Ukraine's opening statement at the first meeting of the Panel, para. 53; and response to Panel question No. 1 after the first meeting of the Panel, para. 12.

[415] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 45.

[416] Ibid. para. 49.

[417] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 51. Ukraine argues that, contrary to Russia's understanding, "the matter before the Panel includes the *de facto* application of Decree No. 1 and Resolution No. 1, and thus the restrictions on traffic in transit imposed by both instruments" and not "any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus". (Ukraine's opening statement at the second meeting of the Panel, para. 24.)

[418] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58-60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.

[419] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 59-60; and Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region,

This is not an open-ended list, and the fact that Ukraine elected, in its first written submission, to demonstrate the *existence* of the measure with respect to transit destined for a subset of those destinations, does not affect the conclusion that the geographical specification in the panel request was not open ended.[420]

7.7.2.2.2.3 Analysis

7.295. Section III.A. of Ukraine's panel request identifies the *de facto* measure in the following manner:

> [R]estrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic.[421]

7.296. This identification refers explicitly to transit restrictions that arise out of the application of Decree No. 1 and Resolution No. 1. The transit restrictions effected through Decree No. 1 and Resolution No. 1 are described in the first three paragraphs of section II.A. of Ukraine's panel request, and concern the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territory of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points.

7.297. Before evaluating the description of the *de facto* measure in Ukraine's panel request, the Panel recalls the level of scrutiny that panels must apply in determining whether a panel request meets the specificity requirement under Article 6.2 of the DSU. The Appellate Body has stated that the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures, which would require that a complainant present relevant arguments and evidence in its submissions.[422] While a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need only be framed "with sufficient particularity so as to indicate *the nature of the measure* and *the gist of what is at issue*".[423] Thus, according to the Appellate Body, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement.[424]

7.298. The standard outlined above was developed by the Appellate Body in *US – Continued Zeroing* in the process of reversing the panel's finding in that dispute that an examination of the specificity of a panel request *would* entail a consideration of the types of measures susceptible to WTO dispute settlement. The panel had found that the panel request did not satisfy the requirement in Article 6.2 to identify the specific measures at issue because it failed to "demonstrate the existence and the precise content of the purported measure" and because "the continued application" of anti-dumping duties resulting from 18 anti-dumping duty orders did not constitute a measure for the purposes of WTO dispute settlement proceedings.[425] The Appellate Body considered that the panel request had sufficiently linked together the following three elements in seeking to identify the measures at issue[426]:

Income Group, and Subregion of the World, (The Regions of Central Asia, Eastern Asia and Caucasus), (Exhibit UKR-102).

[420] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 61.
[421] Ukraine's panel request, section III.A., p. 5.
[422] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[423] Ibid. (emphasis added)
[424] Ibid.
[425] Ibid. para. 167 (quoting Panel Report, *US – Continued Zeroing*, para. 7.56).
[426] Ibid. para. 166.

a. The panel request made "explicit reference" to the duties at issue, imposed through 18 anti-dumping duty orders, each on a "specific product" exported from "a specific country"[427];

b. The panel request indicated that the complainant was challenging the "continued application" of the anti-dumping duties pursuant to certain administrative proceedings[428]; and

c. The panel request stated that the duties at issue were calculated at levels "in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement". The complainant stated specifically in its panel request that the respondent's investigating authority "systematically" used the zeroing methodology in all types of reviews pertaining to anti-dumping duties and relied on margins calculated with the zeroing methodology in sunset reviews.[429]

7.299. The Appellate Body concluded that, with these three elements, taken together, the respondent could reasonably have been expected to understand that the complainant was challenging the continued application of the zeroing methodology in successive proceedings, through each of the 18 anti-dumping duty orders.[430]

7.300. Given these facts, the Panel understands the panel request in *US − Continued Zeroing* to have identified the measures at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue" because it explicitly: (a) provided an indication that the measure was applied to determine the duties imposed on products from "specific countr[ies]"; (b) identified the unwritten measure at issue (i.e. the zeroing methodology); (c) specified the basis on which the measure was challenged (i.e. "the continued application of … anti-dumping duties" according to the zeroing methodology and the "systematic[]" use of the zeroing methodology); and (d) identified the legal instruments in which that methodology was used (i.e. "18 anti-dumping duty orders").

7.301. Reading the standard developed by the Appellate Body in *US − Continued Zeroing* as tied to the precise aspects of the panel request in that dispute, the Panel does not consider that Ukraine's identification of the *de facto* measure in its panel request satisfies Article 6.2 of the DSU. As the Panel will explain further below, the panel request in this dispute does not identify with sufficient precision: (a) *the destinations of the goods* that are subject to the *de facto* measure, (b) the nature of the *de facto* measure as an *unwritten* measure, (c) the nature of the *de facto* measure as a *single* measure, (d) the "*as such*" character of its challenge concerning the *de facto* measure, and (e) the *legal instruments* underpinning the *de facto* measure. These aspects of Ukraine's panel request, taken together, lead to the conclusion that Ukraine has not identified the *de facto* measure with requisite sufficient particularity.

7.302. In the present dispute, the *de facto* measure is described as involving the application of the restrictions in Decree No. 1 and Resolution No. 1, to traffic in transit from Ukraine, for third-country destinations in Central and Eastern Asia and Caucasus, other than Kazakhstan and the Kyrgyz Republic. Ukraine considers that the regions of Central Asia, Eastern Asia and the Caucasus cover the following countries: Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[431] In support, Ukraine submits: (a) a UN map of Central Asia that identifies the countries of Kazakhstan, the Kyrgyz Republic,

[427] Appellate Body Report, *US − Continued Zeroing*, para. 165. The 18 anti-dumping duty orders at issue were also listed in the annex to the European Communities' panel request, and a citation was included for each order. (Ibid.)

[428] Ibid.

[429] Ibid. The complainant also stated in its panel request that it "ha[d] identified in the annex to this request a number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers … in excess of the dumping margin which would have been calculated using a WTO consistent methodology". (Ibid.)

[430] Ibid. para. 166.

[431] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 60; and The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102).

Tajikistan, Turkmenistan and Uzbekistan as "Central Asia"[432]; (b) a map of "the Caucasus and Central Asia" produced by the U.S. Central Intelligence Agency that identifies, in addition to the Central Asian countries identified in the UN map, the countries of Georgia, Armenia and Azerbaijan[433]; and (c) excerpts from a publication of the Population Division of the UN Department of Economic and Social Affairs that classifies countries by region, income group and sub region. In that publication, the region of "Eastern Asia" is classified to cover China; "China, Hong Kong [special administrative region]"; "China, Macao [special administrative region]"; "China, Taiwan Province of China"; "the Democratic People's Republic of Korea"; "Japan"; "Mongolia" and the "Republic of Korea".[434] That publication also identifies Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan as being part of "Central Asia", which is classified, along with countries in "Southern Asia", as part of "South-Central Asia".[435] However, there is no reference in this publication to the region referred to as "the Caucasus". Rather, the countries of Armenia, Azerbaijan and Georgia are presented as part of "Western Asia", along with Turkey, Cyprus, Iraq and the various Gulf States and countries of the Middle East.

7.303. On the basis of the maps submitted by Ukraine, it appears that the countries included within the regions of "Central Asia, Eastern Asia and the Caucasus" cover those that share land borders with Russia to the Southeast (Georgia and Azerbaijan), and to the East (China, Mongolia and North Korea), as well as those that share land borders with Kazakhstan. Indeed, aside from Ukraine and Belarus, the only countries with which Russia shares land borders that would be specifically excluded from the geographical scope of the *de facto* measure, as identified in Ukraine's panel request, are the European Union (Estonia, Finland, Latvia, Lithuania and Poland) and Norway.

7.304. Transit measures by their nature apply to goods that fall within the definition of "traffic in transit" under Article V:1 of the GATT 1994.[436] Owing to the requirement that the passage of such traffic in transit across the territory of a Member begin and end in a territory other than the territory of that Member, the destination of the goods in question is ordinarily an important component of a transit measure.[437] Moreover, when a Member alleges that a transit measure is *in fact* being applied to traffic in transit destined for countries other than those set forth in the measure itself, and that this application constitutes a separate, unwritten transit measure, it is even more important that the destinations in question be precisely identified.[438]

7.305. Given the nature of the measure as a transit measure, which is unwritten and consists of the *de facto* application of a written measure that applies to transit destined for two countries, to what appears to be potentially as many as 15 countries in regions as large and diverse as "Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic", the

[432] The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102), p. 2. (pagination of PDF file)

[433] Ibid. p. 3. (pagination of PDF file)

[434] Ibid. p. 5. (pagination of PDF file)

[435] Ibid. (pagination of PDF file)

[436] Article V:1 of the GATT 1994 provides that "[g]oods … shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes."

[437] This is particularly so when a complainant brings a claim under the second sentence of Article V:2 of the GATT 1994, which provides that "[n]o distinction shall be made which is based on … the place of … destination."

[438] In *EC and certain member States − Large Civil Aircraft*, the Appellate Body explained that, because the very existence and precise contours of a measure that is unwritten may be uncertain, complainants are expected to identify such measures in their panel requests as clearly as possible. (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 792.) In this appeal, the Appellate Body concluded, on its own motion, that the United States' challenge to an unwritten LA/MSF programme was not identified as a specific measure in the United States' panel request and was therefore outside the panel's terms of reference. The Appellate Body considered that the references in the United States' panel request to individual provisions of LA/MSF could not, at the same time, be read to also refer to a distinct measure consisting of an unwritten LA/MSF Programme. (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 790, 792 and 795.)

Panel has serious doubts as to whether Russia would have been able to understand the nature of the measure and the gist of what was at issue.[439]

7.306. Ukraine argues that the reference in its panel request to the countries in Central and Eastern Asia and Caucasus other than those of the Republic of Kazakhstan and the Kyrgyz Republic is not an "open-ended list", but a clear reference to Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[440] Ukraine states that Mongolia, Tajikistan, Turkmenistan and Uzbekistan are part of the "countries in Central and Eastern Asia and Caucasus", and that the reference to these countries in its first written submission thus confirms the wording used in its panel request.[441] The Panel agrees with Ukraine that it was free, in its first written submission, to elect to show the *existence* of the *de facto* measure with respect to transit destined for only a *subset* of countries that it had previously clearly identified in its panel request. However, the present issue involves the question of whether the superset of destination countries that comprises the *de facto* measure was sufficiently clearly identified in the panel request in the first place. The reference to "countries in Central and Eastern Asia and Caucasus" in Ukraine's panel request operates more like a placeholder for countries that Ukraine would later specify in its first written submission. This vagueness in the description of the destination countries in the panel request renders the identification of the *de facto* measure insufficiently precise to meet the requirements of Article 6.2 of the DSU.

7.307. Additionally, the Panel notes that Ukraine's panel request does not explicitly state whether the *de facto* measure identified in the second sub-category of the second group of measures in section III.A. of its panel request is: (a) an unwritten measure, (b) a single measure (as opposed to multiple measures), or (c) being challenged on an "as such" basis. Those aspects of the measure and the way it is being challenged are not clarified until Ukraine's first written submission. Ukraine's panel request identifies the *de facto* measure by noting that Russia "imposes restrictions" on traffic in transit "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The use of the terms "restrictions" and "de facto applying" could reasonably be interpreted to mean that Ukraine challenges individual instances of the *de facto* application of Decree No. 1 and Resolution No. 1. It is not until Ukraine's first written submission that it becomes apparent that Ukraine challenges a single, unwritten measure (consisting of the *de facto* application of Decree No. 1 as amended, beyond the scope of its explicit terms) on an "as such" basis.

7.308. The omission of the "as such" character of Ukraine's challenge concerning the *de facto* measure is particularly important considering the Appellate Body's statements in *US – Oil Country Tubular Goods Sunset Reviews*. In that dispute, the Appellate Body urged complainants to be "*especially diligent*" in setting out "as such" claims in their panel requests "as clearly as possible".[442] The Appellate Body added that it would expect that "as such" claims "state unambiguously" the specific measures of municipal law challenged by the complainant and the legal basis for the allegation that those measures are WTO-inconsistent. Through "such straightforward presentations of 'as such' claims", panel requests should leave respondents "in little doubt" that another Member intends to challenge those measures "as such".[443]

[439] The Panel notes that other panels have found measures to be insufficiently specified for purposes of Article 6.2 of the DSU where they were described too broadly in a panel request. For example, in *Australia – Apples*, New Zealand's panel request referred to both "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand*" and, "in particular" to a list of 17 requirements spelled out in the report and identified in the panel request through bullet points. (Panel Report, *Australia – Apples*, para. 7.1446.) The panel found that "given the length and complexity of Australia's [report]", the broad reference in New Zealand's panel request to "measures specified in and required by Australia pursuant to the [report]" failed to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. (Ibid. para. 7.1449.)

[440] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58-60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.

[441] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 62.

[442] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 173. (emphasis original)

[443] Ibid.

7.309. Although the Appellate Body upheld the panel's finding in that dispute that the measure at issue was identified with sufficient precision pursuant to Article 6.2 of the DSU, the Appellate Body did so on the specific basis that: (a) the panel request explicitly stated that it was challenging the "irrefutable presumption" found in "US law *as such*"[444]; (b) the wording and logic of the panel request demonstrated that the complainant would establish the WTO-inconsistency of the specific US legal provisions embodying the "irrefutable presumption"[445]; and (c) the relevant measure was listed under a shared heading with other "as such" claims, so such a heading could not have been limited to "as applied" claims.[446]

7.310. In the present dispute, the panel request does not specify the "as such" challenge concerning the *de facto* measure in such a manner. First, as stated above, the panel request does not specify the "as such" nature of Ukraine's challenge concerning the *de facto* measure. Second, the wording of the relevant section of Ukraine's panel request, as reproduced in paragraph 7.295 above, does not suggest whether Ukraine aims to establish the WTO-inconsistency of the *de facto* measure as a measure of general and prospective application or as individual instances of application. Third, the heading for section III.A. of the panel request, entitled "The Measures at Issue", and the descriptions of the measures above and below the *de facto* measure, do not indicate whether Ukraine intended to challenge any other measures on an "as such" basis.

7.311. Finally, the Panel observes that the *de facto* measure is identified in Ukraine's panel request as comprising the *de facto* application of one set of legal instruments (Decree No. 1 and Resolution No. 1), while it is described in Ukraine's first written submission as comprising the *de facto* application of a different set of legal instruments (Decree No. 1, *as amended*). Decree No. 1 "as amended" can be understood to mean Decree No. 1 *as amended by Decree No. 319*. Decree No. 319 introduced amendments to Decree No. 1, effective as of 1 July 2016, to (a) extend the requirement that all international cargo transit by road and rail from Ukraine destined for Kazakhstan enter Russia via Belarus and be subject to additional conditions related to identification seals and registration cards, to international cargo transit by road and rail destined for the Kyrgyz Republic; and (b) impose a ban on road and rail transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, as well as goods falling within the scope of the import bans imposed by Resolution No. 778.

7.312. Ukraine did not refer to Decree No. 319 in the section of its panel request that identifies the *de facto* measure. The Panel considers that the failure to refer specifically to Decree No. 319 in the identification of the *de facto* measure in the second group of measures in section III.A. of Ukraine's panel request could reasonably have led Russia to conclude that Ukraine was only challenging the *de facto* application of restrictions on transit effected by Decree No. 1 and Resolution No. 1. This is reinforced by the fact that Ukraine's panel request *did* explicitly refer to Decree No. 319 in the first group of measures in section II.A. In the circumstances, Russia could reasonably have inferred that the absence of a reference to Decree No. 319 in the identification of the second group of measures in section III.A. of the panel request was deliberate.[447]

7.313. This is further supported by the fact that the identification of the *de facto* measure in the second sub-category of the second group of measures in section III.A. of the panel request uses the term "restrictions" rather than "bans". The reference to Decree No. 319 in section II.A. of the panel request, by contrast, describes this instrument as involving a "ban". The use of the word "restrictions" rather than "bans" to describe the *de facto* measure could also reasonably have led Russia to conclude that the *de facto* measure was concerned with the *de facto* application of the *restrictions* on transit (i.e. the restrictive conditions requiring that transit from Ukraine occur

[444] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 165. (emphasis original)

[445] Ibid. para. 166.

[446] Ibid. para. 167.

[447] Although the third sub-category of the second group of measures described in section III.A. of the panel request refers to amendments to any of the measures mentioned in sections II.A. and III.A., this sub-category is prefaced by the explanation that this inclusion is necessary owing to Russia's failure to comply with the transparency and notification obligations under the GATT 1994 and Russia's Accession Protocol in respect of some of the measures. The existence and content of Decree No. 319 was clearly known to Ukraine at the time of its panel request, as it specifically refers to this instrument in the context of its discussion of the first group of measures in section II.A. Therefore, in the circumstances, it would not have been reasonable for Russia to infer, from the references to amendment measures in the third sub-category of measures described in section III.A., that Ukraine was referring to the amendments to Decree No. 1 effected by Decree No. 319.

exclusively through Belarus and the "additional restrictive conditions" such as the application of identification seals and the use of registration cards, all of which are referred to in Decree No. 1), rather than the ban on transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling within the scope of the import ban imposed by Resolution No. 778.

7.314. The Panel recognizes that Ukraine's apparent expansion of the scope of the *de facto* measure in its first written submission, to include the *de facto* application of Decree No. 319 in addition to Decree No. 1, does not strictly affect the question of whether the measure was described with the requisite clarity in Ukraine's panel request. As previously noted, compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. The Panel makes the observations above only to indicate that, even if it had concluded that Ukraine's panel request identified the *de facto* measure with sufficient specificity to meet the requirements of Article 6.2 of the DSU, the Panel considers that the *de facto* measure Ukraine describes in its first written submission is different from the measure it identifies in its panel request.

7.315. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

7.7.2.2.3 Third sub-category of measures

7.316. The third sub-category of the second group of measures (item c. in paragraph 7.285 above) covers any related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.[448] The legal instruments listed in Ukraine's panel request and of which Ukraine clearly was aware (for example, Decree No. 319, which amended Decree No. 1), would not fall within this sub-category.

7.317. The Panel concludes that Ukraine's panel request clearly identifies the third sub-category of the second group of measures.

7.7.2.2.4 Identification of the legal basis of the complaint

7.318. Russia also contends that the legal basis for the complaint in respect of the measures comprising the second group of measures is provided only in respect of the group, rather than for each of the measures within the group.[449] The opening words of section III.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section III.A. are inconsistent with the following WTO provisions". As with the similar objection made by Russia in respect of the first group of measures, Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the second group of measures identified in section III.A. of Ukraine's panel request.[450]

7.319. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B. of Ukraine's panel request.

7.7.2.3 Conclusions on whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.320. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

[448] See Ukraine's opening statement at the second meeting of the Panel, paras. 25-26. Ukraine argues that the use of the phrase "related measures" has not changed the essence of the measures that fall within the Panel's terms of reference. (See ibid. para. 27.)

[449] Russia's second written submission, para. 10.

[450] See para. 7.283 above.

7.321. The Panel finds that the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

7.322. The Panel finds that Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

7.323. The Panel finds that Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU, because, in Russia's view, the panel request does not make clear how the measures that comprise each of the two distinct "groups of measures" set forth in the panel request operate together, or adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two groups of measures.

7.7.3 Whether the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are within the Panel's terms of reference

7.324. In this Section, the Panel addresses Russia's additional argument that the category of measures described in Ukraine's first written submission as the "2014 transit bans and other transit restrictions", and by the Panel as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods" (2014 Belarus-Russia Border Bans)[451], are outside the Panel's terms of reference because these measures were no longer in existence at the time of Ukraine's panel request.

7.325. The 2014 Belarus-Russia Border Bans are the alleged bans identified in the first sub-category of the second group of measures in section III.A. of Ukraine's panel request[452], namely, the 2014 prohibitions on transit from Ukraine across Russia, of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, through checkpoints of the Republic of Belarus, along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[453]

7.326. To recall, in August 2014, the Russian Government passed Resolution No. 778, which temporarily bans the importation into Russia of various agricultural products, raw materials and foodstuffs set forth in a list annexed to the Resolution that originate from certain countries, including the United States, EU Member States, Canada, Australia and Norway, that had imposed sanctions against Russia.[454] The list of products to which the import ban applies has also been modified several times.[455]

7.327. The 2014 Belarus-Russia Border Bans provide that veterinary and plant goods subject to the import bans under Resolution No. 778 may only transit through designated checkpoints located on the Russian side of the external border of the EaEU.[456] The 2014 Belarus-Russia Border Bans are implemented by instructions contained in two letters issued by the *Rosselkhoznadzor*: Instruction No. FS-NV-7/22886, dated 21 November 2014, (the Veterinary Instruction), which

[451] In the previous Sections of this Report, the Panel refers to "2014 transit bans and other transit restrictions" as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods". In this Section, however, for ease of reference, the Panel will refer to these measures as the "2014 Belarus-Russia Border Bans".

[452] See Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.

[453] For a description of the 2014 measures, see paras. 7.1.d and 7.106.c above, and paras. 7.326-7.327 below.

[454] See para. 7.10 above.

[455] Resolution No. 830, (Exhibit UKR-11); Resolution No. 981, (Exhibit UKR-14); Resolution No. 157, (Exhibit UKR-16); Resolution No. 472, (Exhibit UKR-17); Resolution No. 897, (Exhibit UKR-19); Resolution No. 1086, (Exhibit UKR-20); and Resolution No. 1292, (Exhibit UKR-94).

[456] See para. 7.269.a above. The Panel interprets the Plant Instruction in the context of the contemporaneous Veterinary Instruction, given that both instruments were issued on the same date by the same government authority, in reference to the same ban on products under Resolution No. 778. The Panel therefore considers that "the checkpoints" referred to in the Plant Instruction, properly construed, must be those checkpoints listed in the Veterinary Instruction. This interpretation of the two Instructions was also put forward by Ukraine in its panel request, in which Ukraine asserted that the entry of both veterinary and plant goods was only allowed "through the checkpoints located at the Russian part of the external border of the Customs Union". (Ukraine's panel request, Section III.A., p. 4.) For more detail, see fn 458 below.

applies to veterinary goods covered by Resolution No. 778 as of 30 November 2014[457]; and Instruction No. FS-AS-3/22903, dated 21 November 2014, (the Plant Instruction), which applies to plant goods covered by Resolution No. 778 as of 24 November 2014.[458]

7.328. Russia, in its first written submission, requested a preliminary ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference.[459] Russia considers that these alleged bans did not exist at the date of Ukraine's request for consultations (21 September 2016), or at the date of its request for establishment of a panel (10 February 2017).[460] Russia argues that the Veterinary Instruction and the Plant Instruction were "superseded" by Decree No. 1, dated 1 January 2016, and by Resolution No. 1, also dated 1 January 2016.[461] According to Russia, Decree No. 1 therefore "effectively abolished any requirements that were set out in the Letters of *Rosselkhoznadzor* in question in respect of Ukraine".[462] In its opening statement at the first substantive meeting of the Panel, Russia clarified its argument as follows:

a. When the Veterinary Instruction and Plant Instruction were adopted, Ukraine was not included in the list of countries whose goods were subject to Resolution No. 778. Therefore, the 2014 measures "could not [apply] and were not applied to the goods from Ukraine".[463]

b. Resolution No. 778 was amended on 1 January 2016 to add Ukraine to the list of countries whose goods were subject to Resolution No. 778. However, also on 1 January 2016, Decree No. 1 and Resolution No. 1 were adopted to permit the transit of goods from Ukraine across Russian territory only through "the checkpoint situated on the state border of the Russian Federation inside its Russia-Belarus sector".[464]

c. Decree No. 1 and Resolution No. 1, as measures adopted by the Government of the Russian Federation, are superior in the Russian legal hierarchy to the instructions issued

[457] Veterinary Instruction, (Exhibits UKR-21, RUS-10).

[458] Plant Instruction, (Exhibits UKR-22, RUS-11). The Veterinary Instruction specifically prohibits transit across Russia through Belarussian checkpoints, owing to the detection of "gross violations" during the transit of Resolution No. 778 goods through the Republic of Belarus, and limits entry to nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).) The Plant Instruction, conversely, simply states that the transit of phytosanitary goods covered by Resolution No. 778, destined for third countries including Kazakhstan, will take place "exclusively through the checkpoints across the state border of the Russian Federation". (Plant Instruction, (Exhibits UKR-22, RUS-11).) The Plant Instruction does not, on its face, refer to prohibiting transit across Russia through Belarussian checkpoints, or the nine checkpoints identified in the Veterinary Instruction. However, in an official statement issued by the *Rosselkhoznadzor*, it was explained that the Plant Instruction was intended to prevent the "illegal delivery of quarantined products from the territory of Belarus" and "false transit by the Belarusian and Kazakhstani competent services". (Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014, (Exhibit UKR-88).)

[459] Russia's first written submission, para. 31; and opening statement at the first meeting of the Panel, para. 6.

[460] Russia's first written submission, paras. 3, 27 and 30; and opening statement at the first meeting of the Panel, para. 6.

[461] Russia's first written submission, para. 26. Decree No. 1 provides that all road and railway cargo transportation from Ukraine to Kazakhstan, through the territory of Russia, shall be carried out only from the territory of Belarus and shall be subject to additional conditions related to identification seals and registration cards, at specific control points to be established by the Russian Government. Decree No. 1 was amended in various respects by Decree No. 319 on 1 July 2016, including by extending the restrictions on traffic in transit from Ukraine, destined for Kazakhstan, to traffic in transit from Ukraine, destined for the Kyrgyz Republic. Decree No. 319 also imposed a temporary prohibition on the transit from Ukraine, across the territory of Russia, of goods that would be subject to import duties above zero if imported into Russia, as well as goods covered by Resolution No. 778. (Decree No. 1, (Exhibits UKR-1, RUS-1); and Decree No. 319, (Exhibits UKR-2, RUS-2).) Decree No.1 has been extended to apply until 30 June 2018 by Decree No. 643, (Exhibits UKR-98, RUS-13).

[462] Russia's first written submission, para. 26.

[463] Russia's opening statement at the first meeting of the Panel, para. 5.

[464] Ibid. para. 6.

> by the *Rosselkhoznadzor*, which is a Federal Service reporting to the Government of the Russian Federation.[465]

7.329. Accordingly, Russia argues that there has "not been a single day when the measures contained in the Letters of *Rosselkhoznadzor* were applied to the transit of goods from Ukraine".[466]

7.330. Ukraine, in its first written submission, acknowledges that the Veterinary Instruction was formally amended by Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor* on 10 October 2016, to provide that "traffic in transit of goods that are subject to control by the state veterinary surveillance, from the territory of Ukraine into the territor[ies] of the Republic of Kazakhstan and the Kyrgyz Republic must be carried out according to [Resolution No. 1]".[467] While conceding that veterinary goods covered by Resolution No. 778 "moving specifically from" the territory of Ukraine to the territories of Kazakhstan and the Kyrgyz Republic are accordingly no longer subject to the Veterinary Instruction, Ukraine argues that the Veterinary Instruction continues to apply to traffic in transit *not* covered by Resolution No. 1.[468] Ukraine further argues that if neither instruction ever applied with respect to Ukraine, there would have been no need to adopt Instruction No. FS-EN-7/19132, providing that the traffic in transit of veterinary goods from the territory of Ukraine into the territories of Kazakhstan and the Kyrgyz Republic must be carried out in accordance with Resolution No. 1.[469] Consequently, according to Ukraine, (a) veterinary goods covered by Resolution No. 778 transiting from countries *other than* Ukraine, and (b) veterinary goods covered by Resolution No. 778 transiting from Ukraine but to destinations *other than Kazakhstan and the Kyrgyz Republic*, remain subject to the Veterinary Instruction.[470]

7.7.3.1 Whether the existence of the 2014 Belarus-Russia Border Bans goes to the Panel's terms of reference

7.331. Russia argues that the 2014 Belarus-Russia Border Bans do not have any legal effect with respect to transit from Ukraine, and therefore that the measures do not exist, and are accordingly outside the Panel's terms of reference. Russia's request for a ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference relies on what it considers to be a "general rule" in WTO jurisprudence, according to which "the measure covered by a panel's terms of reference must be a measure in existence at the time of the establishment of the panel."[471] It refers to the Appellate Body Report in *EC −Chicken Cuts* in support of this proposition.[472]

7.332. The *EC − Chicken Cuts* dispute involved two original measures that had been explicitly identified in the complaining parties' panel requests. The issue for the panel and Appellate Body was whether two subsequent measures, which had come into existence after the date of the panel requests and therefore had not been explicitly identified in the panel requests, were nevertheless within the panel's terms of reference. In this specific context, the Appellate Body stated that the term "specific measures at issue" in Article 6.2 of the DSU suggests that:

> [A]s a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However,

[465] Russia's opening statement at the first meeting of the Panel, para. 6.
[466] Ibid.
[467] Ukraine's first written submission, paras. 59 and 244; and Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor*, dated 10 October 2016, (Exhibit UKR-75). See also Ukraine's opening statement at the first meeting of the Panel, paras. 9-11.
[468] Ukraine's first written submission, paras. 59 and 244. Ukraine similarly argues that Decree No. 1 and Resolution No. 1 would supersede the Plant Instruction, but only to the extent of a conflict between them, because Presidential decrees and Government resolutions are superior to agency instructions in the Russian legal hierarchy, and in this case, the relevant decree and resolution were also promulgated later in time. (Ukraine's first written submission, para. 60; and opening statement at the first meeting of the Panel, para. 13.)
[469] Ukraine's second written submission, para. 18.
[470] Ukraine's first written submission, para. 244; and opening statement at the first meeting of the Panel, para. 11.
[471] Russia's first written submission, para. 25.
[472] Ibid. (referring to Appellate Body Report, *EC − Chicken Cuts*, para. 156).

> measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference.[473]

7.333. In other words, in *EC − Chicken Cuts*, the terms of reference issue arose because the two subsequent measures had not been explicitly identified in the complainants' panel requests (owing to the fact that they did not then exist). The question was whether they were nevertheless sufficiently identified in the panel requests for purposes of Article 6.2 of the DSU on account of their relationship to two original measures that had been explicitly identified in the panel requests.

7.334. The situation before this Panel is therefore different from the situation in *EC − Chicken Cuts*. The 2014 Belarus-Russia Border Bans *are* identified in Ukraine's panel request.[474] The issue is whether these measures *in fact existed* at the relevant time.

7.335. It is clearly established that the issue of the existence of a measure goes to the merits of a case. It is not a jurisdictional issue. In *EC and certain member States − Large Civil Aircraft*, the European Communities sought a preliminary ruling that alleged launch aid / member State financing (LA/MSF) subsidies to support the development of the Airbus A350 aircraft (A350) were outside the panel's terms of reference because the subsidies did not exist at the time of the United States' panel request for the establishment of a panel. The panel noted that the dispute between the parties concerned the factual question of whether there were any LA/MSF measures in existence with respect to the A350 at the time of the panel request. The panel stated that, where the existence or non-existence of a challenged measure is a disputed question of fact, it is not an appropriate matter for determination in a preliminary ruling. The panel therefore addressed this issue in its evaluation of the United States' substantive claims.[475]

7.336. In *US − Continued Zeroing*, the Appellate Body rejected the panel's view that, in order to successfully raise claims against a measure, the complaining Member must first demonstrate the existence and the precise content of the measure, according to the requirements of Article 6.2 of the DSU.[476] The Appellate Body explained that the identification of the specific measures at issue, pursuant to Article 6.2 of the DSU, is different from a demonstration of the existence of such measures. Only in respect of the latter would the complaining party be expected to present relevant arguments and evidence during the panel proceedings to show the existence of the measures.[477]

7.337. The Appellate Body's approach in *US − Continued Zeroing* was followed by the panel in *US − Orange Juice (Brazil*), which rejected the United States' request for a ruling that Brazil's alleged "continued zeroing" measure was outside the panel's terms of reference because the measure as described in the panel request did not satisfy the requirements of Article 6.2. The panel considered that it was reasonably clear from the description of the measure in its panel request that the complainant challenged the United States' "continued use" of "zeroing procedures" as "ongoing conduct". The panel noted that, in order for it to rule on the United States' request for a preliminary ruling, there was no need for it to go further, and pronounce on whether such "ongoing conduct" was susceptible to challenge in WTO dispute settlement, or decide whether the alleged "ongoing conduct" measure actually existed.[478]

7.338. In *Russia − Tariff Treatment*, Russia sought a preliminary ruling that one of the measures, concerning a particular tariff line, did not exist at the time of the establishment of the panel. The panel quoted the Appellate Body's statement in *US − Continued Zeroing*, adding that a complaining party is not required to establish the existence of a specific measure at issue in its panel

[473] Appellate Body Report, *EC − Chicken Cuts*, para. 156. (underlining added; footnote omitted)

[474] In its first written submission, Ukraine clarifies that its reference to the Plant Instruction in its panel request contained a typographical error. (See Ukraine's first written submission, fn 77 to para. 55; and opening statement at the first meeting of the Panel, para. 18.) Russia also seems to have understood that particular reference to be a typographical error. (See Russia's first written submission, para. 24.)

[475] See Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.108-7.117.

[476] Panel Report, *US − Continued Zeroing*, para. 7.50.

[477] Appellate Body Report, *US − Continued Zeroing*, para. 169. See also Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 21-22, where, in connection with arguments concerning a different measure, Ukraine refers to the Appellate Body's statement in *US − Continued Zeroing* to support its argument that Article 6.2 of the DSU does not require that the existence of the measures at issue be demonstrated in a panel request.

[478] Panel Report, *US − Orange Juice (Brazil*), paras. 7.41-7.42.

request. Rather, such demonstration is to be made in the complaining party's written submissions and at a panel's meetings with the parties.[479]

7.339. In conclusion, the existence of the 2014 Belarus-Russia Border Bans is an issue that goes to the merits of the case, rather than to the delimitation of the scope of the terms of reference.

7.7.3.2 Whether Ukraine has established the existence of the 2014 Belarus-Russia Border Bans in its panel request

7.340. The Panel next considers whether Ukraine has established that the 2014 Belarus-Russia Border Bans in fact existed at the time of its panel request. The answer to this question depends on whether Ukraine has established that the 2014 Belarus-Russia Border Bans continue to have legal effect with respect to transit from Ukraine, notwithstanding the promulgation of Decree No. 1 and Resolution No. 1 on 1 January 2016. In this respect, Ukraine argues that there is no evidence before the Panel expressly or implicitly of the repeal of the 2014 Belarus-Russia Border Bans, and that, to demonstrate the existence of these measures at the time of the establishment of the Panel, Ukraine is not required to provide evidence of actual application of these transit measures.[480]

7.341. As noted previously, the 2014 Belarus-Russia Border Bans are implemented by two *Rosselkhoznadzor* instruction letters of November 2014.[481] The Veterinary Instruction prohibits, as of 30 November 2014, the transit of veterinary goods covered by Resolution No. 778 and destined for Kazakhstan or third countries across Russian territory through checkpoints in the territory of Belarus. Rather, transit of such goods must take place through specific checkpoints located on the Russian side of the external border of the EaEU.[482] The Plant Instruction does not, on its face, prohibit the transit of plant goods covered by Resolution No. 778 across Russian territory from checkpoints in the territory of Belarus, but instead requires that, as of 24 November 2014, transit of such goods destined for third countries, including Kazakhstan, occur exclusively through "the checkpoints across the state border of the Russian Federation".[483]

7.342. The parties agree that *goods of Ukrainian origin* were not originally subject to Resolution No. 778 and thus, that neither the Veterinary Instruction nor the Plant Instruction originally applied to transit of goods of *Ukrainian origin*. However, the Veterinary Instruction and Plant Instruction by their terms nevertheless applied to the *transit from Ukraine of goods covered by Resolution No. 778* (i.e. specified veterinary and plant goods originating from countries listed in Resolution No. 778).

7.343. The Russian Government subsequently amended Resolution No. 778 so that it also applied to the specified veterinary and plant *goods of Ukrainian origin*, as of 1 January 2016.[484] At the same time, the Russian President promulgated Decree No. 1, which is entitled "On the measures ensuring economic security and national interests of the Russian Federation in the cases of international transit cargo transportation from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation". Decree No. 1 requires that, as of 1 January 2016, *transit from Ukraine* destined for Kazakhstan could only enter Russian territory from

[479] Panel Report, *Russia – Tariff Treatment*, Annex A-1, para. 6.7.
[480] See Ukraine's opening statement at the second meeting of the Panel, paras. 6-7.
[481] See para. 7.327 above.
[482] The introduction to the Veterinary Instruction provides that the prohibition on transit of veterinary Resolution No. 778 goods across Russia from the checkpoints in the territory of Belarus is necessitated by the "detection of gross violations during the transit through the territory of the Republic of Belarus" of veterinary Resolution No. 778 goods. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).)
[483] However, see fns 456 and 458 above.
[484] Russia's opening statement at the first meeting of the Panel, paras. 5-6; and Ukraine's second written submission, para. 14. This was effected through two resolutions of the Government of the Russian Federation: (a) Resolution No. 842, (Exhibit UKR-13), which added Ukraine to the list of countries whose veterinary and plant goods were subject to Resolution No. 778, but with a proviso that the import ban applying to such goods of Ukrainian origin would be applied from the effective date of paragraph 1 of Resolution No. 959 of the Government of the Russian Federation, dated 19 September 2014, but no later than 1 January 2016; and (b) Resolution No. 1397, (Exhibit UKR-15), which amended Resolution No. 778 to provide that the import ban on specified veterinary and plant goods would be applied to Ukraine from 1 January 2016.

the territory of Belarus, and subject to additional conditions related to identification seals and registration cards as well as control points to be established by the Russian Government.[485]

7.344. The parties agree that, to the extent that there is any inconsistency between the Veterinary and Plant Instructions, on the one hand, and Decree No. 1, on the other, the latter would prevail, owing to the fact that it is superior in the Russian legal hierarchy.[486]

7.345. The Veterinary and Plant Instructions concern the transit of goods subject to Resolution No. 778 that are destined for Kazakhstan and other third countries. The requirements in those instructions (i.e. that such goods may not enter Russia through Belarus and can only enter through certain designated checkpoints situated on the Russian state border) would be superseded, as regards *transit from Ukraine* of such goods, by the requirement in Decree No. 1 that *all transit from Ukraine* (which would include goods covered by Resolution No. 778 transiting across Russia from Ukraine) that is destined for Kazakhstan (and from 1 July 2016, the Kyrgyz Republic), be carried out exclusively from the territory of Belarus, and comply with the additional conditions related to identification seals and registration cards, at specific control points, as set out in Decree No. 1.

7.346. Therefore, it is clear that, as of 1 January 2016, the 2014 Belarus-Russia Border Bans did not apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic. The question is whether the 2014 Belarus-Russia Border Bans continued to apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries other than Kazakhstan or the Kyrgyz Republic. The Panel considers that the answer to that question depends on the scope of application of the amendment to Decree No. 1 effected by Decree No. 319, namely, the temporary prohibition on the transit of goods covered by Resolution No. 778.

7.347. Decree No. 319 not only expanded the restrictions applying to transit from Ukraine destined for Kazakhstan to apply to transit from Ukraine destined for the Kyrgyz Republic. It also introduced what is referred to as a "temporary" prohibition on the transit of goods covered by Resolution No. 778.[487] The terms of this amendment to Decree No. 1, introduced by Decree No. 319, are as follows:

> To introduce a temporary prohibition for motor road and railroad transportation of goods covered in the Russian Federation by the rates of import customs duties specified in the Common Customs Tariff of the [EaEU] different from zero and the goods included into the list of agricultural produce, raw materials and foodstuffs endorsed by the Government of the Russian Federation in pursuance of Decree of the President of the Russian Federation No. 560 of August 6, 2014 on the Application of Individual Specific Economic Measures for the Purposes of Security of the Russian Federation.[488]

7.348. The prohibition introduced by Decree No. 319 is not, by its express terms, confined to transit *from Ukraine* of goods covered by Resolution No. 778, or to the transit of goods covered by Resolution No. 778 that are destined for any particular countries. If the prohibition applied to the transit of goods covered by Resolution No. 778 regardless of the country from which the goods entered Russia, or the country of destination, the 2014 Belarus-Russia Border Bans would, since 1 July 2016, have been entirely superseded by Decree No. 1, as amended by Decree No. 319.

7.349. However, the title to Decree No. 1 (as amended by Decree No. 319) expressly states that it applies to transit *from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic*. Therefore, the Panel considers that the scope of the prohibition on the transit of goods covered by Resolution No. 778, effected by Decree No. 319 above, is limited to transit *from Ukraine* of such goods where the destination of the goods is either Kazakhstan or the Kyrgyz Republic, and not other destinations.

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[485] Decree No. 1, (Exhibits UKR-1, RUS-1). Decree No. 1 was amended by Decree No. 319 to extend these requirements to Ukrainian traffic in transit destined for the Kyrgyz Republic, as of 1 July 2016. (Decree No. 319, (Exhibits UKR-2, RUS-2).) The control points were established by Resolution No. 1, (Exhibits UKR-3, RUS-4).

[486] See, e.g. Ukraine's first written submission, para. 60; and Russia's first written submission, para. 26.

[487] The temporary prohibition introduced by Decree No. 319 also applies to the transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU. (Decree No. 319, (Exhibits UKR-2, RUS-2).)

[488] Decree No. 1, as amended by Decree No. 319, (Exhibit RUS-1), section 1.1. (underlining original)

7.350. This being so, it appears that Decree No. 1, as amended by Decree No. 319, does not entirely supersede the legal operation of the 2014 Belarus-Russia Border Bans with respect to the transit from Ukraine of goods covered by Resolution No. 778. The 2014 Belarus-Russia Border Bans would continue to apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic.

7.351. The Panel's conclusion that the 2014 Belarus-Russia Border Bans have some residual legal effect as regards transit from Ukraine of goods covered by Resolution No. 778, notwithstanding the promulgation of Decree No. 1 and Decree No. 319, is complicated somewhat by Ukraine's allegation that the Russian authorities are *de facto* applying the measures implemented by Decree No. 1, as amended, to traffic in transit from Ukraine which is destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Clearly, if this were the case, the scope of operation of the 2014 Belarus-Russia Border Bans would, in fact, be even more limited owing to the corresponding expansion in the scope of operation of Decree No. 1, as a factual matter.

7.352. However, the Panel has ruled that the *de facto* measure is outside its terms of reference.[489] Therefore, the Panel does not reach any conclusion as to whether Ukraine has established, as an evidentiary matter, that Decree No. 1 is in fact being applied to transit from Ukraine of goods destined for these other countries.

7.353. The Panel therefore concludes that, while Decree No. 1 (as amended by Decree No. 319) supersedes the 2014 Belarus-Russia Border Bans as they apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic, Decree No. 1, as amended, does not by its terms affect the legal operation of the 2014 Belarus-Russia Border Bans as they apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic. Accordingly, the Panel finds that Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319), in that they had legal effect with respect to transit from Ukraine of goods covered by Resolution No. 778 destined for countries other than Kazakhstan or the Kyrgyz Republic.

7.354. For the sake of clarification, the Panel would add that it is aware that the 2014 Belarus-Russia Border Bans also apply to transit, from countries other than Ukraine, of goods covered by Resolution No. 778. However, Ukraine's panel request confines its challenge to the transit restrictions in the 2014 Belarus-Russia Border Bans to those that apply to "traffic in transit from the territory of Ukraine through the territory of the Russian Federation". This limitation is clear from the underscored paragraph that summarizes the effect of the instruments that implement the first sub-category of the second group of measures in section III.A.:

> As a result of the restrictions imposed by these Instructions combined with the restrictions imposed by Decree No. 1, the goods falling within the scope of these Instructions are prohibited for transit *from the territory of Ukraine* through the territory of the Russian Federation to the territory of the Republic of Kazakhstan and the Kyrgyz Republic.[490]

7.355. Owing to this limitation in Ukraine's panel request, the only aspects of the 2014 Belarus-Russia Border Bans that are within the Panel's terms of reference are those that apply to transit *from Ukraine*.

7.7.4 Summary of the Panel's findings on the measures that are within its terms of reference

7.356. In this Section of the Report, the Panel finds that the *de facto* measure, i.e. the measure referred to in the second sub-category of the second group of measures in section III.A. of Ukraine's panel request as "de facto applying Decree No. 1 and Resolution No. 1 to transit from the

[489] See para. 7.315 above.

[490] Ukraine's panel request, section III.A., p. 5. (underlining original; italics added) See also ibid. section III.A., first sentence, p. 4.

territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic", is outside its terms of reference.

7.357. The Panel finds that the following measures are within its terms of reference:

a. The 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

b. The 2016 Transit Bans on Non-Zero Duty Goods and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to the Panel's jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

   i. it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

b. With respect to the measures and claims within the Panel's terms of reference, the Panel finds that:

   i. the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

   ii. the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

   iii. Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

   iv. Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU.

c. With respect to the existence of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as of the date of Ukraine's panel request, the Panel finds that:

   i. Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319).

d. With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

   i. as of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;

   ii. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;

   iii. Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994; and

   iv. accordingly, Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered by Article XXI(b)(iii) of the GATT 1994.

8.2. The Panel also concludes as follows:

a. With respect to Ukraine's claims under the first sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

   i. the 2016 Belarus Transit Requirements were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine;

   ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

   iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

b. With respect to Ukraine's claims under the second sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

   i. the 2016 Belarus Transit Requirements were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

   ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of entry (certain countries where entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

c. With respect to Ukraine's remaining claims under the GATT 1994, the Panel does not consider it necessary to address Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994.

d. With respect to Ukraine's claims under Russia's Working Party Report, as incorporated into its Accession Protocol by reference, the Panel considers that:

i. Russia could justify any inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994; and

ii. With respect to Ukraine's claims under paragraph 1161 of Russia's Working Party Report, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both; and

iii. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

8.3. Having found that Russia has not acted inconsistently with its obligations under the GATT 1994 or with commitments in Russia's Accession Protocol, the Panel makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.

APPENDIX – SUBSEQUENT CONDUCT CONCERNING ARTICLE XXI OF THE GATT 1947

INTRODUCTION

1.1. Russia has directed the Panel to analyse the "historic perspective" in order to support its interpretation of Article XXI.[1] In particular, Russia has drawn the attention of the Panel to the following documents: (a) statements made by Czechoslovakia in 1949, in the context of its dispute with the United States over certain export controls; (b) statements made by Ghana in 1961, in the context of opposing Portugal's accession to the GATT 1947; (c) statements made by the European Communities and the United States in 1982, in the context of the dispute between the European Communities and Argentina over certain import measures; (d) statements made by the United States in 1985, in the context of its dispute with Nicaragua over an embargo on Nicaraguan goods; and (e) statements made by the European Communities in 1991, in the context of the dispute between the European Communities and Yugoslavia over the withdrawal of certain preferences.[2]

1.2. The Panel recalls that in interpreting the terms of a treaty in accordance with the customary rules of interpretation, it is empowered to consider any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[3] The Panel also recalls that pursuant to Article 13 of the DSU, it is empowered to seek information from "any relevant source" in making its findings.[4] Accordingly, the Panel has conducted a survey of the discussions referred to it by Russia and related documents in order to examine the attitudes of GATT contracting parties and WTO Members on occasions when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.[5] The Panel's conclusions on this survey are contained in paragraphs 7.80 and 7.81 of the Panel Report.

1.3. The Panel wishes to note that it does not consider that certain documents referred to it by Russia establish any relevant conduct of "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. In particular, the Panel notes that statements made by Ghana to justify the imposition of an import ban against Portugal in 1961 were made prior to Portugal's accession, during which the parties had not yet assumed any obligations to one another under the GATT 1947.[6] In the Panel's view, invocations of Article XXI by a contracting party in order to defend measures taken against a non-contracting party, as well as any invocations of Article XXI by non-contracting parties during accession negotiations, cannot establish a pattern of practice between "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. Accordingly, the Panel has omitted from this

[1] Russia's first written submission, para. 40. This Appendix uses the term "European Communities" to refer to both the European Economic Community and the European Community prior to 2009, and the term the "European Union" to refer to the European Union after 2009. On 1 November 1993, the *Treaty on European Union* (done at Maastricht, 7 February 1992) entered into force. On 1 December 2009, *the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[2] Ibid. paras. 41-46.

[3] Article 31(3)(b) of the Vienna Convention provides that: "[t]here shall be taken into account, together with the context: ... [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[4] Article 13 of the DSU provides that: "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."

[5] This document examines the subsequent conduct of GATT contracting parties and WTO Members in GATT and WTO fora from the period of 1 January 1948 (entry into force of the GATT 1947) to 6 June 2017 (composition of the Panel in this dispute). By including documents in this survey, the Panel does not intend to attribute any legal significance to the type of document examined or the contents of any such documents. The Panel notes only that it has examined such documents in order to conclude that this record does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention. (See para. 7.80 of the Panel Report.)

[6] See, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

survey such invocations of Article XXI made in the context of accession negotiations to the GATT 1947 and WTO Agreement.[7]

1.4. Additionally, the Panel observes that on several occasions, GATT contracting parties and WTO Members have unilaterally invoked Article XXI in the context of notifying measures to various GATT and WTO bodies.[8] The Panel recalls the statements of the Appellate Body in *EC − Chicken Cuts* that it is unlikely that a "concordant, common and discernible pattern" of practice can be established from the pronouncements of one or very few parties to a multilateral treaty.[9] The Panel also recalls the Appellate Body's caution about deducing agreement, without more, from "a lack of reaction" or protest by other Members.[10] Accordingly, the Panel does not consider that it can ascribe any weight to the silence of other GATT contracting parties and WTO Members as to these notifications. The Panel has consequently omitted from this survey such unilateral invocations of Article XXI except where they provoked debate.

1.5. The following Section proceeds to summarize the relevant conduct of GATT contracting parties and WTO Members, subsequent to the conclusion of the GATT 1947, when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.

SUBSEQUENT CONDUCT OF GATT CONTRACTING PARTIES AND WTO MEMBERS

United States v. Czechoslovakia (1949)

1.6. In 1948, the United States enforced its "Comprehensive Export Schedule" by imposing export controls on US exports going to certain parts of Europe.[11] At the time, the United States licensed products in short supply or of military significance to Western European countries that were participating in the Marshall Plan, but exports of such products to Eastern European countries that did not participate in the Marshall Plan became subject to export controls. Czechoslovakia fell into the group of non-participating Eastern European countries, for which reason products destined for its borders were subject to export licensing controls. The United States explained that one of the purposes of the export control regime was "to prevent the shipment to Eastern Europe of things that would contribute significantly to the military potential of that region".[12] Czechoslovakia asserted that the United States' use of the term "military potential" referred to "an entirely different thing" than what was covered by the terms of Article XXI(b)(ii), in particular, the term "military establishment". Czechoslovakia claimed that the US export control measure was inconsistent with the basic principles of Articles I and XIII of the GATT. Czechoslovakia also requested all relevant information concerning the administration of restrictions and the distribution of licences by the United States pursuant to Article XIII.[13] In response, the United States referred to Articles XXI(b)(i) and XXI(a) of the GATT. The United States stated that it considered it to be "contrary to its security interest—and to the

[7] See, e.g. GATT Contracting Parties, Twenty-Sixth Session, Report by the Working Party on the Accession of the United Arab Republic, L/3362, paras. 20-22; GATT Contracting Parties, Accession of Thailand, Questions and Replies to the Memorandum on Foreign Trade Regime (L/4803), L/5300, pp. 5 and 18-26; and GATT Contracting Parties, Accession of Saudi Arabia, Questions and Replies to the Memorandum on the Foreign Trade Regime (L/7489 & Add.1), L/7645/Add.1, pp. 27 and 32.

[8] See, e.g. Committee on Technical Barriers to Trade, Notification by Thailand, G/TBT/Notif.95/123, p. 1 (referring to consumer protection and national security as its objective and rationale for undertaking a particular measure); and Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions by the Seychelles, G/MA/QR/N/SYC/1, pp. 23, 25, 35, 36, 45 and 49.

[9] Appellate Body Report, *EC − Chicken Cuts,* para. 259.

[10] Ibid. para. 272.

[11] GATT Contracting Parties, Third Session, Statement by the Head of the Czechoslovak Delegation Mr. Zdenèk AUGENTHALER to Item 14 of Agenda (CP.3/2/Rev.2), GATT/CP.3/33, p. 3 (referring to the official publication of the US Department of Commerce − "Comprehensive Export Schedule" No. 26, issued on 1 October 1948, p. 18.)

[12] Ibid. p. 5. (referring to the statement of Mr. Willard L. Thorp made at the General Assembly in Paris on 4 November 1948).

[13] Ibid. pp. 5-6. Czechoslovakia stated that the notion of "war or military potential" is an extremely elastic notion, embracing the reserves of man-power and economic resources of a country including the extent to which both have been militarized. In addition, this concept also embraces a time element, that is, not only the possibility to develop military strength but also the degree of actual preparedness. Thus, according to Czechoslovakia, Article XXI should be interpreted narrowly so as to avoid a situation in which "practically everything may be a possible element of war potential". (Ibid.)

security interest of other friendly countries—to reveal the names of the commodities that it considers to be most strategic".[14]

1.7. At the June 1949 meeting of the GATT Council, Czechoslovakia requested a decision on whether the United States had failed to carry out its obligations under the GATT through its administration of the export licenses.[15] The United Kingdom expressed the view that "every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement".[16] Pakistan stated that Article XXI embodied "exceptions to all other provisions of the Agreement, [and] should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article".[17] Cuba stated that Czechoslovakia's request should be dismissed because it lacked a factual basis. Moreover, Cuba considered that the United States had justified its case under Article XXI "whose provisions overrode those of Article I".[18]

1.8. In response to Czechoslovakia's request for a decision under Article XXIII, only Czechoslovakia voted in the affirmative.[19] Czechoslovakia noted that it did not consider that the contracting parties had made a legally valid decision or correct interpretation of the General Agreement, and that it would regard itself free to take any steps necessary to protect its further interests.[20]

United States − Suspension of Obligations with Czechoslovakia (1951)

1.9. In 1951, the United States requested the GATT Council to formally dissolve its reciprocal obligations with Czechoslovakia under the GATT 1947, and to withdraw the benefits of trade-agreement tariff concessions from Czechoslovakia.[21] The United States justified this request by arguing that the assumption that it was in its and Czechoslovakia's mutual interests to promote the movement of goods, money and people between them was no longer valid.[22] Although the United States did not formally refer to Article XXI of the GATT 1947, it argued that "manifestations of Czechoslovak ill-will" towards the United States and the progressive integration of Czechoslovakia's economy into the Soviet bloc had led the United States to request that the GATT obligations between the two countries be dissolved.[23] Czechoslovakia considered the United States' request to be "another attempt [by the United States] to achieve political ends by means of economic pressure".[24] Czechoslovakia was of the view that the "General Agreement should not be misused for the enforcement of political intentions" and for "forceful, unilateral imposition of a foreign will, by means of the violation of agreements".[25]

[14] GATT Contracting Parties, Third Session, Reply by the Vice Chairman of the United States Delegation, Mr John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda, GATT/CP.3/38, pp. 2-3 and 9-11. In addition, the US delegate provided dollar estimates of approved Czechoslovakian licences for different products such as electrical equipment and machinery to demonstrate that the United States had been highly selective in imposing controls for security reasons and had not denied licences where the product was for peaceful use. (Ibid.) See also GATT Contracting Parties, Third Session, Reply of the Head of the Czechoslovak Delegation, Mr. Zdenèk AUGENTHALER, to the Speech of the Vice-Chairman of the USA Delegation, Mr. John W. Evans, under Item 14 of the Agenda, GATT/CP.3/39, pp. 2-3.

[15] See GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 4.

[16] Ibid. p. 7; and GATT Contracting Parties, Third Session, Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1.

[17] GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 6.

[18] Ibid. p. 5.

[19] Ibid. p. 9. The vote was one affirmative, 17 negative, three abstentions and two absents. (Ibid.)

[20] Ibid. p. 10.

[21] GATT Contracting Parties, Sixth Session, Statement by the United States, Termination of Obligations between the United States and Czechoslovakia under the Agreement, GATT/CP.6/5, p. 1.

[22] Ibid. According to the United States, Czechoslovakia had persecuted and harassed American firms, imprisoned American citizens, and confiscated the property of American citizens without justification. (Ibid.)

[23] Ibid.

[24] GATT Contracting Parties, Sixth Session, Termination of Obligations between the United States and Czechoslovakia under the Agreement, Statement by Czechoslovakia, GATT/CP.6/5/Add.1, p. 2.

[25] Ibid. p. 3.

1.10. The GATT CONTRACTING PARTIES declared that the United States and Czechoslovakia were free to suspend, each with respect to the other, the obligations of the GATT.[26]

United States − Imports of Dairy Products (1951)

1.11. In 1951, the Netherlands and Denmark each circulated a memorandum to the GATT contracting parties noting the imposition by the United States of certain import controls on dairy products under Section 104 of the Defense Production Act.[27] Section 104 stated that these import controls were "necessary for the protection of the essential security interests and economy of the United States in the existing emergency in international relations".[28] The Netherlands and Denmark considered these restrictions to be inconsistent with Article XI of the GATT 1947.[29] In response, the United States circulated a memorandum noting that these objections had been formally communicated to Congress.[30] The United States also included two statements made to the Senate Banking and Currency Committee by the Assistant Secretary of State and Under Secretary of Agriculture recommending the repeal of Section 104.[31] The Assistant Secretary of State had asserted to the Committee that "the restrictions required by Section 104 appear to the Department clearly to violate the provisions of the [GATT]."[32] The Under Secretary of Agriculture also noted to the Committee that "[i]t seems unlikely that we will be able to convince these [objecting] countries that certain imports, which would at most have a limited effect on our agriculture, would endanger the essential security interests and economy of the United States."[33] The Under Secretary stated additionally that "if we use the security exception of the [GATT] to justify protection of a few selected products, this would give other countries a good excuse for using the same exception to justify any protective barriers by which they may wish to limit their imports of our farm products."[34]

1.12. At the September 1951 meeting of the GATT contracting parties, the Netherlands and Denmark reiterated their objections to the measure.[35] Denmark also noted that it agreed with the remarks of the Canadian representative in an earlier speech that "it was obvious that defence production and national security would seem to have little connection with the import control of cheese."[36] Italy, New Zealand, Norway, Australia, France, Canada, Finland, the United Kingdom and Sweden also noted their opposition to the measure.[37] Canada asserted that it was difficult "to find any grounds for the action whatsoever".[38] The United States did not contest that the measure infringed the GATT 1947, and responded that Section 104 had been recommended as a last-minute

[26] GATT Contracting Parties, Sixth Session, Item 21 − Termination of Obligations between the United States and Czechoslovakia under the Agreement, Declaration Proposed by the Delegation of the United States, GATT/CP.6/5/Add.2.

[27] GATT Contracting Parties, Sixth Session, Item 30 − Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26; GATT Contracting Parties, Sixth Session, Item 30 − Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1; and GATT Contracting Parties, Sixth Session, Item 30 − Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28. See also GATT Contracting Parties, Sixth Session, Summary Record of the First Meeting held on 17 September 1951, GATT/CP.6/SR.1, p. 4.

[28] GATT Contracting Parties, Sixth Session, Item 30 - Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

[29] GATT Contracting Parties, Sixth Session, Item 30 − Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26, p. 3; and GATT Contracting Parties, Sixth Session, Item 30 − Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

[30] GATT Contracting Parties, Sixth Session, Item 30 − Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1.

[31] Ibid. pp. 4 and 7.

[32] Ibid. p. 3.

[33] Ibid. p. 6.

[34] Ibid.

[35] GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 3-4.

[36] Ibid. p. 4.

[37] Ibid. pp. 4-7. Czechoslovakia also noted that while it did not particularly suffer from the measure in question, it hoped that the contracting parties would always be prepared to defend the spirit of the GATT. (Ibid. p. 7.)

[38] Ibid. p. 6.

amendment by a committee "which had limited acquaintance with international problems".[39] The United States asserted that the measure should be regarded as an "isolated incident and must not be held as an indication of any reorientation of the basic policy of the United States".[40] The United States noted that vigorous efforts were being made by the executive branch to secure the repeal of the measure, and asked that its government be given the opportunity to complete this action.[41] The Council agreed to keep this matter on its agenda.[42]

1.13. At the October 1951 meeting of the GATT contracting parties, a resolution was adopted affording the United States a reasonable period of time to repeal the measure, subject to a reporting obligation.[43] In 1952, the United States provided a report noting that Section 104 had been revised but not repealed.[44] At the October 1952 meeting of the GATT contracting parties, several contracting parties expressed their continuing opposition to the measure.[45] The United States acknowledged that the measure was inconsistent with the GATT 1947 and noted that it would not object to other contracting parties withdrawing reasonably necessary concessions.[46] The GATT CONTRACTING PARTIES agreed to convene a Working Party to examine the issue.[47] In November 1952, the Working Party recommended that the GATT contracting parties authorize the Netherlands to impose a retaliatory quota on wheat flour from the United States.[48] This recommendation was adopted as a resolution at the November 1952 meeting of the GATT CONTRACTING PARTIES.[49]

1.14. The GATT CONTRACTING PARTIES re-authorized this retaliatory quota on an annual basis until 1959, pursuant to the recommendations of subsequent Working Parties.[50]

[39] GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 7-8.

[40] Ibid. p. 8.

[41] Ibid.

[42] Ibid. p. 9.

[43] GATT Contracting Parties, Sixth Session, Summary Record of the Twenty-Seventh Meeting held on 27 October 1951, GATT/CP.6/SR.27, p. 8. For the draft resolution, see GATT Contracting Parties, Sixth Session, Item 30 − Resolution of the Contracting Parties on the United States Import Restrictions on Dairy Products imposed under Section 104 of the United States Defence Production Act, Proposal by the Chairman after Consultation with Interested Delegations, GATT/CP.6/51. For the adopted resolution, see GATT Contracting Parties, Decisions, Declarations and Resolutions of the Contracting Parties at the Special Session held on March-April 1951 and the Sixth Session held on September-October 1951, GATT/CP/130, pp. 14-15.

[44] See GATT Contracting Parties, United States' Restrictions on Dairy Products, Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19, p. 1. See also GATT Contracting Parties, United States' Restrictions on Dairy Products, Supplementary Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19/Add.1.

[45] See GATT Contracting Parties, Seventh Session, Summary Record of the Tenth Meeting held on 28 October 1952, SR.7/10, pp. 2-8. The Netherlands, New Zealand, Denmark, Canada, Italy, Norway, Cuba, Australia, United Kingdom, India, Czechoslovakia and South Africa expressed objections to the measure, and Pakistan expressed gratitude that the United States had taken some steps to mitigate the effects of the restrictions. (Ibid.)

[46] Ibid. pp. 8-9.

[47] Ibid. p. 9.

[48] Working Party 8 on Netherlands Action under Article XXIII:2, Report to the Contracting Parties, L/61, p. 3. The Netherlands had requested that it be allowed to impose an upper limit of 57,000 metric tons on the import of wheat flour, but the Working Party recommended that the Netherlands impose an upper limit of 60,000 metric tons. (Ibid. pp. 1-3.)

[49] GATT Contracting Parties, United States Import Restrictions on Dairy Products, Draft Resolution, L/59; and GATT Contracting Parties, Seventh Session, Summary Record of the Sixteenth Meeting held on 8 November 1952, SR.7/16, p. 7.

[50] Negotiating Group on Dispute Settlement, Communication from the United States, MTN.GNG/NG13/W/40, fn 4 to p. 9. See also GATT Contracting Parties, United States Restrictions on Dairy Products, Resolution Proposed for Adoption by the CONTRACTING PARTIES, L/154; GATT Contracting Parties, United States Import Restrictions on Dairy Products, Resolution of 5 November 1954, L/280; GATT Contracting Parties, Tenth Session, Report of the Working Party, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, L/464; GATT Contracting Parties, Eleventh Session, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, Report of the Working Party, L/590; GATT Contracting Parties, Twelfth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/754; and GATT Contracting Parties, Thirteenth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/918.

United States − Section 232 of the Trade Expansion Act (1968)

1.15. In 1968, the United Kingdom and Japan submitted a notification to the Committee on Trade in Industrial Products expressing concern that certain powers given to the President of the United States under the Trade Expansion Act of 1962 could disrupt foreign trade.[51] During the Committee's first examination of the notified barriers in 1969[52], Japan expressed concern over the "lack of a definition of 'security'" and "the wide discretion as to form of action and the lack of a time-limit for carrying out investigations" under the Trade Expansion Act of 1962.[53] The United States responded that the legislation "was in conformity with Article XXI", and pointed out that "the existence of an institutional framework for national security cases could be regarded as a safeguard, since it ensured full consideration of the merits of each case before action was taken."[54] In 1970, at the next examination of these notifications by a Working Group convened for this purpose, the Working Group concluded that there was a "divergence of view as to the meaning and scope of certain essential concepts in the GATT, in particular … the scope of some of the exceptions … especially Articles XX and XXI".[55]

1.16. In 1970, the Joint Working Group on Import Restrictions was notified of a global quota maintained by the United States on petroleum oil products.[56] At the April 1970 meetings of the Joint Working Group[57], the European Communities and Canada asserted that they considered these restrictions to be inconsistent with the GATT 1947.[58] The European Communities did not accept that these restrictions could be justified by national security considerations and considered that the restrictions had been applied to the benefit of the petroleum industry of the United States.[59] The European Communities also asserted that a recent US Task Force had given arguments against the maintenance of the system for security reasons.[60] The United States responded that the restrictions had been applied under Section 232 of the Trade Expansion Act of 1962 "in accordance with Article XXI", given the "high degree of industrialization of the United States as well as its remoteness from some major oil supplying countries".[61]

See also GATT Contracting Parties, Report of the Working Party on Italian Import Restrictions, L/1468, paras. 5-6. In 1961, a Working Party was convened to examine a variety of Italian import restrictions and prohibitions. Before the Working Party, Italy asserted that prohibitions or restrictions on certain items were justified under the "provisions of Article XX or Article XXI of the General Agreement". (Ibid. para. 5.) The Working Party did not respond specifically to this invocation, but noted in general that they deplored "the continued use of discriminatory restrictions for which no justification could be found". (Ibid. para. 6.)

[51] Committee on Industrial Products, Inventory of Non-Tariff Barriers, COM.IND/4, pp. 231-232. The notification referred to "escape clause tariff action", or the powers under the Trade Expansion Act of 1962 to increase the rate of import duty on any item in order to effect additional protection of a domestic industry. (Ibid. p. 231.)

[52] See Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19-25 June 1969, COM.IND/W/7, para. 1.

[53] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, Part 4 − Specific Limitations on Imports and Exports, COM.IND/W/12, p. 269.

[54] Ibid. pp. 269-271.

[55] Committee on Trade in Industrial Products, Draft Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), Revision, Spec(70)48/Rev.1, para. 4; and Committee on Trade in Industrial Products, Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), COM.IND/W/49, para. 5.

[56] Joint Working Group on Import Restrictions, Import Restrictions, Addendum, Industrial Products, L/3377/Add.2, pp. 1-2; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 4. The United States had limited imports to 12 per cent of domestic production. (See Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49.) Notifications could be provided to the Joint Working Group by countries maintaining the restrictions as well as their trading partners. (Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 5.)

[57] Ibid. para. 1.

[58] Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49. During these meetings, there was also debate on whether certain restrictions maintained by Japan and Switzerland on various fissile chemical elements could be justified under Article XXI. (Ibid. pp. 71 and 73.)

[59] Ibid. p. 49.

[60] Ibid.

[61] Ibid.

1.17. Although the Council agreed that the Joint Working Group on Import Restrictions should continue its review of import restrictions, the Joint Working Group did not meet again after 1970.[62]

Austria − Penicillin and Other Medicaments (1970)

1.18. In 1970, the Joint Working Group on Import Restrictions was notified of certain restrictions maintained by Austria on penicillin, tyrothricin and related medicaments, which took the form of either import licensing restrictions or quotas.[63] At the April 1970 meetings of the Joint Working Group[64], a question was posed to Austria as to "what part of Article XXI might cover this restriction".[65] Austria responded that it regarded the restriction to be necessary under Article XXI(b)(ii) of the GATT 1947 "in order to have available a local source of supply in case of emergency".[66] In 1971, these restrictions were considered again by the Group of Three.[67] The Group of Three noted Austria's explanation that the restrictions were maintained for defence reasons, but concluded that as "other countries find it possible to do without restrictions, it should … be possible for Austria to do the same".[68] In 1972, these restrictions were considered again by the Group on Residual Restrictions.[69] At the January 1972 meeting of the Group, the United States recalled the recommendation of the Group of Three that Austria should eliminate the restrictions on these products "as other countries did not find it necessary to maintain them for security or other reasons".[70] At the July 1972 session of the Committee on Trade and Development, in the context of discussions on the Second Report of the Group of Three[71], Austria asserted that it would not be possible to liberalize imports of these products "for reasons previously stated", but noted that "sympathetic consideration would be given in this connexion to any trade problems faced by developing countries."[72]

[62] See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.

[63] Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23-24; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6. The Joint Working Group's documents from April 1970 and November 1970 label these restrictions as "global quotas", but documents from June 1970 label these as "discretionary licensing" restrictions. (Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23-24; Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6; and Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Table of Import Restrictions (Chapters 25-99), COM.IND/W/28/Rev.2, p. 8.) Later documents from the Group on Residual Restrictions appear to clarify that these products were subject to *either* import licensing restrictions or global quotas. (See Group on Residual Restrictions, Additional Products Suggested for Examination, Note by the Secretariat, COM.TD/W/140, p. 14; and Group on Residual Restrictions, Proceedings of the Meeting of the Group held on 24-25 January 1972, Note by the Secretariat, COM.TD/85, para. 58.)

[64] Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 1.

[65] Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 95.

[66] Ibid. Although the Council agreed that the Joint Working Group on Import Restrictions should continue to annually or biennially review such import restrictions, the Joint Working Group did not meet again after 1970. (See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.)

[67] See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 14. The Group of Three was convened by the Committee on Trade and Development, and consisted of the Chairman of the contracting parties, the Chairman of the Council and the Chairman of the Committee on Trade and Development. (See Committee on Trade and Development, Report of the Committee on Trade and Development to the Contracting Parties, L/3487, para. 9.)

[68] Group of Three, Preliminary Report of the Group of Three, W(71)2, p. 23; and Group of Three, Report of the Group of Three, L/3610, p. 21.

[69] Group on Residual Restrictions, Note on Proceedings of the Meeting of the Group held on 24-25 January 1972, Prepared by the Secretariat, COM.TD/85, para. 1.

[70] Ibid. para. 58.

[71] The Group of Three had noted in their Second Report that Austria had not "found it possible so far to liberalize imports of penicillin, tyrothricin and medicaments as recommended in L/3610". (Group of Three, Second Report, L/3710, p. 20.)

[72] Committee on Trade and Development, Proceedings of the Twenty-First Session, Note Prepared by the Secretariat, COM.TD/87, para. 13.

1.19. Austria continued to maintain certain restrictions on penicillin and related medicaments until December 1990, when these were abolished as part of the Uruguay Round negotiations at the request of the United States.[73]

Sweden − Import Restrictions on Certain Footwear (1975)

1.20. In 1975, Sweden notified the GATT Council of its intention to introduce a global import quota system for leather shoes, plastic shoes and rubber boots. Sweden advised that it was introducing this system "in order to allow time to remedy the serious difficulties that have arisen in this sector of the industry", referring to downward trends in the Swedish shoe industry that had begun in the 1960s and had accelerated during the 1970s.[74] Sweden considered that the reasons underlying this development were the relatively high production costs in Sweden, combined with the traditional liberal trade policy pursued by the Swedish Government, which thereby encouraged and made possible a very substantial increase in the volume of imports. Sweden considered that "[t]he continued decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy."[75] Sweden's security policy necessitated the maintenance of a minimum domestic production capacity in vital industries, such capacity being considered by Sweden to be "indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations".[76] At the October 1975 meeting of the GATT Council, several contracting parties expressed concern at the Swedish decision, taken at a time of high unemployment in their own countries.[77] They noted that Sweden had not provided a detailed economic justification for the measures, and expressed doubts as to the justification for these measures under the GATT.[78] Sweden responded that it considered the measure to be taken in conformity with "the spirit of Article XXI", but added that it did not wish to deprive contracting parties of the possibility to consult and therefore declared its readiness to consult bilaterally with interested contracting parties even if such a consultation was not formally required by Article XXI.[79] Many delegations reserved their rights under the GATT and took note of Sweden's offer to consult.[80]

1.21. In March 1977, Sweden notified the GATT Council that it intended to terminate the quotas in respect of leather shoes and plastic shoes as of 1 July 1977.[81]

European Communities v. Argentina (1982)

1.22. In 1982, Argentina brought to the GATT Council's attention the suspension by the European Communities, Canada and Australia of imports from Argentina.[82] Argentina noted that there had

[73] See Committee on Trade and Development, Action by Governments Relevant to the Provisions of Part IV, Addendum, COM.TD/W/170/Add.7, p. 2; Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Part IV, Specific Limitations, NTM/INV/IV, Inventory Number IV.A.4; Group of Negotiations on Goods, Communication from Austria, Uruguay Round − Market Access, MTN.GNG/NG1/W/63, p. 2; and GATT Council, Trade Policy Review Mechanism, Austria, Report by the Secretariat, C/RM/S/19A, para. 46.

[74] Communication from Sweden, *Sweden − Import Restrictions on Certain Footwear,* L/4250, paras. 1 and 3.

[75] Ibid. para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 8; and GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, pp. 17-18.

[76] Communication from Sweden, *Sweden − Import Restrictions on Certain Footwear*, L/4250, para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

[77] Ibid.

[78] Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

[79] GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

[80] Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

[81] Communication from Sweden, *Sweden − Import Restrictions on Certain Footwear*, Addendum, L/4250/Add.1. Relatedly, at the December 1983 meeting of the Group on Quantitative Restrictions and Other Non-Tariff Measures, it was recorded by the Secretariat that some delegations wondered "how a discriminatory restriction, such as that imposed by one contracting party on imports of footwear, could be compatible with the provisions of Article XXI". (Group on Quantitative Restrictions and Other Non-Tariff Measures, Meeting held on 5-8 December 1983, Note by the Secretariat, NTM/5, para. 27.)

[82] Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317.

been no pronouncement by the UN Security Council authorizing the application of Article XXI(c) of the GATT.[83] Argentina stated that the measures adopted by the European Communities (other than the United Kingdom), Canada and Australia were entirely without justification, coming from countries with which the Argentine Republic had maintained relations. Such measures therefore constituted a hostile act and "flagrant economic aggression".[84] Further, such measures were not derived from any "economic or commercial issue", but from the unjustified interference in a long-standing territorial dispute in the region of the Malvinas Islands.[85] Argentina stated that the measures adopted by the United Kingdom similarly had no justification, even under Article XXI(b) of the GATT, since the Security Council resolution which had recognized that there was a breach of the peace situated the problem solely in the region of the Malvinas Islands, and consequently the metropolitan territory of the United Kingdom was not affected.[86] The European Communities, Canada and Australia issued a joint communication stating that they had taken the measures at issue in light of the situation addressed in UN Security Council Resolution 502, on the basis of their "inherent rights of which Article XXI of the General Agreement is a reflection".[87]

1.23. At the May 1982 meeting of the GATT Council, Argentina reiterated that the measures were not applied for "economic and trade reasons", but were based on reasons of a "political nature and were meant to exert political pressure on the sovereign decisions of Argentina in order to intervene in a conflict in which only one of the countries was involved".[88] Argentina stressed that UN Security Council Resolution 502 had not asked for or authorized the adoption of any measures such as the trade sanctions taken, nor were the measures justified under Article XXI. Argentina considered that the "concerted coercive action" taken by a number of economically powerful countries violated the letter and the spirit of the GATT.[89] The European Communities stressed that the measures were taken on the basis of their inherent rights, of which Article XXI was a reflection, and did not require notification, justification or approval, as confirmed by 35 years of implementation of the GATT.[90] Canada stated that the situation which had necessitated the measures needed to be resolved by appropriate action outside the GATT, as the GATT had neither the competence nor the responsibility to deal with the political issue that had arisen. Canada also noted that Article XXI did not contain a definition of "essential security interests", and that many contracting parties had taken the same or similar actions for political reasons. In the present case, the action had been taken to encourage a peaceful settlement by temporarily suspending the normal operation of some provisions of the GATT. Canada considered that the fact that the action had been taken was not really unprecedented; what was unprecedented was the examination of the action in the GATT.[91] Australia endorsed the statements of the European Communities and Canada, and stated that the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification.[92]

1.24. Peru, Brazil, Uruguay, Zaire, Colombia, Dominican Republic, Cuba, Pakistan, Romania and Poland expressed opposition to, or concern at, what they considered was a dangerous precedent involving the use by contracting parties of trade and economic measures for non-trade reasons, and which were not justified under the GATT.[93] India, Yugoslavia, Indonesia, Hungary and

[83] Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317, para. III.

[84] Ibid. para. IV.

[85] Ibid. Argentina referred in this regard to UN Resolutions 2065 (XX), 3160 (XXVIII) and 31/49 (XXXI). (Ibid.)

[86] Ibid. para. V.

[87] Communication from the Commission of the European Communities, Australia and Canada, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5319/Rev.1, para. 1(b).

[88] GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 2.

[89] Ibid. p. 4.

[90] Ibid. p. 10.

[91] Ibid. pp. 10-11.

[92] Ibid. p. 11.

[93] Ibid. pp. 4-9. For example, Brazil drew attention to subparagraph (iii) of Article XXI(b), and stated that the present case could set a dangerous precedent if the measures were considered necessary for the protection of essential security interests taken in time of war or other emergency in international relations, because such interests had not been demonstrated. While this matter could be considered to be an emergency in international relations, Brazil stressed that this was the case only in respect of the region in question, as defined by the Security Council, whose action had a bearing on the GATT in light of Article XXI(c). Brazil also stated that it was difficult to accept that the countries in question, except for one, were taking this action in protection of their essential security interests. (GATT Council, Minutes of Meeting held on 7 May 1982,

Czechoslovakia considered more generally that the GATT Council should approach the issues in this case with caution.[94] Japan also considered that the interjection of political elements into GATT activities would not facilitate the Organization's carrying out of its functions.[95]

1.25. The Philippines noted that UN Security Council Resolution 502 referred only to Argentina and the United Kingdom, while the joint communication issued by the European Communities, Canada and Australia gave the impression that the European Communities, Canada and Australia had taken these measures in the exercise of their inherent rights, of which Article XXI was a reflection. The Philippines questioned this argument as applied to the European Communities, which was not a contracting party to the GATT 1947.[96] Spain considered that the actions of the United Kingdom could be justified under Article XXI(b)(iii), but had doubts that the same could be said for other States, which were not technically in the same position as the United Kingdom with respect to Argentina.[97]

1.26. The United States considered that, regrettably, contracting parties had in the past used sanctions involving trade in the context of their security interests as they perceived them. However, the GATT had never been the forum for resolution of disputes whose essence was security and not trade, and for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes. Trade measures could not be "split off" as if taken in a vacuum, since the specific justification of international measures could not be discussed in the context of broadly embargoed trade.[98] The United States also expressed the view that the GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise, since no country could participate in the GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests.[99] New Zealand questioned whether the GATT was the appropriate body in which the circumstances that had led to the imposition of economic sanctions should be debated. New Zealand stated that it has also imposed sanctions on Argentina for reasons similar to those given by the European Communities, Canada and Australia. New Zealand considered that it had an inherent right as a sovereign state to take such action and that such actions were in conformity with New Zealand's rights and obligations under the GATT.[100] Singapore expressed the view that the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests, while also recognizing the danger of a broad interpretation of Article XXI.[101] Norway also considered that the European Communities, Canada and Australia did not contravene the GATT in taking the measures in question.[102]

1.27. At the June 1982 meeting of the GATT Council, Argentina formally requested an interpretation of Article XXI of the GATT 1947: (a) to know whether Article XXI exempted contracting parties from obligations regarding notification and surveillance procedures; (b) to determine the natural rights which could be inherent for contracting parties and had been invoked in relation to Article XXI in general; (c) to establish whether any contracting party, including one not involved in a problem between two other contracting parties, could interpret "per se" that there existed an emergency in international relations as referred to in Article XXI(b)(iii) and consequently take unilateral measures; and (d) to determine whether one or more contracting parties could take action under Article XXI(c) without the prior existence of a specific provision adopted by the United Nations authorizing the application of restrictive trade measures.[103] This proposal was supported by a number of contracting parties.[104] Canada did not support the proposal, expressing the view that the case of Ghana was the only appropriate precedent for the present case, and asserting that it provided an example of the

C/M/157, p. 5.) Pakistan did not consider the situation addressed by UN Security Council Resolution 502 to be an "extreme" emergency in international relations, of the sort permitted under the spirit of the GATT. (GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 7.)

[94] Ibid. pp. 7-9.
[95] Ibid. p. 9.
[96] Ibid. p. 7.
[97] Ibid. p. 6.
[98] Ibid. p. 8.
[99] Ibid. p. 8.
[100] Ibid. p. 9.
[101] Ibid. p. 7.
[102] Ibid. p. 10.
[103] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, pp. 15-16.
[104] Brazil, Cuba, India, Uruguay, Colombia, Spain, Peru, Romania, Nigeria, Yugoslavia, the Philippines and the Dominican Republic (with Venezuela and Ecuador as observers). (Ibid. pp. 17-18.)

notion of national security being interpreted in a broad sense by the government of that country.[105] Australia doubted the need for an interpretation of Article XXI, given its infrequent use thus far.[106] The United States considered that debate in the Council would not serve a useful purpose, stressing that the GATT had no role in a crisis of military force.[107] Japan, New Zealand and Norway similarly expressed doubts that a note interpreting Article XXI would lead to useful results.[108] The European Communities suggested that if the Council were to adopt a decision, the proposal should have a chance of obtaining a consensus.[109] The Chair subsequently reported that informal consultations with delegations to arrive at suggestions for resolving the matter had not resulted in conclusions that could lead to such suggestions.[110]

The 1982 Decision regarding Article XXI

1.28. On 29 November 1982, the contracting parties adopted a Ministerial Declaration in which the contracting parties decided, in drawing up their work program and priorities for the 1980s, to "abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".[111] On 30 November 1982, the GATT CONTRACTING PARTIES adopted a Decision Concerning Article XXI of the General Agreement (1982 Decision), setting forth procedural guidelines for the application of Article XXI, until such time as the GATT CONTRACTING PARTIES might decide to make a formal interpretation of Article XXI.[112] Under the 1982 Decision, the GATT CONTRACTING PARTIES noted that: (a) the exceptions envisaged in Article XXI "constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"; (b) recourse to Article XXI could constitute an element of disruption and uncertainty for international trade, and "affect benefits accruing to contracting parties under the GATT"; and (c) consequently, "in taking action in terms of the exceptions provided in Article XXI", contracting parties should take into consideration the interests of third parties which might be affected. The GATT CONTRACTING PARTIES therefore undertook to ensure that contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI, and noted that all contracting parties affected by actions taken under Article XXI retained their full rights under the GATT.[113]

United States − Imports of Sugar from Nicaragua (1983)

1.29. In 1983, the President of the United States announced that the United States would be reducing Nicaragua's allocation of the total import quota for sugar. The President stated that by denying to Nicaragua a foreign exchange benefit, the United States "hoped to reduce the resources available to [Nicaragua] for financing its military build-up, and its support for subversion and extremist violence in the region".[114] This announcement was subsequently implemented pursuant to the President's authority under the Tariff Schedules of the United States to give due consideration to the interests of domestic producers in the sugar market.[115]

1.30. Following the announcement, Nicaragua requested consultations with the United States, arguing that the measure would create "serious adverse trade effects".[116] The consultations did not achieve a mutually satisfactory solution, and Nicaragua subsequently requested the establishment of a panel.[117] At the July 1983 meeting of the GATT Council, the United States stated that "[t]he motives for the measure were not strictly trade considerations; and it followed that any examination

[105] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, p. 18. For the statements of Ghana referred to by Canada, see, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

[106] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, p. 19.

[107] Ibid.

[108] Ibid. p. 20.

[109] Ibid. p. 21.

[110] GATT Council, Minutes of Meeting held on 2 November 1982, C/M/162, p. 18.

[111] GATT Contracting Parties, Thirty-Eighth Session, Ministerial Declaration adopted on 29 November 1982, L/5424, p. 3.

[112] Decision Concerning Article XXI of the General Agreement of 30 November 1982, L/5426.

[113] Ibid.

[114] GATT Panel Report, *US − Sugar Quota*, L/5607, para. 2.3.

[115] Ibid.

[116] Communication from Nicaragua, *US − Sugar Quota*, L/5492.

[117] Communication from Nicaragua, *US − Sugar Quota, Recourse to Article XXIII:2 by Nicaragua*, L/5513.

of this matter in purely trade terms would be sterile or disingenuous."[118] The United States also questioned the utility of resolving this issue by establishing a panel, stating that "[a] political solution could resolve the trade aspect of this dispute; but a GATT panel could not appropriately examine or assist in the resolution of the political or security issues that lay at its core."[119] India considered that the Council should follow established GATT practice and establish a panel, as Nicaragua had requested a panel after fulfilling the proper procedures and that "[i]t was not for the Council to judge the merits of the case at this stage."[120]

1.31. The Council agreed to establish a panel[121], and the panel's composition and terms of reference were announced at the October 1983 meeting of the GATT Council.[122]

1.32. Before the panel, Nicaragua argued that the United States had violated Articles II, XI and XIII and Part IV of the GATT 1947 by reducing its sugar quota below the level agreed upon in the United States schedule of concessions.[123] Nicaragua also cited the "fundamental principle" embodied in paragraph 7(iii) of the 1982 Ministerial Declaration that "no contracting party should use trade measures to exert pressure for the purposes of solving non-economic problems."[124] In response, the United States argued that it was "neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms".[125] In the view of the United States, while the action did affect trade, it was not taken for trade-policy reasons.[126] Consequently, any attempt to discuss the issue in purely trade terms, "divorced from the broader context of the dispute", would be disingenuous.[127] The panel considered that within its terms of reference, it could examine the measures "solely in the light of the relevant GATT provisions, concerning itself with only the trade issues under dispute", and therefore did not consider Article XXI.[128] The panel proceeded to conclude that the reduced sugar quota was inconsistent with the United States' obligations under Article XIII:2 of the GATT 1994, and exercised judicial economy over Nicaragua's other claims.[129]

1.33. At the March 1984 meeting of the GATT Council, Nicaragua commended the panel's findings and added that it had been perplexed by "the US reasons for adopting the measure, the refusal to have recourse to exceptions provided under the General Agreement, and the questioning of the GATT's competence to examine this case".[130] Nicaragua "wondered what would the United States consider to be the competent forum for discussing the justification of a measure designed to restrict access to a market which had the effect of reducing export earnings".[131] The United States reiterated its view that examination of the matter in purely trade terms within the GATT was disingenuous, noting that "the reduction in Nicaragua's sugar imports had not secured any economic or trade benefit for the United States."[132] The United States added that while it would not object to the adoption of the report, a resolution of its broader dispute with Nicaragua would be required before it would remove the contested measure.[133] Venezuela, Mexico and Argentina considered that the US measure had contravened the Ministerial Declaration[134], and Cuba, the Dominican Republic and Switzerland criticized the United States for using economic measures to secure political objectives.[135] Several contracting parties including Venezuela, Mexico and Brazil and the United Kingdom, on behalf of Hong Kong reiterated the importance of positively resolving the case through the

[118] GATT Council, Minutes of Meeting held on 12 July 1983, C/M/170, p. 12.
[119] Ibid.
[120] Ibid.
[121] Ibid. p. 13. Colombia, Spain, Brazil, Singapore, Argentina, Switzerland and Finland (on behalf of the Nordic countries) supported Nicaragua's request for a panel. (Ibid.)
[122] GATT Council, Minutes of Meeting held on 3 October 1983, C/M/171, p. 12.
[123] GATT Panel Report, *US –Sugar Quota*, L/5607, para. 3.1.
[124] Ibid. para. 3.9.
[125] Ibid. para. 3.10.
[126] Ibid.
[127] Ibid. para. 3.11.
[128] Ibid. para. 4.1.
[129] Ibid. paras. 4.3-4.6.
[130] GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, p. 8.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid. p. 9.
[135] Ibid. p. 10.

GATT's dispute settlement system.[136] Argentina added that it could not understand why the Panel had not examined the motivations for the measure outside of trade considerations, and that it "regretted that the United States had been unable to advance any argument based on the General Agreement to justify its measure".[137] Poland stated its firm belief that no measure having adverse trade implications for another contracting party could be dismissed as irrelevant for the GATT.[138]

1.34. The Council took note of these statements and adopted the panel's report.[139]

1.35. At the May 1984 meeting of the GATT Council, Nicaragua noted that the United States had recently increased its total sugar import quota without allocating any share of this increase to Nicaragua.[140] Nicaragua asked the United States to inform the Council of its intentions regarding the recommendations of the contracting parties. The United States maintained its earlier position that the lifting of the measures would first require a "resolution of the broader dispute".[141] At the November 1984 meeting of the GATT Council, Nicaragua noted that not only had the United States failed to implement the panel's recommendations, it had once again applied a measure limiting Nicaragua's sugar quota.[142] Nicaragua noted that "[i]f the measure corresponded to security considerations, Nicaragua wondered why the United States had not invoked Article XXI."[143] The United States maintained its previous position.[144] The Council took note of these statements.[145]

European Communities v. Czechoslovakia (1985)

1.36. In 1985, Czechoslovakia notified the Group on Quantitative Restrictions and Other Non-Tariff Measures that it considered Italy and the United Kingdom to be maintaining a discriminatory embargo on exports of certain electronic products to Czechoslovakia.[146] The United Kingdom and Italy asserted that the measures were maintained under Article XXI(b) of the GATT 1947.[147] In 1986, Czechoslovakia submitted an additional notification, responding to the United Kingdom that "the imports of computers and related equipment ... mentioned in the Czechoslovak notification are not related to either fissionable materials or traffic in arms or to traffic in other goods carried on for the purposes of supplying a military establishment."[148] Czechoslovakia also asserted that "[t]he two contracting parties in this case cannot be said to be in a state of belligerency or other emergency situation."[149] Czechoslovakia considered that the United Kingdom had not demonstrated "a genuine causal link between its security interests and the trade action taken", and therefore did not consider the action to be in conformity with the GATT 1947.[150]

[136] GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, pp. 8-9.
[137] Ibid. p. 9.
[138] Ibid. p. 10.
[139] Ibid. p. 11. Argentina, Australia, Brazil, Cuba, Colombia, Poland, India, Norway on behalf of the Nordic countries, Uruguay, Dominican Republic, United Kingdom on behalf of Hong Kong, Hungary, Portugal, Peru, Jamaica, Austria, Egypt, Romania, Switzerland, Chile, Singapore, Nigeria, Yugoslavia, Canada, Trinidad and Tobago, Senegal and Zaire supported the adoption of the panel's report. (Ibid. p. 9.)
[140] GATT Council, Minutes of Meeting held on 15-16 May 1984, C/M/178, p. 27.
[141] Ibid. Argentina and Cuba expressed their concern with the United States' failure to comply with the recommendations. (Ibid. pp. 27-28.)
[142] GATT Council, Minutes of Meeting held on 6-8 and 20 November 1984, C/M/183, p. 65.
[143] Ibid.
[144] Ibid. Several contracting parties such as Argentina, Brazil, Cuba, Hungary, India, Uruguay and Poland expressed their concern with the United States' ongoing failure to comply with the recommendations. (Ibid. pp. 65-66.)
[145] Ibid. p. 66.
[146] Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.10, Inventory Numbers IV.B.17.1 (p. 59 of PDF file) and IV.B.18 (p. 61 of PDF file). Czechoslovakia characterized the measure maintained by Italy as an "embargo" on exports of electronic systems to Czechoslovakia, and the measure maintained by the United Kingdom as an embargo on exports of computers and related equipment. Italy responded that there was no embargo, but an inter-ministerial Committee which examined each export license application. (Ibid.)
[147] Ibid.
[148] Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.12, Inventory Number IV.B.18 (p. 9 of PDF file).
[149] Ibid.
[150] Ibid.

United States v. Nicaragua (1985)

1.37. In 1985, the United States circulated a communication stating that it had imposed a complete import and export embargo on Nicaragua and declared a national emergency due to the extraordinary threat to national security posed by Nicaragua's policies and actions.[151] At a special meeting of the GATT Council requested by Nicaragua in May 1985, Nicaragua argued that this measure "violated both the general principles and certain specific provisions" of the GATT 1947.[152] Nicaragua argued that the US Administration, in declaring a national emergency to deal with a perceived threat by Nicaragua, seemed to have lost any sense of proportion and was trying to override the principles of international trade.[153] Nicaragua said that it was absurd to suggest that it could pose a threat to the national security of the United States, pointing to the relative power and size of the two countries as well as the absence of any "armed conflict between the United States and Nicaragua".[154] Nicaragua also noted that "the United States, in stating to the Security Council that its measures were principally intended to prevent Nicaragua from having the benefit of trading with the United States, had thereby acknowledged that this was not a matter of national security but one of coercion."[155]

1.38. The United States stated that it took the measures for "national security" reasons and that the measures fell within the exception contained in Article XXI(b)(iii).[156] The United States emphasized that Article XXI left it to each contracting party to judge what measures it considered necessary for the protection of its essential security interests.[157] According to the United States, it was not for the GATT to approve or disapprove this judgement.[158] The United States also considered that GATT, as a trade organization, had "no competence to judge such matters" and that its effectiveness in addressing trade issues would only be weakened if it became a "forum for debating political and security issues".[159] Nicaragua responded that Article XXI "was not to be applied in an arbitrary fashion" and required "some correspondence between the measures adopted and the situation giving rise to their adoption".[160] Nicaragua also considered that "since this matter involved commercial and trade measures, the GATT, as the institution responsible for the conduct of international trade, should express a view on this issue."[161]

1.39. Cuba, Argentina, Peru, Brazil, Spain, Czechoslovakia, Romania, Yugoslavia and Portugal considered that the measures taken by the United States were incompatible with Article 7(iii) of the 1982 Ministerial Declaration[162], and Poland, Chile, Hungary, Austria, Sweden, Switzerland, Jamaica

[151] Communication from the United States*, US – Nicaraguan Trade,* L/5803. The measures were embodied in an Executive Order issued by President Reagan, and comprised: (a) a prohibition on all imports into the United States of goods and services of Nicaraguan origin; (b) a prohibition on all exports from the United States of goods to or destined for Nicaragua; (c) a prohibition on Nicaraguan air carriers engaging in air transport to or from points in the United States, and transactions relating thereto; and (d) a prohibition on vessels of Nicaraguan registration from entering the United States' ports, and a prohibition on transactions related thereto. (Communication from the United States*, US – Nicaraguan Trade,* L/5803, p. 2.)

[152] GATT Council*,* Minutes of Meeting held on 29 May 1985, C/M/188, p. 2. Nicaragua specifically alleged that the US measures contravened Articles I, II, V, XI, XIII, XXXVI, XXXVII and XXXVIII of the GATT 1947. Nicaragua also alleged that US measures violated the spirit and provisions "of the UN Charter, the resolutions of the UN General Assembly and Security Council, the decisions of the [ICJ], the Charter of the Organization of American States, and other international instruments, including the Bilateral Treaty of Friendship, Commerce and Navigation". (Ibid. p. 4.)

[153] Ibid. p. 3.

[154] Ibid. Nicaragua also criticized the refusal from the United States to enter into dialogue, as well as "the US policy of force, serious threats of increased military aggression and disregard of international legal provisions and of the bodies and tribunals responsible for ensuring their observance". (Ibid. p. 2.)

[155] Ibid. p. 4. Nicaragua argued that "the measures had been taken as a form of coercion for political reasons, and formed part of a US policy of political, financial, trade and military aggression against Nicaragua", which included the mining of the country's ports and campaigns to prevent the harvesting of coffee and other products. (Ibid. p. 2.)

[156] Ibid. p. 4.

[157] Ibid. pp. 4-5.

[158] Ibid. p. 5.

[159] Ibid. pp. 4-5.

[160] Ibid. p. 16.

[161] Ibid.

[162] Ibid. pp. 5-7, 9, 10 and 12. See also Ministerial Declaration adopted on 29 November 1982, L/5424 (1982 Ministerial Declaration). Paragraph 7(iii) of the 1982 Ministerial Declaration provides that the GATT CONTRACTING PARTIES, in drawing up the work programme and priorities for the 1980s, undertake,

and China, as an observer, criticized the use of economic measures to secure political objectives.[163] Argentina and Brazil additionally asserted that the measures were incompatible with the Charter of the United Nations (UN Charter), and Argentina cited incompatibility with the 1982 Decision.[164]

1.40. Cuba, Poland and Chile asserted that the GATT was the proper forum for discussing disputes with trade implications.[165] Poland noted that this was required to ensure that "GATT's conciliatory functions and responsibilities have practical meaning."[166] Chile did not consider that an invocation of Article XXI implied that the trade consequences of measures taken under it could not be discussed under the GATT.[167] Hungary noted that while ideally politics and trade should be kept separate, a total separation was not realistic and was "evidenced by the provisions in the General Agreement covering cases in which political and commercial considerations were in opposition".[168]

1.41. Canada conversely considered that "this was fundamentally not a trade issue", and urged the two parties to seek a solution outside of the GATT context.[169] The European Communities stated that its concern was to protect the GATT multilateral system from being damaged by any ill-considered development of a situation that could neither be dealt with nor settled in the GATT framework.[170] The European Communities agreed that the GATT was not the appropriate forum because the US measures were only part of a broader situation and the GATT had never had the authority or competence to settle "disputes essentially linked to security".[171] Japan agreed that even though "the issue now before the Council obviously had a trade aspect, that aspect stemmed from deep roots and it had to be admitted that GATT was not competent to grapple with those roots".[172]

1.42. Spain and Czechoslovakia considered that the measures taken by the United States could not be justified under the provisions of Article XXI.[173] Cuba and Peru argued that Nicaragua could not possibly threaten the security of the United States, and Cuba considered that the United States was "putting forward various political pretexts, including a reference to Article XXI" in order to "punish Nicaragua for not serving US interests".[174] Cuba asserted that "recourse to Article XXI had to be backed by certain facts" to effectively guarantee against an abuse of the GATT system.[175] Brazil noted that the right to invoke Article XXI "should only be exercised in the light of other international obligations such as those assumed under the UN Charter".[176] Czechoslovakia stated that the United States' interpretation of Article XXI would enable any contracting party wanting to justify introduction of certain trade measures against any other contracting party to simply refer to Article XXI and declare that its security was threatened. On the contrary, Czechoslovakia considered that Article XXI "dealt with emergency situations and therefore had to be applied according to the specific provisions in paragraphs b(i), (ii), or (iii)".[177]

1.43. India argued that "a contracting party having recourse to Article XXI(b)(iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken; the security exception should not be used to impose economic sanctions for non-economic purposes".[178] India did not consider that the United States had established such a nexus.[179]

1.44. Sweden agreed with the United States that it was "up to each country to define its essential security interests under Article XXI", but noted that "contracting parties should be expected to

individually and jointly "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".

[163] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, pp. 5-15.
[164] Ibid. pp. 6-7. The 1982 Decision is discussed in paragraph 1.28 of this Appendix.
[165] Ibid. pp. 5-8.
[166] Ibid. p. 8.
[167] Ibid.
[168] Ibid.
[169] Ibid. p. 12.
[170] Ibid. p. 13.
[171] Ibid.
[172] Ibid. p. 14.
[173] Ibid. pp. 9-10.
[174] Ibid. pp. 5-6.
[175] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 5.
[176] Ibid. pp. 7-8.
[177] Ibid. p. 10.
[178] Ibid. pp. 10-11.
[179] Ibid. p. 11.

exercise their rights under that Article with utmost prudence."[180] Finland, Switzerland, Norway, Iceland, Egypt and Portugal expressed similar views.[181] Sweden further considered that the United States had not shown such prudence in choosing to give "a too far-reaching interpretation" of Article XXI.[182] The European Communities agreed that Article XXI "left to each contracting party the task of judging what was necessary to protect its essential security interests", but noted that such discretion should be exercised in a spirit of "responsibility, discernment, moderation, ensuring above all that discretion did not mean arbitrary application".[183]

1.45. Australia stated that the United States was permitted under Article XXI "to take action of this kind with no requirement to justify such action", noting that the UN Security Council was the appropriate forum for the discussion of such issues. Nevertheless, Australia believed that contracting parties should avoid any action which could threaten GATT's credibility and undermine attachment to the principles of an open multilateral system. Australia considered that, while in principle, Nicaragua retained its GATT rights, in practical terms the US action had rendered this right inoperative.[184] Canada expressed a similar view.[185]

1.46. Nicaragua circulated a draft decision to the contracting parties for their consideration, but the Council agreed to defer any determination on this matter to its next meeting.[186] Nicaragua subsequently requested consultations with the United States in relation to this matter.[187] At the July 1985 meeting of the GATT Council, Nicaragua requested the establishment of a panel.[188] The United States reiterated the futility of resolving this issue through GATT procedures, as the trade effects of the measure had already been acknowledged and the export embargo had removed any opportunity for Nicaragua to retaliate.[189] The United States considered Nicaragua's request for a panel as "a further attempt … to politicize GATT".[190] The United States also contended that under Article XXI(b) a panel "could neither examine the national security reasons for the US action, nor determine the appropriateness of invoking the security exception".[191] The European Communities considered that each party had to judge on its own whether to invoke Article XXI. The European Communities questioned what a panel could do in this case, since it could not interpret Article XXI and the United States had already recognized trade prejudice.[192] The European Communities said that it could not oppose a contracting party's request for a panel, provided the terms of reference clearly did not include interpretation of Article XXI.[193] Canada expressed full agreement with the United States that only the individual contracting party itself could judge questions involving national security, noting that a panel could not make that judgment.[194] Nevertheless, Canada considered that measures taken under Article XXI could have trade effects which could be considered by a GATT panel. Canada considered that every contracting party had a right to request and to receive a hearing of a panel on any GATT-related issue, even where a panel was unlikely to be able to make a useful finding. Canada agreed that a panel would serve no useful purpose in the present case, since nullification and impairment of benefits had already been admitted and Nicaragua had no means to retaliate under Article XXIII:2.[195] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[196]

[180] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 10.
[181] Ibid. pp. 11-15.
[182] Ibid. p. 10.
[183] Ibid. p. 13.
[184] Ibid. pp. 12-13.
[185] Ibid. p. 12.
[186] Ibid. p. 17.
[187] Communication from Nicaragua, *US – Nicaraguan Trade*, L/5847.
[188] GATT Council, Minutes of Meeting held on 17-19 July 1985, C/M/191, p. 41. Colombia, Argentina, Poland, Uruguay, Peru, Brazil, Cuba, Chile, Spain, Romania, Jamaica, India, Hungary, Yugoslavia, Trinidad and Tobago and Czechoslovakia, as well as Venezuela and Mexico as observers, supported Nicaragua's request to establish a panel. (Ibid. p. 42.)
[189] Ibid. p. 41.
[190] Ibid. p. 42.
[191] Ibid. p. 43.
[192] Ibid. p. 44.
[193] Ibid.
[194] Ibid. p. 45.
[195] GATT Council, Minutes of Meeting held on 17-19 July 1985, C/M/191, p. 45.
[196] Ibid. p. 46.

1.47. At the October 1985 meeting of the GATT Council, the United States agreed to the establishment of a panel on the condition that it "could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States".[197] At the March 1986 meeting of the GATT Council, the panel was established with the aforementioned carve-out from its terms of reference.[198]

1.48. Before the panel, Nicaragua argued that the embargo imposed by the United States had deprived Nicaragua of benefits under Articles I:1, II, V, XI:1, XIII, XXIV, XXXVI, XXXVII and XXXVIII of the GATT 1947.[199] Nicaragua argued that the embargo therefore constituted a *prima facie* nullification or impairment of benefits accruing to Nicaragua under the General Agreement. Nicaragua stressed that whether the invocation of Article XXI(b)(iii) was justified or not, benefits accruing to Nicaragua under the General Agreement had been seriously impaired or nullified as a result of the embargo. Nicaragua argued that it had been recognized both by the drafters of the General Agreement and by the contracting parties that an invocation of Article XXI did not prevent recourse to Article XXIII. Nicaragua said that it had no reason to expect that an embargo would cut off all trade relations with the United States when the United States' tariff concessions were negotiated (i.e. between 1949 and 1961) and that the embargo had in fact nullified or impaired the benefits accruing to Nicaragua under all of the trade-facilitating provisions of the General Agreement.[200]

1.49. The United States reiterated its position that its actions were valid under Article XXI, but that the panel could not in any event examine the validity of, nor the motivation for, its invocation of Article XXI(b)(iii) within its terms of reference.[201] The United States agreed that a measure not conflicting with obligations under the General Agreement could be found to cause nullification and impairment, and that an invocation of Article XXI did not prevent recourse to the procedure of Article XXIII. However, the United States argued that nullification or impairment could not be presumed in cases in which Article XXI was invoked.[202] Rather, this was dependent on the facts and circumstances of the particular case, including the expectations that the contracting party bringing the complaint could reasonably have had when it negotiated its tariff concessions. The United States did not consider it meaningful for the Panel to propose in the present case a ruling on the question of whether nullification or impairment could be caused through measures under Article XXI.[203]

1.50. The panel stated that it had not considered the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article because this examination was precluded by its mandate.[204] The panel concluded that as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, "it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement."[205] In examining the embargo in the light of Article XXIII:1(b), the panel noted the question of whether the nullification or impairment of the trade opportunities of Nicaragua through the embargo constituted a nullification or impairment of benefits accruing to Nicaragua within the meaning of Article XXIII:1(b). In the panel's view, this question raised basic interpretive issues relating to the concept of non-violation and nullification and impairment which had not been addressed by the drafters of the GATT or decided by the contracting parties. Against this background, the panel felt that it would only be appropriate for it to propose a ruling on these issues if such a

[197] GATT Council, Minutes of Meeting held on 10 October 1985, C/M/192, p. 6.

[198] GATT Council, Minutes of Meeting held on 12 March 1986, C/M/196, p. 7. The agreed terms of reference were as follows: "To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter". (Ibid.)

[199] GATT Panel Report, *US – Nicaraguan Trade*, L/6053 (unadopted), para. 4.3.

[200] Ibid. para. 4.8.

[201] Ibid. para. 4.6.

[202] Ibid. para. 4.9.

[203] Ibid.

[204] Ibid. para. 5.3.

[205] Ibid.

ruling would enable the contracting parties to draw practical conclusions from it in the case at hand.[206] The panel reasoned that, as long as the embargo was not found to be inconsistent with the General Agreement, the United States would be under no obligation to follow a recommendation by the contracting parties under Article XXIII:2 to withdraw the embargo.[207] Moreover, even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether it was justified under Article XXI, the contracting parties could, in the circumstances of the present case, take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo. In the light of all these considerations, the panel decided not to propose a ruling on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.[208] However, the panel noted that embargoes such as those imposed by the United States, independent of whether they were justified under Article XXI, ran counter to the basic aims of the GATT 1994 and encouraged each contracting party to "carefully weigh[] its security needs against the need to maintain stable trade relations".[209]

1.51. At the November 1986 meeting of the GATT Council, Nicaragua expressed disappointment that the panel report had neither determined the level of nullification or impairment of Nicaragua's rights under the GATT 1947, nor made any specific recommendations.[210] Nicaragua also noted that it "remained clear that the United States had imposed the embargo not for reasons of security, but for political coercion" and noted that the case involved a "clear misuse of Article XXI".[211] Nicaragua requested that the Council recommend a removal of the embargo, authorize special support measures to compensate Nicaragua for damage caused by the embargo, and prepare an interpretive note on Article XXI which would reflect the elements of this case.[212] Nicaragua also asked that in making such recommendations, the Council give consideration to the ruling of the International Court of Justice (ICJ) "as proof that the conditions necessary for invoking Article XXI had not been met".[213] Nicaragua added that it could not support the adoption of the report until the Council was in a position to make such recommendations.[214]

1.52. The United States said that the panel had reached sound conclusions in a difficult situation and recommended that the Council adopt the report.[215] The United States stated that it continued to believe that this dispute should never have been brought to GATT. There were and had been many instances of trade sanctions that had been imposed by various contracting parties for reasons, it could be surmised, of national security. Rarely had those situations even been raised in GATT, and never before had a party insisted on a panel, because contracting parties, including those against whom sanctions had been imposed, had tacitly recognized that GATT, by its traditions, its competence, and the terms of Article XXI, could not help resolve such matters, and that pressing the issue would only weaken GATT's intended role.[216] In this regard, the United States observed that "GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations."[217] The United States also agreed with the panel's decision not to address the "novel and delicate question of nullification and impairment in a situation of Article XXI trade sanctions" when the outcome of such question "could create a precedent of much wider ramifications for the scope of GATT rights and obligations

[206] GATT Panel Report, *US –Nicaraguan Trade*, L/6053 (unadopted), para. 5.6.
[207] Ibid. para. 5.9.
[208] Ibid. para. 5.11.
[209] Ibid. para. 5.16.
[210] GATT Council, Minutes of Meeting held on 5-6 November 1986, C/M/204, p. 7. Uruguay, Nigeria, Argentina, Colombia, Cuba, Peru, Hungary, Trinidad and Tobago, Czechoslovakia, Yugoslavia, Romania, Poland, India, Mexico and Tanzania, as an observer, supported Nicaragua's request to lift the embargo. Uruguay, Argentina, Colombia, Cuba, Peru, Hungary, Czechoslovakia, Yugoslavia and Romania supported Nicaragua's request to take measures to compensate Nicaragua. Uruguay, Nigeria, Argentina, Colombia, Czechoslovakia, Yugoslavia and Romania supported a re-examination of Article XXI in depth during the Uruguay Round negotiations. (Ibid. p. 10.)
[211] Ibid. p. 8.
[212] Ibid.
[213] Ibid. p. 7.
[214] Ibid. p. 17.
[215] Ibid. pp. 8-10.
[216] Ibid. p. 8.
[217] Ibid.

but which would serve no useful purpose in the particular matter before the [p]anel".[218] The United States considered that nullification or impairment in situations where no GATT violation had been found was a "delicate issue, linked to the question of 'reasonable expectations'."[219] According to the United States, applying the concept of "reasonable expectations" to a case of trade sanctions motivated by national security considerations would be "particularly perilous", since at a broader level, those security considerations would nevertheless enter into expectations.[220]

1.53. Chile noted that "Article XXI should be invoked only when absolutely necessary to protect national security interests, and not to punish another contracting party."[221] Nigeria stated that Article XXI could only be invoked "in cases of a state of war or emergency", and that neither was the case with the US embargo as "[t]he ICJ had found no evidence that Nicaragua's policies threatened the United States and thus had found no justification for the embargo."[222] Argentina asserted that it was clear to the international community at large that Article XXI had been improperly invoked and that "the ICJ had confirmed that the US embargo was not compatible with GATT."[223] Peru rejected the use of trade measures for political coercion "unless such action was approved by the UN Security Council" and noted that the UN General Assembly had condemned the embargo.[224] Colombia, Trinidad and Tobago and Czechoslovakia expressed similar views.[225] Sweden expressed concern that the restricted terms of reference in this dispute should not prejudice the mandate of future panels, noting that panels "should be able to examine all relevant GATT Articles, including Article XXI".[226] Jamaica also expressed concern that the restricted terms of reference had been agreed upon without prior examination by the contracting parties.[227]

1.54. Hungary argued that Article XXI provided discretion to the contracting parties to judge whether circumstances warranted its invocation, but noted that "the most powerful trading nations should demonstrate the greatest self-restraint."[228] The European Communities reiterated its view that the United States "alone had the sovereign right to determine its national security interests", and noted that Article XXI was an "essential safety valve" which the European Communities did not support being subject to further interpretation, discussion, or negotiation either in the Council or in the new round.[229] That said, the European Communities also considered that the discretionary rights inherent in Article XXI should not be arbitrarily invoked.[230] Several GATT contracting parties also reiterated views expressed at earlier meetings of the Council.[231]

1.55. The Council concluded that it could not adopt the panel's report without consensus, but agreed for the Chair to engage in informal discussions and to keep this matter on its agenda.[232]

1.56. At the April 1987 meeting of the GATT Council, Nicaragua reiterated its position that it could not support the adoption of the report until the Council was in a position to make recommendations.[233] It noted that such recommendations would need to consider the decisions of other fora, in particular, the ICJ "which had concluded that the embargo was not necessary to protect any US security interest, as well as Resolutions 40/188 and 41/164 of the United Nations General

[218] GATT Council, Minutes of Meeting held on 5-6 November 1986, C/M/204, p. 9.
[219] Ibid.
[220] Ibid.
[221] Ibid. p. 10.
[222] Ibid. pp. 10-11. Nigeria also noted that "[a]ny action which clearly undermined the United Nations Charter had to be seen as a gross abuse of rights conferred by the General Agreement." (Ibid.)
[223] Ibid. p. 11.
[224] Ibid. p. 13.
[225] Ibid. pp. 12-14.
[226] Ibid. pp. 11-12.
[227] Ibid. p. 15.
[228] Ibid. p. 13.
[229] Ibid. p. 16.
[230] Ibid.
[231] Ibid. pp. 11-15. Sweden reiterated its view that it was the sole prerogative of each GATT contracting party to determine whether or not to invoke Article XXI. Peru and Poland reiterated their opposition to the use of trade measures for political reasons. India reiterated its view that a contracting party having recourse to Article XXI should be able to demonstrate a genuine nexus between its security interests and the trade action taken. Japan reiterated its view that the roots of the present dispute were too deep to be addressed in the context of the General Agreement. (Ibid.)
[232] Ibid. p. 17.
[233] GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, pp. 17-18.

Assembly which called for the immediate cessation of the embargo".[234] Nicaragua also argued that certain amendments that the United States had proposed to UN document A/C.2/41/L.2 suggested that it did consider the GATT to have competence to rule on this matter.[235] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and that the panel's findings confirmed this position. The United States reiterated that with respect to this and other similar issues brought before the Council in the past, the GATT, by its traditions, its competence, and the terms of Article XXI itself, could not resolve cases where trade sanctions were imposed for national security reasons.[236] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[237]

1.57. At the July 1987 meeting of the GATT Council, Nicaragua circulated a draft decision adopting the panel report, but recommending that the United States take into consideration the negative trade effects of the embargo and authorizing contracting parties wishing to do so to grant trade concessions to Nicaragua.[238] Nicaragua reiterated its view that "no one believed that Nicaragua was a threat to any country's security" and that it "could not accept that the United States had the right to invoke Article XXI and still less to impose the embargo".[239] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and condemned Nicaragua's draft resolution as politically motivated.[240] The United States also asserted that the panel's report had found that "the United States was under no obligation to remove the embargo", and reiterated its position that the United States "had acted in full conformity with its GATT rights and obligations".[241] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[242] At the November 1987 meeting of the GATT Council, Nicaragua noted that the President of the United States had proposed that the embargo be renewed for an additional six months.[243] Nicaragua expressed its intention to request that the contracting parties implement paragraph 21 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance at its Forty-Third Session.[244] The Council took note of these statements.[245]

1.58. At the June 1989 meeting of the GATT Council, Nicaragua noted that the President of the United States had sent a message to Congress in April 1989 extending the national emergency and economic sanctions against Nicaragua indefinitely.[246] Nicaragua also read out an official United States document stating that trade sanctions were an essential element of the United States policy regarding Nicaragua, and that, in the United States' view, present conditions in Nicaragua did not justify the lifting of trade sanctions.[247] Nicaragua noted that this document "did not refer to the protection of the United States' essential security interests, but exclusively to Nicaragua's internal matters" and thus "infringed the fundamental principles of the United Nations Charter and other instruments of international law" and could not be justified under Article XXI.[248] Nicaragua called on

[234] GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, p. 17.
[235] Ibid. p. 18.
[236] Ibid.
[237] Ibid.
[238] GATT Council, Minutes of Meeting held on 15-17 July 1987, C/M/212, pp. 24-25. Cuba supported the adoption of this decision, and the European Communities, Switzerland, Canada, Australia, Austria, Japan, Finland on behalf of the Nordic countries, Israel, Turkey, Singapore, Yugoslavia and Indonesia requested the continuation of informal consultations aimed at seeking a consensus solution to this matter. An alternate text, adopting the panel report but solely recommending that other parties grant trade concessions to Nicaragua, was circulated by six Latin American countries. (Ibid. pp. 25-28. See also Communication from Argentina, Brazil, Colombia, Mexico, Peru and Uruguay, *US –Nicaraguan Trade*, C/W/525.)
[239] GATT Council, Minutes of Meeting held on 15-17 July 1987, C/M/212, p. 28.
[240] Ibid. p. 25.
[241] Ibid. p. 26.
[242] Ibid. p. 29.
[243] GATT Council, Minutes of Meeting held on 10-11 November 1987, C/M/215, p. 40.
[244] Ibid.
[245] Ibid. Several contracting parties including Nicaragua, the United States, Brazil, Cuba, Argentina, Mexico, Colombia, Peru, Romania and Uruguay reiterated their views on the matter at the Fourth Meeting of the Forty-Third Session. (See GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting held on 2 December 1987, SR.43/4, pp. 12-16.)
[246] GATT Council, Minutes of Meeting held on 21-22 June 1989, C/M/234, p. 37.
[247] Ibid. The document went on to state that, if Nicaragua fulfilled its *Esquipulas* commitments and held free, fair and open elections, this might resolve the emergency which had led the US Administration to impose trade sanctions. (Ibid.)
[248] Ibid. p. 38.

the contracting parties to "impose a limit on the irresponsibility with which the United States had claimed to interpret the provisions of Article XXI".[249] Nicaragua also noted that it still could not support the adoption of the panel's report, as to do so would create a dangerous precedent by denying Nicaragua the right to have its complaint examined in accordance with Article XXIII:2.[250] The United States expressed surprise that Nicaragua had brought this issue back to the Council some two and a half years after the first consideration of the panel report, and renewed its request for the adoption of the panel's report, as it believed no other resolution of the matter was realistic.[251] The United States also asserted that the panel "had confirmed that the United States was within its rights to invoke Article XXI".[252] The Council took note of these statements.[253]

1.59. In March 1990, Nicaragua circulated a communication noting that the United States had lifted the embargo and other economic measures on Nicaragua.[254] At the April 1990 meeting of the GATT Council, Nicaragua welcomed the removal of the embargo, but noted that the dispute had demonstrated that the GATT "did not have mechanisms to establish a proper balance between rights and obligations".[255] The United States stated that "in light of changed circumstances and recent events, the conditions which had necessitated action under Article XXI of the General Agreement had ceased to exist" and it had consequently terminated the embargo.[256] The United States also noted its intention to restore Nicaragua's sugar allocation.[257] Cuba stated that the embargo "had been imposed for political reasons and its lifting was a reminder of its political nature and coercive character".[258] The Council took note of the statements.[259]

1.60. The panel report in *United States − Trade Measures Affecting Nicaragua* was never adopted.[260]

Negotiating Group on GATT Articles

1.61. The Negotiating Group on GATT Articles also reviewed Article XXI in meetings in November 1987 and June 1988, on the basis of communications submitted by Nicaragua[261], a Secretariat background note[262] and a communication submitted by Argentina.[263] The Negotiating Group was unable to agree on any of the proposals regarding Article XXI, and the Chairman's Report to the Group of Negotiations on Goods did not list Article XXI among the provisions that it was considering.[264]

[249] GATT Council, Minutes of Meeting held on 21-22 June 1989, C/M/234, p. 41.

[250] Ibid. p. 40.

[251] Ibid. p. 38.

[252] Ibid. The European Communities reiterated its view that invocation of Article XXI was at the discretion of governments but that this "did not necessarily mean an arbitrary step or measure". (Ibid. p. 40.)

[253] Ibid. p. 42. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989 (the April 1989 Decision), section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.) The procedural rules adopted under the April 1989 Decision applied to the GATT Council discussions concerning *European Communities v. Yugoslavia (1991)*, discussed below, and the Helms-Burton legislation in 1996 (see discussion in *United States v. Cuba (including Helms-Burton Act) (1962-2016)*, while the equivalent rules under the DSU applied to the situation involving Nicaragua and Honduras (also discussed further below).

[254] Communication from Nicaragua, *US − Nicaraguan Trade,* L/6661.

[255] GATT Council, Minutes of Meeting held on 3 April 1990, C/M/240, p. 31.

[256] Ibid.

[257] Ibid.

[258] Ibid. p. 32. The European Communities reiterated its view that discretionary but not arbitrary use of Article XXI was to be recommended. (Ibid.)

[259] Ibid.

[260] See GATT Council, Status of Work in Panels and Implementation of Panel Reports, Report of the Director-General, C/172, p. 1.

[261] Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/34; and Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/39.

[262] Article XXI, Note by the Secretariat, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/16.

[263] Communication from Argentina, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/44.

[264] Negotiating Group on GATT Articles, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG7/W/73.

Negotiations Leading to the Adoption of the April 1989 Decision (1988-1989)

1.62. As stated above[265], the GATT CONTRACTING PARTIES jointly agreed, in adopting the April 1989 Decision, that any panel or working party would be established at the GATT Council meeting following the meeting at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise.[266] Prior to the adoption of the April 1989 Decision, trade ministers considered a proposal which provided that, where the Council could not agree on whether a matter fell within the scope of Article XXIII of the GATT, a panel would make a recommendation on the jurisdictional issue as a preliminary matter, with bracketed text stating "including the question of whether the matter is appropriate for resolution through the panel process".[267] By 6 December 1998, a Secretariat note stated that this language in the proposal was to be deleted. The final draft text of the report from the Trade Negotiations Committee Meeting omitted this language and included only the text that formed part of the April 1989 Decision; namely, that "a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda".[268]

European Communities v. Yugoslavia (1991)

1.63. In 1991, the European Communities circulated a communication stating that it had suspended the benefit of certain trade concessions that had been granted to Yugoslavia on a preferential basis.[269] The European Communities referred in this context to its "vigorous efforts over recent months to put a stop to bloodshed in Yugoslavia", including promoting cease-fire agreements which unfortunately had not led to the "full cessation of hostilities".[270] The European Communities stated that the measures had been taken upon consideration of its "essential security interests and based on GATT Article XXI", as it was faced with "continuing risks of political instability in this region of Europe, with potentially destabilizing consequences elsewhere".[271] In response, Yugoslavia circulated a communication noting that it did not presently claim that the measures violated any GATT provisions as "the majority do not relate to the contractual obligations under the GATT or could be justified under Article XXI".[272] However, Yugoslavia did express concerns about the negative trade effects of the measure as well as the use of punitive economic measures to secure political objectives.[273] Yugoslavia also requested that it be notified of any additional measures pursuant to the 1982 Decision, and noted that it reserved its rights under the GATT.[274]

1.64. Following this communication, Yugoslavia requested consultations with the European Communities in relation to these and certain other measures.[275] The consultations did not

[265] See fn 253 of this Appendix.

[266] See the April 1989 Decision, section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.

[267] Group of Negotiations on Goods, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988, MTN.GNG/13, pp. 59-60.

[268] Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, Trade Negotiations Committee, MTN.TNC/7(MIN), 9 December 1988, p. 29; Mid-Term Meeting, Trade Negotiations Committee, MTN.TNC/11, 21 April 1989, p. 27.

[269] Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 1. The measures comprised: (a) the suspension of the bilateral trade agreement between Yugoslavia and the European Communities, (b) the reapplication of certain quantitative limitations on textile products from Yugoslavia, (c) withdrawal of Generalized System of Preferences benefits from Yugoslavia, (d) suspension of the trade concessions granted to Yugoslavia as part of the Treaty establishing the European Coal and Steel Community, and (e) suspension of bilateral trade agreements between Member States of the European Communities and Yugoslavia. (Ibid. p. 2.)

[270] Ibid.

[271] Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 2.

[272] Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, p. 2.

[273] Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, pp. 2-3.

[274] Ibid. p. 3. Yugoslavia also noted that it reserved its right to propose that the GATT contracting parties issue a "formal interpretation" on Article XXI under this Decision. (Ibid.)

[275] Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1. In addition to the measures notified by the European Communities, Yugoslavia also challenged a decision to apply selective positive measures in favour of "those parties which

achieve a mutually satisfactory solution, and Yugoslavia subsequently requested the establishment of a panel.[276] In its request, Yugoslavia asserted that the measures were taken "for purely political reasons" and were inconsistent with the GATT and paragraph 7(iii) of the 1982 Ministerial Declaration.[277] Yugoslavia stated that the measures could not be justified under Article XXI, as the situation in Yugoslavia did not correspond to the "notion or meaning" of Article XXI(b) and Article XXI(c), and no relevant UN body had authorized economic sanctions against Yugoslavia.[278] At the February 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a GATT panel.[279] The European Communities queried whether the withdrawal of preferences violated Article I of the GATT, and noted that as the situation was delicate and continually evolving, its primary objective was not to hamper the peace processes that had been engaged in securing a political solution in Yugoslavia.[280] The European Communities stated that it was willing to engage in consultations, but that the establishment of a GATT panel "could only exacerbate the problem".[281] Yugoslavia's request for the establishment of a GATT panel was supported by Chile, Cuba, and Venezuela.[282] India also supported the request. It asserted that trade measures for non-economic reasons should only be taken within the framework of a UN Security Council decision, and noted that Yugoslavia's request "encompassed an issue which was covered by GATT provisions".[283] The Council agreed to revert to this matter at its next meeting.[284]

1.65. At the March 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a panel.[285] Yugoslavia asserted that the continued discrimination by the European Communities was wrong, as the peace process in Yugoslavia was proceeding well and the non-economic reasons underlying the measures had "completely changed".[286] The European Communities acknowledged the right of Yugoslavia to request the establishment of a panel, but considered the timing to be inopportune as the European Communities was "deeply involved" in the ongoing peace process and did not consider that a panel established at the present time would aid that process.[287] The European Communities recognized that under the April 1989 Decision, a panel had to be established at the second Council meeting at which it was requested, unless at that meeting the Council decided otherwise. The European Communities queried whether, given that the measures had been taken for non-economic reasons, a different course of action could be taken, such as establishing the panel but "delaying its activation subject to further clarity in the situation".[288] The European Communities also reserved its right to reflect further on what the standard terms of reference should be in disputes involving measures taken for non-economic reasons.[289] The United States affirmed Yugoslavia's right to request a panel, but noted that the problems that had given rise to the measures were not capable of resolution by the Council and should be resolved politically.[290] Canada expressed similar views.[291] New Zealand noted that while the GATT process needed to be observed, the "trends in the political situation" should be ascertained before any GATT

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contribute to progress towards peace". Yugoslavia asserted that this additional measure created a dangerous precedent for GATT practice. (See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, pp. 1-2.)

[276] Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1, p. 1. The request for establishment of a GATT panel was made pursuant to Article XXIII:2 and also paragraphs C.1 and F(a) of the April 1989 Decision. (See fn 253 of this Appendix.)

[277] See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, p. 2. Yugoslavia specifically alleged that the measures contravened, *inter alia,* Articles I and XXI of the GATT 1947. (Ibid.)

[278] Ibid. p. 2.

[279] GATT Council, Minutes of Meeting held on 18 February 1992, C/M/254, p. 35. Chile, Cuba, Venezuela and India supported Yugoslavia's request for the establishment of a panel. (Ibid. pp. 35-36.)

[280] Ibid.

[281] Ibid. p. 36.

[282] Ibid.

[283] Ibid.

[284] Ibid.

[285] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 14. India, Pakistan, Argentina, Chile, Peru, Cuba, Mexico and Venezuela all made statements supporting Yugoslavia's right to the establishment of a panel. (Ibid. pp. 15-17.)

[286] Ibid. p. 14.

[287] Ibid.

[288] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 15. The European Communities asserted that the April 1989 Decision was silent on this issue. (Ibid.)

[289] Ibid. pp. 15 and 18.

[290] Ibid. p. 15.

[291] Ibid.

consideration of the measures.[292] Argentina asserted that Yugoslavia had the right to have a panel examine any question relating to the application of GATT provisions, including "measures taken for non-economic reasons and invoked under Article XXI".[293] Mexico affirmed Yugoslavia's right to request a panel, but noted that the GATT was "perhaps not the most appropriate forum to discuss those issues, much less to solve them".[294] Japan affirmed Yugoslavia's right to request a panel, but noted that the circumstances were "rather unique" and that its preferred approach was for the parties to seek a solution through dialogue.[295] Tanzania affirmed Yugoslavia's right to request a panel, but noted that it would not want to see a peaceful solution in Yugoslavia impaired by GATT dispute settlement procedures.[296]

1.66. The Chair of the GATT Council stated that the Council had to decide on the establishment of a GATT panel in light of the rules in the April 1989 Decision. The Chair recalled a previous understanding that, under the rules in the April 1989 Decision, a contracting party had the right to a panel at the second Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting, the Council decided otherwise. The Chair therefore proposed that the Council agree to establish a panel with standard terms of reference unless, as provided for in the April 1989 Decision, the parties agreed to other terms of reference within 20 days.[297] The GATT Council agreed to establish a panel with standard terms of reference unless otherwise agreed by the parties.[298] The panel did not proceed owing to the subsequent dissolution of the State of Yugoslavia.

Nicaragua v. Honduras and Colombia (1999)

1.67. In 1999, Nicaragua imposed a tax on all goods and services imported, manufactured or assembled, coming from or originating in Honduras and Colombia, and cancelled licences for all fishing vessels under Honduran and Colombian flags, as a response to the ratification of the bilateral Treaty on Maritime Delimitation in the Caribbean Sea (Ramírez-López Treaty) between those states.[299] In January 2000, Colombia requested consultations with Nicaragua in relation to these measures.[300] These consultations did not achieve a mutually satisfactory solution, and in March 2000, Colombia requested the establishment of a panel.[301]

1.68. At the April 2000 meeting of the DSB, Colombia reiterated its request for a panel.[302] Nicaragua responded that the Ramírez-López Treaty infringed its "sovereign rights in the Caribbean Sea by imposing limits unilaterally, illegally and arbitrarily through reciprocal recognition by Honduras and Colombia of their expansionist aims in the Caribbean Sea to the detriment of Nicaragua's territorial rights".[303] Nicaragua considered that Colombia and Honduras had created "serious international tension" in the form of despatching Honduran troops at its northern border and conducting military manoeuvres by deploying war planes and ships in the region of its continental shelf.[304] Nicaragua asserted that the Organization of American States had recognized the "state of serious international tension" by appointing a special envoy to assess the situation.[305] Accordingly, Nicaragua considered that its measures were consistent with "Article XXI of the GATT 1994 and Article XIV*bis* of the GATS, which reflected a state's inherent right to protect its

[292] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 17.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid. pp. 17-18.
[298] Ibid. p. 18.
[299] Request for the establishment of a panel by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2, p. 1; and Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, p. 12.
[300] Request for consultations by Colombia, WT/DS188/1.
[301] Request for the establishment of a panel by Colombia, WT/DS188/2. Colombia specifically alleged that the measures were inconsistent with Articles I and II of the GATT 1994, as well as Articles II and XVI of the GATS. (Ibid. p. 1.)
[302] Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, item 4.
[303] Ibid. para. 51.
[304] Ibid. para. 52. Nicaragua also referred to complaints made by Miskito communities bordering Honduras and the increase in the defence budget of Honduras adopted by the Congress of the Republic. (Ibid.)
[305] Ibid. para. 53.

security, and therefore constituted a general exception to multilateral trade rules".[306] Nicaragua noted that it had not adopted the measures for trade purposes or to protect domestic industry, but rather to safeguard its essential security interests.[307] Nicaragua recognized Colombia's right to request establishment of a panel, but doubted the utility of having a panel examine the matter, asserting that "it had been customary practice in the WTO that the contracting party applying the measure should be the sole judge in matters that concerned its essential security interests, in particular if such interests could be threatened by any actual or potential danger."[308] According to Nicaragua, if the panel "gave itself powers that belonged to political fora that could result in a dangerous and unacceptable precedent".[309] Nicaragua was also of the view that, "before establishing a panel to examine this matter, the General Council should take a decision on the competence of panels to deal with highly political issues and should make a formal interpretation of Article XXI of GATT 1994."[310] Honduras disputed Nicaragua's assertions regarding the movement of troops and military equipment. Honduras also noted that the DSU provided it with the possibility of restoring its rights, but considered the subject of maritime limits to fall outside of the mandate of the WTO.[311] The DSB agreed to revert to this matter at its next meeting.[312]

1.69. At the May 2000 meeting of the DSB, Colombia reiterated its request for a panel.[313] Nicaragua reiterated its position that Article XXI of the GATT 1994 "could not be subjected to an examination by a panel", and asserted that the 1982 Decision had given the Ministerial Conference and General Council "exclusive authority" to interpret Article XXI to the exclusion of any other body.[314] Japan, Canada, the European Communities and Honduras expressed the view that issues of national security were sensitive and should be addressed with great caution.[315] The European Communities asserted that the panel could examine the facts to determine whether the matter concerned a national security issue or a trade policy measure.[316]

1.70. The DSB agreed to establish the panel[317], but the panel was never composed.[318]

1.71. In July 2006, in the context of the Trade Policy Review of Nicaragua, Colombia noted that Nicaragua had suspended the application of the tax to goods and services imported from or originating in Honduras since March 2003. [319] Colombia argued that this made the "discrimination of Nicaragua's trade policy against Colombia much more obvious", and asked to have the trade practice put on record in the conclusions of the Trade Policy Review.[320] Nicaragua maintained that the tax was applied in conformity with Article XXI of the GATT 1994 in order to protect Nicaragua's essential security interests.[321]

India v. Pakistan (2002)

1.72. During the 2002 Trade Policy Review of Pakistan, India asserted that Pakistan had consistently denied MFN status to India in violation of the basic principles of the GATT 1994 and the WTO.[322]

[306] Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, para. 54. Nicaragua specifically argued that the measures were fully justified under Article XXI(b)(iii) of the GATT 1994 and Article XIV*bis*:1(b)(iii) of the GATS Agreement. (Ibid. para. 60.)

[307] Ibid. para. 55. Nicaragua also asserted that there had been no nullification or impairment under Article II of the GATT 1994 because Nicaragua had not exceeded its scheduled tariff ceilings. (Ibid. para. 60.)

[308] Ibid. para. 58.

[309] Ibid. para. 59.

[310] Ibid.

[311] Ibid. para. 61.

[312] Ibid. para. 62.

[313] Dispute Settlement Body, Minutes of Meeting held on 18 May 2000, WT/DSB/M/80, para. 26.

[314] Ibid. paras. 29-30.

[315] Ibid. paras. 32-35.

[316] Ibid. para. 35.

[317] Ibid. para. 40.

[318] See Note by the Secretariat, Update of WTO Dispute Settlement Cases, WT/DS/OV/34, p. 60.

[319] Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 35.

[320] Ibid.

[321] Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 131.

[322] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

Pakistan responded that the India-Pakistan relationship had to be viewed in the context of the "difficult political relations between the two countries over the course of the past 50 years".[323] Pakistan noted that after the 1965 war, trade and diplomatic relations had been terminated by both sides, and the subsequent process of normalization had been slow and on an item-by-item basis through limited trade and shipping routes.[324] Pakistan therefore considered that both India and Pakistan had acted consistently with Article XXI(b)(iii) by treating each other as exceptions to MFN principles.[325]

1.73. At the 2008 Trade Policy Review of Pakistan, India reiterated that Pakistan was denying MFN status to India, to which Pakistan responded that trade relations between India and Pakistan were continuously liberalizing and improving.[326]

United States v. Brazil (2003)

1.74. In 2003, the United States circulated a communication to the Committee on Import Licensing raising concerns about Brazil's import licensing system for certain lithium compounds and the compatibility of the system with the Import Licensing Agreement.[327] The United States disagreed with the inclusion of these lithium compounds in a measure regulating goods related to the production of nuclear energy, as the United States domestic industry had reported that these lithium compounds had no nuclear application but were rather used as a raw material in various commercial products.[328] The United States therefore requested that Brazil provide additional information about the operation of the system.[329] The United States repeated these concerns at the October 2003 meeting of the Committee on Import Licensing.[330] The Committee took note of these statements.[331] In 2004, Brazil circulated a communication responding to the questions of the United States, in which Brazil asserted that the restrictions were maintained because lithium could have an application in the production of nuclear energy.[332] At the September 2004 meeting of the Committee on Import Licensing, the United States observed that the explanation given by Brazil was "tenuous", as it did not demonstrate that the lithium compounds had any nuclear application outside of its "common commercial use".[333] The United States asserted that in practice, these licensing requirements acted as quantitative restrictions and noted that Brazil's response "engendered some suspicion that there might be other more protectionist reasons for the requirement".[334] The United States noted that it would circulate further questions to Brazil in writing, and Brazil responded that such questions would be conveyed to its government.[335] The Committee took note of these statements.[336]

[323] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

[324] Ibid.

[325] Ibid.

[326] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 16 and 18 January 2008, Addendum, WT/TPR/M/193/Add.1, pp. 101-102. Pakistan expressed similar views at its 2015 Trade Policy Review. (Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 24 and 26 March 2015, Addendum, WT/TPR/M/311/Add.1, pp. 17 and 52.)

[327] Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Questions from the United States to Brazil, G/LIC/Q/BRA/1. Article XXI of the GATT 1994 applies to the Import Licensing Agreement by reference through Article 1.10 of that Agreement.

[328] Ibid. p. 1.

[329] Ibid. p. 2.

[330] Committee on Import Licensing, Minutes of the Meeting held on 2 October 2003, G/LIC/M/18, p. 8.

[331] Ibid.

[332] Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Replies from Brazil to Questions from the United States, G/LIC/Q/BRA/2, p. 2.

[333] Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, pp. 2-3.

[334] Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, p. 3.

[335] Ibid. pp. 3-4. The United States circulated a communication reiterating these concerns and posing further questions in November 2004. (See Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3.)

[336] Ibid. p. 4.

1.75. At the June 2005 meeting of the Committee on Import Licensing, the United States noted that they had not yet received a response to their questions.[337] Brazil reiterated that the restrictions were justified because of the potential risks and uses of lithium compounds "including for nuclear ends".[338] The Committee took note of these statements.[339] At the June 2006 meeting of the Committee on Import Licensing, the United States noted that they had still not received a response to their questions, as recently circulated with supplementary questions.[340] The United States also asserted that "it seemed clear that none of the requests for information that the U.S. was making, involved the national security provisions of Article XXI of the GATT 1994, since the information was requested for commercial purposes."[341] Brazil responded that there had been no change in its policy, but that it had taken note of the concerns of the United States.[342] The Committee took note of these statements.[343] Similar views were expressed at subsequent meetings of the Committee on Import Licensing until 2009.[344] In 2009, Brazil circulated a communication to the Committee on Import Licensing responding to the questions of the United States, in which Brazil reiterated that "since some lithium compounds have an application in the production of nuclear energy", this restriction "was treated as a matter of national security".[345]

1.76. At the October 2009 meeting of the Committee on Import Licensing, the United States thanked Brazil for its response.[346] At the April 2010 meeting of the Committee on Import Licensing, the United States thanked Brazil again and noted that it did not have further questions at the time.[347]

European Union v. Brazil (2013)

1.77. During the 2013 Trade Policy Review of Brazil, the European Union posed a question to Brazil regarding its import licensing restrictions on nitrocellulose.[348] The European Union asserted that industrial nitrocellulose was a different product from military-grade nitrocellulose, and argued that as the former was a safe product which did not pose any problems related to national security, it was not justifiable to impose a *de facto* import ban on the product.[349] Brazil responded that it did not necessarily agree that industrial nitrocellulose posed no problems related to security, as low concentrations of the product could be used as an explosive.[350] Brazil noted that it was however currently reviewing its legislation on controlled products.[351]

1.78. At the April 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns about Brazil's import licensing scheme for nitrocellulose.[352] The European Union argued that the Brazilian producer of nitrocellulose benefited from the restrictions as a monopoly supplier in the closed local market.[353] The European Union also stressed that the "essential security exceptions in the provision of Article XXI of the GATT 1994 were to be applied on

[337] Committee on Import Licensing, Minutes of Meeting held on 15 June 2005, G/LIC/M/21, p. 3.
[338] Ibid.
[339] Ibid. p. 5.
[340] Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 3. See also Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3/Add.1.
[341] Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 4.
[342] Ibid. p. 3.
[343] Ibid. p. 4.
[344] See, e.g. Committee on Import Licensing, Minutes of Meeting held on 2 April 2007, G/LIC/M/25, p. 3; Committee on Import Licensing, Minutes of Meeting held on 28 April 2008, G/LIC/M/27, pp. 5-6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, pp. 3-4; and Committee on Import Licensing, Minutes of Meeting held on 30 April 2009, G/LIC/M/29, p. 8. Brazil also emphasized that controls on lithium products in other countries were not uncommon, and maintained that this was a matter of national security due to the application of lithium compounds in the production of nuclear energy. (See Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, p. 4.)
[345] Committee on Import Licensing, Replies from Brazil to Questions from the United States, Brazil's Non-Automatic Import Licensing Procedures, G/LIC/Q/BRA/13, p. 1.
[346] Committee on Import Licensing, Minutes of Meeting held on 19 October 2009, G/LIC/M/30, pp. 6-7.
[347] Committee on Import Licensing, Minutes of Meeting held on 12 July 2010, G/LIC/M/31, pp. 5-6.
[348] Trade Policy Review Body, Trade Policy Review, Brazil, Minutes of Meeting held on 24 and 26 June 2013, Addendum, WT/TPR/M/283/Add.1, p. 103.
[349] Ibid.
[350] Ibid.
[351] Ibid.
[352] Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.
[353] Ibid.

traffic in implements of war and to goods for the purpose of supplying a military establishment, but not to the non-military industrial sector."[354] The European Union requested that Brazil remove the licensing requirements and asked for additional information regarding grants of such licenses over the last five years.[355] Brazil took note of these comments and asked that the European Union provide its comments and questions in writing.[356] The Committee took note of these statements.[357]

1.79. The European Union subsequently circulated a communication to the Committee on Import Licensing containing these questions to Brazil.[358] At the October 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns and further asserted that industrial nitrocellulose was only used for "commercial purposes such as for applications like printing inks, wood lacquer, or nail varnish".[359] Brazil responded that it disagreed with the European Union's view that industrial and military nitrocellulose were substantially and chemically different products, as regardless of its intended use, "the product poses risks".[360] The Committee took note of these statements.[361] Brazil contemporaneously circulated a communication responding to the European Union's questions in which Brazil asserted that nitrocellulose was a hazardous material at any concentration, and controls on the product were therefore legitimate for "security and safety reasons".[362] Similar views were expressed at subsequent meetings of the Committee on Import Licensing[363], and the European Union circulated further questions to Brazil in 2016.[364] Discussions between the European Union and Brazil on this issue continued into 2018.[365]

United States v. Cuba (1962-1996)

1.80. In 1962, the United States imposed an embargo prohibiting imports into the United States of all products of Cuban origin, in addition to all goods imported via Cuba, and ordering a continuing prohibition on all exports from the United States to Cuba.[366] In 1968, Cuba submitted a notification to the Committee on Trade in Industrial Products stating that the embargo constituted a non-tariff barrier which adversely affected Cuba's trade.[367] During the Committee's first examination of the notified barriers in 1969[368], Cuba emphasized that the embargo differed from the previously examined trade barriers because it was not limited to particular products or particular commercial interests, but instead was "designed to reduce a small country to submission by starvation".[369] The United States responded that the embargo had been imposed for reasons of "individual and collective self-defense" and to "promote national and hemispheric security", and invoked Article XXI as

[354] Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.
[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Committee on Import Licensing, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, Questions from the European Union to Brazil, G/LIC/Q/BRA/18.
[359] Committee on Import Licensing, Minutes of Meeting held on 20 October 2014, G/LIC/M/40, p. 8.
[360] Ibid. p. 9.
[361] Ibid.
[362] Committee on Import Licensing, Replies from Brazil to Questions from the European Union, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, G/LIC/Q/BRA/19, p. 3.
[363] See Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2015, G/LIC/M/42, pp. 6-7; and Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, pp. 7-8. Brazil subsequently emphasized the risk that nitrocellulose posed to human health as another justification for the measure. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6.) Brazil also asserted that nitrocellulose was reportedly employed in certain criminal activities, such as ATM robberies. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, p. 8.)
[364] Committee on Import Licensing, Questions from the European Union to Brazil, G/LIC/Q/BRA/20. For Brazil's response, see Committee on Import Licensing, Replies from Brazil to the European Union, G/LIC/Q/BRA/21.
[365] See, e.g. Committee on Import Licensing, Follow-Up Questions from the European Union to Brazil, Import Licensing System of Brazil, G/LIC/Q/BRA/22; and Committee on Import Licensing, Replies from Brazil to Questions from the European Union, Import Licensing System of Brazil, G/LIC/Q/BRA/23.
[366] GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec(90)4, p. 2.
[367] Committee on Industrial Products, Inventory of Non-Tariff Barriers, COM.IND/4, pp. 228-229.
[368] Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19-25 June 1969, COM.IND/W/7, para. 1.
[369] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.

justification for its actions.[370] Cuba responded that the invocation of Article XXI was inadequate because the United States had unilaterally adopted coercive measures without securing any authorization from the international legal community, in particular the UN Security Council.[371]

1.81. In 1986, Cuba circulated a communication expressing concern over a measure imposed by the United States removing quotas for sugar imports unless the supplying country guaranteed that it would not import sugar from Cuba for re-export to the United States.[372] At the May 1986 meeting of the GATT Council, Cuba argued that this measure violated the GATT and stated that the United States was undermining free trade, not only by harming Cuba, but also by trying to hamper its normal trade with third countries.[373] The United States responded that the measure was a reflection of the long-standing trade embargo against Cuba which the United States had maintained for national security reasons.[374] Nicaragua, Argentina, Brazil, Hungary, Peru, Czechoslovakia, Poland and Uruguay all opposed the measure, considering it to be politically motivated, coercive and discriminatory.[375] The Council took note of the statements.[376]

1.82. In 1987, in the context of the meetings of the United Nations Conference on Trade and Employment, the Cuban Vice-Minister for Foreign Trade made a statement asserting that the embargo imposed by the United States violated the objectives and principles of the GATT, including those enumerated in Articles I, II and V and Part IV.[377] The Vice-Minister also noted that the United States had unjustifiably invoked Article XXI, "since it is no secret that Cuba has not threatened, is not threatening nor will ever threaten the United States: on the contrary, the latter country has threatened and is threatening our security through sabotage, spying, violation of our land, sea and air frontiers, and has organized and supported armed aggression against our people as on the occasion of the mercenary landing at the Bay of Pigs".[378]

1.83. In 1988, in the context of the discussion of the United States embargo against Nicaragua at the Fourth Meeting of the Forty-Third Session, Cuba noted that the United States had justified its embargoes against both Nicaragua and Cuba on grounds of national security.[379] Cuba responded that "[i]f two small countries could pose a threat to an enormous military and economic power such as the United States, many countries might find themselves subject to similar measures by that country."[380] Cuba called on the contracting parties to recognize the rights of Nicaragua.[381]

1.84. In 1989, in the context of the Trade Policy Review Mechanism, the United States submitted a report to the GATT Council summarizing its domestic trade framework.[382] In this report, the United States cited "U.S. foreign policy and national security goals" and the President's "wartime and national emergency powers" as the justification for the Office of Foreign Assets Control's administration of the economic embargo against Cuba.[383] In response, Cuba circulated a communication stating that the embargo contradicted the United States' commitments under the

[370] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.
[371] Ibid. Cuba based its arguments upon its reading of paragraph (c) of Article XXI. (Ibid. p. 313.)
[372] Communication from Cuba, *United States – Measures Affecting Cuban Sugar Exports*, L/5980.
[373] GATT Council, Minutes of Meeting held on 22 May 1986, C/M/198, p. 33. Cuba specifically argued that the US measures violated Part IV and GATT Articles dealing with quantitative restrictions, non-discrimination and most-favoured-nation treatment. (Ibid.)
[374] Ibid. p. 34.
[375] Ibid. p. 33.
[376] Ibid. The same contracting parties reiterated these views at the First Meeting of the Forty-Second Session in 1986. (See GATT Contracting Parties, Forty-Second Session, Summary Record of the First Meeting on 24 November 1986, SR.42/1, pp. 11-13.)
[377] GATT Contracting Parties, Forty-Third Session, Cuba, Statement by Mr. Alberto Betancourt Roa, Vice Minister, Ministry of Foreign Trade, SR.43/ST/10, p. 7.
[378] Ibid.
[379] GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting on 2 December 1987, SR.43/4, p. 14.
[380] Ibid.
[381] Ibid.
[382] GATT Council, Trade Policy Review Mechanism, United States, Report by the United States of America, C/RM/G/3.
[383] Ibid. p. 81.

GATT 1947 and paragraph 7(iii) of the 1982 Ministerial Declaration.[384] Cuba also asserted that the invocation of Article XXI by the United States was inappropriate, "[s]ince Cuba has not provoked any 'national emergency', there is no 'wartime' nor any serious international tension."[385] Cuba expressed similar views on several subsequent occasions between 1990 and 1996.[386]

United States v. Cuba (including Helms-Burton Act) (1996-2016)

1.85. In 1996, Cuba circulated a Communication noting the adoption by the United States of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act).[387] Cuba argued that the objective of the Helms-Burton Act was to "intimidate the world business community and prevent it from participating in the ever-widening economic opportunities for foreign investment" in Cuba.[388] Cuba also asserted that the measure constituted a violation of its sovereignty by attempting to legislate on its internal matters, namely, the property of Cuban nationals.[389] At the March 1996 meeting of the Council for Trade in Goods, Cuba argued that the Helms-Burton Act was incompatible with various provisions of the GATT 1994 and other WTO Agreements.[390] The United States responded that it had recognized the need to take strong measures after the recent shooting down of two unarmed US civilian aircraft by the Cuban government, and asserted that "persons who knowingly and intentionally did business in Cuba using confiscated property were furthering wrongs committed against the former owners of this property, and were undermining the interests of the USA and its citizens".[391] Canada stated that the Helms-Burton Act was not a "useful tool" for achieving democratic reform in Cuba and noted that the legislation "was designed to chill investment in Cuba".[392] The Council for Trade in Goods took note of these statements.[393] Several Members reiterated their views at the April 1996 meeting of the General Council.[394]

1.86. In May 1996, the European Communities requested consultations in respect of the extraterritorial application of the United States' trade embargo against Cuba under the Helms-Burton Act and related US legislation and regulations.[395] These consultations did not achieve a mutually satisfactory solution, and the European Communities subsequently requested the establishment of a panel.[396] At the October 1996 meeting of the DSB, the European Communities

[384] GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec (90)4, p. 5. Cuba specifically cited incompatibility with Articles II, XI:1, XIII:1, XXXVI and XXXVII of the GATT 1947. (Ibid. pp. 5-6.)

[385] Ibid. p. 5.

[386] See, e.g. GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 11-12 March 1992, C/RM/M/23, pp. 26-27; GATT Council, Minutes of Meeting held on 29 September − 1 October 1992, C/M/259, pp. 77-78; GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 16-17 February 1994, C/RM/M/45, p. 24; and Communication from Cuba, *Analysis of the Effects of the Embargo Imposed by the Government of the United States of America against Cuba*, L/7525.

[387] Communication from Cuba, *United States - Cuban Liberty and Democratic Solidarity Act of 1996,* WT/L/142. The Helms-Burton Act, amongst other things, empowered the President to "encourage" other countries to restrict their trade and credit relations with Cuba, withheld payments to international financial institutions which approved loans to Cuba, and denied entry into the United States for companies with certain investments and assets in Cuba. (See Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6-7.)

[388] Ibid. p. 2.

[389] Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers-Requests, Communication from Cuba, TN/MA/NTR/2, pp. 2-3.

[390] Council for Trade in Goods, Minutes of Meeting held on 19 March 1996, G/C/M/9, pp. 3-4. Cuba specifically alleged that the measure was incompatible with the principles of MFN treatment, Article XI and Part IV of the GATT 1994, the Agreement on Trade-Related Investment Measures, and the commitments of the United States to ensure freedom of access in trade in services. (Ibid.)

[391] Ibid. p. 6.

[392] Ibid. p. 5. Mexico, Chile, the European Communities, Nicaragua and India also expressed concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5-6.)

[393] Ibid. p. 6.

[394] General Council, Minutes of Meeting held on 16 April 1996, WT/GC/M/11, pp. 5-9. Bolivia, Canada, the European Communities, Mexico, India, Nicaragua, Madagascar, Jamaica, the Philippines, Australia, Switzerland, Norway, Colombia, Trinidad and Tobago, Japan, Sri Lanka and Iceland expressed their concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5-10.)

[395] Request for consultations by the European Communities, *United States − The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1.

[396] Request for the establishment of a panel by the European Communities, WT/DS38/2 (European Communities' panel request), pp. 1-2. The other challenged measures included: (a) denial of access to the US

reiterated its request for a panel, noting that its concern with the legislation "was not its objectives, but the extra-territorial means chosen to achieve those objectives".[397] The United States asserted again that the Helms-Burton Act was a response to the shooting down of two civilian aircraft by the Cuban government.[398] The United States described this incident as the latest in a series of actions taken by the Cuban government over the past 35 years that had directly affected US interests, and noted that the Helms-Burton Act, other US laws and regulations, as well as the Cuban embargo which dated from the 1960s "reflected the abiding US foreign policy and security concerns with regard to Cuba pursued by eight US Presidents".[399] The United States asserted that the Helms-Burton Act was "designed to promote a swift transition to democracy in Cuba" and noted that the European Communities had not suggested that the US policy with regard to Cuba generally, or the Helms-Burton Act in particular, was motivated by trade protectionism.[400] The United States noted that several of the challenged measures had been in force for years or decades, and had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of its essential security interests.[401] The United States questioned the utility and desirability of pursuing this issue through the WTO, arguing that the WTO had been established to manage "trade relations", not "diplomatic or security relations" with negligible trade and investment effects.[402] The United States refused to join a consensus to establish a panel, and urged the European Communities to explore other options.[403] Cuba asserted that the Helms-Burton Act was incompatible with the GATT 1994, but noted that it would reply to the "political statement" by the United States in other fora such as the UN General Assembly.[404] The DSB agreed to revert to this matter at its next meeting.[405]

1.87. At the November 1996 meeting of the DSB, the European Communities reiterated its request for a panel.[406] The United States maintained its earlier position, and noted that it did not believe that a panel would lead to a resolution of the dispute, but rather, would pose serious risks to the WTO as a nascent organization.[407] Cuba responded that unlike the United States, Cuba had never launched an invasion, or initiated any military actions or intelligence operations against the United States.[408] Cuba asserted that if anything, "Cuba would be in a better position than the US to resort to Article XXI of the GATT 1994."[409] Cuba noted, however, that the DSB was not the appropriate forum to enumerate an endless list of such grievances.[410]

1.88. The DSB agreed to establish the panel with standard terms of reference.[411] In 1997, the European Communities requested that the panel suspend proceedings while a mutually agreeable

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tariff rate quota for sugar (through a prohibition on the allocation of any of the sugar quota to a country that was a net importer of sugar unless that country certified that it did not import Cuban sugar that could indirectly find its way to the US); (b) denial of transit of EC goods and vessels of EC Member States through US ports where the vessels carried goods or passengers to or from Cuba, or carried goods in which Cuba or a Cuban national had any interest; (c) prohibiting US persons from financing transactions involving confiscated property owned by a US national; (d) a right of action in favour of US citizens to sue EC citizens and companies in US courts to obtain compensation for Cuban properties "trafficked" by such EC citizens or companies and confiscated by the Cuban Government from persons who were US nationals; and (e) denials of visas and exclusion from the US of persons (including the spouses, minor children and agents of such persons) involved in confiscating or "trafficking" in confiscated property owned by US nationals or persons. (European Communities' panel request, pp. 1-2.)

[397] Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 6. Australia, Bolivia, Canada, India and Switzerland also expressed their concern about the potential extra-territorial application of the Helms-Burton Act. (Ibid. pp. 7-9.)

[398] Ibid. p. 6.

[399] Ibid. pp. 6-7.

[400] Ibid. p. 7.

[401] Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 7.

[402] Ibid.

[403] Ibid. p. 7.

[404] Ibid. p. 8.

[405] Ibid. p. 9.

[406] Dispute Settlement Body, Minutes of the Meeting held on 20 November 1996, WT/DSB/M/26, p. 2. New Zealand and Norway expressed their concerns regarding the extraterritorial application of the measures. (Ibid. pp. 2-3.)

[407] Ibid. p. 2.

[408] Ibid. pp. 2-3.

[409] Ibid. p. 3.

[410] Ibid.

[411] Ibid. p. 2.

solution was negotiated.[412] The European Communities and the United States subsequently reached an Understanding that the United States would consult with Congress with a view to obtaining a waiver for the European Communities from the Helms-Burton Act.[413] The panel's authority lapsed in April 1998.[414] At the April 1998 meeting of the DSB, Cuba expressed its continuing conviction that the measures were illegal and reserved its right to revert to this matter.[415]

1.89. Cuba and the United States have reiterated their views about the Helms-Burton Act and the embargo more generally on several subsequent occasions.[416]

CONCLUDING REMARKS

1.90. As discussed in paragraphs 7.80 and 7.81 of the Panel Report, the Panel considers that the foregoing survey of the pronouncements of the GATT contracting parties and WTO Members does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.

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[412] Communication from the Chairman of the Panel, WT/DS38/5.

[413] See Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Communication by the United States, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25.

[414] Note by the Secretariat, Lapse of the Authority for Establishment of the Panel, WT/DS38/6.

[415] Dispute Settlement Body, Minutes of the Meeting held on 22 April 1998, WT/DSB/M/45, pp. 15-16.

[416] See, e.g. Dispute Settlement Body, Minutes of the Meeting held on 22 June 1998, WT/DSB/M/46, pp. 17-18; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 17 September 2001, Addendum, WT/TPR/M/88/Add.1, p. 242; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 16 January 2004, Addendum, WT/TPR/M/126/Add.3, p. 117; Negotiating Group on Market Access, Non-Tariff Barriers Imposed by the United States Impeding and Prohibiting Cuba's Trade, Communication from Cuba, TN/MA/W/71, pp. 1-12; Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6-7; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 22 and 24 March 2006, Addendum, WT/TPR/M/160/Add.1, pp. 162-166; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 9 and 11 June 2008, Addendum, WT/TPR/M/200/Add.1, p. 165; Trade Policy Review Body, Trade Policy Review, United States, Record of Meeting held on 29 September and 1 October 2010, WT/TPR/M/235, pp. 58-59; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 16 and 18 December 2014, Addendum, WT/TPR/M/307/Add.1, p. 221; and Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 19 and 21 December 2016, Addendum, WT/TPR/M/350/Add.1, pp. 159-160.

WORLD TRADE ORGANIZATION

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RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS512/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 12 July 2017
Revised on 11 January 2018

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Information designated as confidential shall be used only for the purposes of the proceedings under the DSU, during which such information was submitted. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. The Panel shall meet in closed session. The parties and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties") shall be present at the meetings only when invited by the Panel to appear before it.

1.4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Ukraine requests such a ruling, the Russian Federation shall submit its response to the request in its first written submission. If the Russian Federation requests such a ruling, Ukraine shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.8. Where the original language of an exhibit is not a WTO working language, the party or third party submitting such an exhibit shall submit, at the same time, a translation of the exhibit into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should

be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the filing of the exhibit comprising the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Thereafter, the Panel will rule as promptly as possible on any objection to the accuracy of a translation.

1.9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

1.10. To facilitate the maintenance of the record of the dispute and to maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Ukraine could be numbered UKR-1, UKR-2, etc. If the last exhibit in connection with the first submission was numbered UKR-5, the first exhibit of the next submission thus would be numbered UKR-6. Exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc.

Questions

1.11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting of the Panel.

Substantive meetings

1.12. Each party and third party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and by no later than 5.00 p.m. on the Friday prior to each substantive meeting.[1]

1.13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Ukraine to make an opening statement to present its case first. Subsequently, the Panel shall invite the Russian Federation to present its point of view. Before a party takes the floor, it shall provide the Panel, the other party, and the third parties at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each such party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel, the other party and the third parties the final version of its opening statement, as well as the final version of its closing statement, if any, as soon as practicable following the end of the session at which that statement is delivered. In any event, each party shall make available the final version of its opening statement by no later than 9.00 a.m. on Wednesday, 24 January 2018. Each party shall then make available the final version of its closing statement by no later than 5.00 p.m. on Friday, 26 January 2018.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to answer these questions orally. Each party shall send in writing, on 30 January 2018, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions by 13 February 2018.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, on 30 January 2018, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions by 13 February 2018.

[1] For the first substantive meeting, this date would be Friday, 19 January 2018. For the second substantive meeting, this date would be Friday, 11 May 2018.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Ukraine presenting its statement first.

1.14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the Russian Federation if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the Russian Federation to present its opening statement, followed by Ukraine. If the Russian Federation chooses not to avail itself of that right, the Panel shall invite Ukraine to present its opening statement first. Before a party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each such party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.16. Each third party may be present at the sessions of the first substantive meeting with the Panel at which the parties deliver their opening oral statements, and their closing oral statements, respectively.

1.17. Each third party shall also be invited to present its views orally during a session of the first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. on Friday, 19 January 2018.

1.18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each such third party shall provide additional copies to the interpreters, through the Panel Secretary. Third parties shall make available to the Panel,

the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. on Friday, 26 January 2018.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, on 30 January 2018, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions by 13 February 2018.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, on 30 January 2018, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions by 13 February 2018.

Descriptive part

1.19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

1.20. Each party shall submit, in accordance with the timetable adopted by the Panel: (i) the first integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and, optionally, responses to questions following the first substantive meeting; and (ii) the second integrated executive summary of its rebuttal, second opening and closing oral statements and, optionally, responses to questions and comments thereon following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' and third parties' responses to questions or the parties' comments on responses to questions.

1.21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed six (6) pages. If a third-party submission and/or statement do(-es) not exceed six (6) pages, it can be deemed, upon such third party's request, an integrated executive summary of its arguments.

Interim review

1.22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

1.24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

1.25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (Office No. 2047). Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

b. Each party and third party shall file two (2) paper copies of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the two (2) paper copies. The electronic version shall be filed in a format compatible with that used by the Secretariat; either on 4 CD-ROMs, 4 DVDs or 4 USB keys; or as an e-mail attachment containing the document(s). If the electronic version is provided on a CD-ROM, DVD or USB key, the 4 copies shall be delivered to the DS Registry (Office No. 2047). If the electronic version is provided by e-mail attachment, the e-mail shall be sent to the DS Registry (*****@wto.org), with copies to Ms Michelle Healy (*****@wto.org), Ms Parika Ganeriwal (*****@wto.org) and Mr Matthew D'Orsi (*****@wto.org).

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel. A party or third party may serve its documents on the other party or third party in electronic format only, unless a paper copy is requested specifically in writing no later than one day prior to the filing and provided that the Panel Secretary is notified. Service of the electronic (or paper) copy of any document shall constitute service of that document for purposes of these Working Procedures.

e. In parallel with the submission of a document to the DS Registry and the service of a document upon a party or a third party, each party and third party may upload the same document to the Digital Dispute Settlement Registry (DDSR). Such a document must be uploaded to the DDSR no later than one day after the due date established by the Panel for that document. If a party or third party experiences technical difficulties in uploading a document promptly to the DDSR, such difficulties will not affect the official submission of the document to the Panel or the service of the document to a party or third party. As stated above, the paper version of a document shall constitute the official version for the purposes of the record of the dispute, and service of an electronic (or a paper) copy of a document on a party or third party shall constitute service of that document for purposes of these Working Procedures. For assistance with any technical difficulties concerning the DDSR, please contact the DS Registry (*****@wto.org).

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

1.26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 25 August 2017

1 These procedures apply to any business confidential information ("BCI") that a party or third party wishes to submit to the Panel.

2 For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party or third party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the Member submitting the information or of the person or entity that supplied the information to that Member.

3 No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise, or association of enterprises, engaged in the production or sale of products affected by the measures at issue in this dispute, or in import, export or transit operations regarding such products.

4 A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5 The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between bolded brackets, as follows: [xx,xxx.xx]. The first page or cover of the document shall state in bold "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" in bold at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI), Exhibit RUS-1(BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between bolded brackets, as follows: [xx,xxx.xx]". Should the party submit an exhibit of which the entire content constitutes BCI, the cover page of the exhibit and the top of each page of the exhibit shall state in bold "All of the information included in this exhibit is business confidential information" without it being necessary to place all of the specific information in that exhibit between bold brackets.

6 Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

7 If a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions, written versions of oral statements and documents submitted in binary-encoded form, shall mark the document and any storage medium, and use bolded brackets, as set out in paragraphs 5 and 6.

8 In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

9 If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party marked as containing BCI in any of the ways set forth in paragraphs 5 and 6 above should not be designated as BCI. Each party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

10 The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

11 The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

12 If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 13 below.

13 If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures.

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ANNEX B

PRELIMINARY RULINGS

ANNEX B-1

ENHANCED THIRD-PARTY RIGHTS RULING

Issued by the Panel on 9 January 2018

1.1. The Panel refers to the joint request of Australia, Canada and the European Union (the requesting third parties) of 10 November 2017, in which the requesting third parties request the Panel to grant to all of the third parties certain additional third-party rights in these proceedings, namely to: (a) receive all submissions by the parties to the Panel; (b) be present during the entirety of the first and second substantive meetings of the Panel; (c) make a statement to the Panel at the second substantive meeting; and (d) have the opportunity to respond to questions from the Panel to the parties and other third parties.[1]

1.2. The requesting third parties advance two main grounds in support of their request for these enhanced third-party rights.

1.3. First, they note the novelty of the Russian Federation's defence based on Article XXI of the GATT 1994, and the significance of this dispute as the first in which a WTO dispute settlement panel will address the scope of the WTO security exceptions.[2] Further, they assert that the Russian Federation has presented limited argumentation in support of its defence, and with Ukraine not having anticipated this defence in its first written submission, the parties will have to make their case in respect of the security exception in Article XXI(b)(iii) in their second written submissions. The requesting third parties argue that, in these circumstances, confining the third parties' involvement in the case to the first written submissions and the first substantive meeting would mean that the third parties are not able to fully participate in legal exchanges of "utmost systemic importance" which would frustrate the purpose of third-party rights.[3]

1.4. Second, they assert the European Union's significant economic interests in this dispute as a major exporter to Kazakhstan and the Kyrgyz Republic and as a major user of the transit routes implicated in this dispute.[4]

1.5. The requesting third parties submit that the grant of enhanced third-party rights does not place any additional burden on the parties (given that the service of documents by parties and third parties is being effected electronically) and suggest that the Panel has the means available to ensure the appropriate balance between the interests of the parties and third parties, including with respect to the efficiency and promptness of the proceedings, even in a situation in which there is a comparatively large number of third parties.[5]

1.6. Following the Panel's invitation to the parties and the other third parties to comment on the joint request, Ukraine, the Russian Federation and certain of the other third parties (Brazil, China, Japan, Singapore and the United States) provided comments on the joint request on 1 December 2017. Ukraine generally supports the joint request, but does not consider it necessary that the third parties participate in the entirety of the sessions of the first and second substantive meetings that are reserved for the parties.[6] The Russian Federation opposes the joint request on the grounds that the request is not justified in this case, is unsupported in the case law, and involves an undue burden on the parties, the Secretariat and the Panel.[7] Brazil and Singapore support the grant of "passive" enhanced third-party rights (i.e. to receive all submissions by the parties to the

[1] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 8.
[2] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 4.
[3] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 5.
[4] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 7.
[5] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 6.
[6] Letter from Ukraine dated 1 December 2017, paras. 2 and 10.
[7] Letter from the Russian Federation dated 1 December 2017, pp. 2-3, 3-5, and 5-6.

Panel and to be present during the first and second substantive meetings of the Panel).[8] China and Japan both express the view that the decision to grant enhanced third-party rights should be made on a case-by-case basis.[9] China and Japan each request that, if the Panel grants any such rights to any of the third parties, those same rights be granted to them.[10] The United States considers that the Panel should deny the joint request, based on its view that the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994 means that there is no basis for the Panel to make findings in this proceeding. Accordingly, the Panel should not require further written submissions from the parties, or hold substantive meetings with the parties and third parties.[11]

1.7. Articles 10.2 and 10.3 of the DSU and paragraph 6 of Appendix 3 of the DSU define the rights of third parties in panel proceedings. Pursuant to these provisions, third parties have the rights to (a) receive the submissions of the parties up to the first meeting of the panel, (b) make submissions to the panel, (c) present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session.

1.8. A panel may exercise the discretion afforded to it under Article 12.1 of the DSU[12] to grant enhanced third-party rights in a dispute, provided the additional rights are consistent with the provisions of the DSU and the principles of due process.[13] All third parties in a panel proceeding may be presumed to have a "substantial interest" in the matter before the panel.[14] Additional third-party rights have been granted in panel proceedings for specific reasons only, namely, where there were special circumstances that justified the grant of enhanced third-party rights. Previous panels have granted enhanced third-party rights on the basis of, *inter alia*, certain third parties enjoying economic benefits that were directly implicated by the measure at issue[15], the importance of trade in the product at issue to certain third parties[16], at least one of the parties agreeing that enhanced third-party rights should be granted[17], claims that the measures at issue derived from an international treaty to which certain third parties were parties[18], third parties having previously been granted enhanced rights in related panel proceedings[19], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[20] Decisions on whether to grant enhanced third-party rights are made on a case-by-case basis, and are informed by the factors considered in previous disputes.[21] These determinations are made in light of the need to maintain the distinction drawn in the DSU between the rights afforded to parties and those afforded to third parties.[22]

1.9. We recall that the panels in *EC − Bananas III*, *EC − Tariff Preferences,* and *EU − Poultry Meat (China)* granted enhanced third-party rights where third parties enjoyed certain economic benefits that were directly implicated by the measure at issue.[23] In these disputes, the third parties were direct beneficiaries of the challenged measures (respectively, tariff rate quotas, tariff preferences and tariff rates). By contrast, in the present case, the European Union does not enjoy particular legal rights or economic benefits in Russia's transit regime as such. While the European Union may be a significant user of the transit routes affected by Russia's transit measures, we note that in cases where third parties have asserted an economic interest in the outcome of a case, for example,

[8] Letter from Brazil dated 1 December 2017, p. 2; and Letter from Singapore dated 1 December 2017, paras. 2-3.
[9] Letter from China dated 1 December 2017, p. 1; and Letter from Japan dated 1 December 2017, p. 1.
[10] Letter from China dated 1 December 2017, p. 2; and Letter from Japan dated 1 December 2017, p. 2.
[11] Letter from the United States dated 1 December 2017, para. 2.
[12] Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."
[13] Appellate Body Reports, *US − 1916 Act*, para. 150; *EC − Hormones*, para. 154; and *US − FSC (Article 21.5 − EC*), para. 243.
[14] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.16.
[15] Panel Reports, *EC − Bananas III*, para. 7.8; *EC − Tariff Preferences*, Annex A, para. 7; and *EU − Poultry Meat (China)*, para. 7.44.
[16] Panel Report, *EC − Export Subsidies on Sugar (Australia)*, para. 2.5.
[17] Panel Reports, *EC − Bananas III*, para. 7.8.
[18] Panel Reports, *EC − Bananas III*, para. 7.8.
[19] Panel Reports, *EC − Bananas III*, para. 7.8.
[20] Panel Report, *EC − Hormones (Canada*), para. 8.17.
[21] See Panel Report, *China − Rare Earths*, para. 7.7.
[22] Panel Reports, *US − 1916 Act*, para. 6.33; and *EC − Export Subsidies on Sugar (Australia*), para. 2.5.
[23] Panel Reports, *EC − Bananas III*, paras. 4.9, 4.10; *EC − Tariff Preferences*, Annex A, para. 7; *EU − Poultry Meat (China*), para. 7.44.

because their exports are potentially affected by the same measures, panels have declined to grant enhanced third-party rights if one or both parties opposed the grant.[24]

1.10. The other basis on which the requesting third parties request enhanced third-party rights concerns the "novelty" of Russia's defence based on Article XXI of the GATT 1994, and the "utmost systemic importance" of the legal issues that arise in relation to the interpretation of this provision, along with the assertion that the third parties will not have been able to fully engage with the parties' arguments regarding Article XXI until the parties' second written submissions.[25] Ukraine also supports the grant of enhanced third-party rights on similar grounds, noting that the third parties will not have access to Ukraine's opening oral statement at the first substantive meeting or to Ukraine's second written submission.[26] The important systemic implications of the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994 are also referred to by Brazil, China and Japan.[27]

1.11. The Russian Federation, on the other hand, argues that panels have consistently rejected requests for enhanced third-party rights where the requesting third party only has legal and systemic interests that do not differentiate it from other third parties or Members.[28] The Russian Federation refers specifically to the decisions of three panels denying requests for enhanced third-party rights that were made on the basis of the alleged systemic interests of the requesting third parties: *US – Countervailing Measures (China)*, *Indonesia – Import Licensing Regimes*, and *India – Solar Cells*.[29] It argues that Ukraine was fully aware of the substance of the measures at issue and the circumstances leading to their imposition and notes that five of the third parties have already made extensive arguments concerning Article XXI of the GATT 1994 in their third-party submissions.[30]

1.12. We agree with the Russian Federation that prior panels have not supported requests for enhanced third-party rights when the requesting third party has simply alleged a "systemic interest" in the interpretation of various provisions of WTO Agreements. This is because all WTO Members are presumed to have a systemic interest in the interpretation of the covered agreements. Requesting third parties have therefore typically been required to identify a specific interest, over and above the systemic interests common to all WTO Members.

1.13. The Panel considers, however, that this proceeding presents something of an exceptional situation. In its first written submission, the Russian Federation invokes Article XXI(b)(iii) of the GATT 1994 as a defence to Ukraine's claims. This proceeding will, therefore, be the first occasion on which a WTO dispute settlement panel will interpret Article XXI(b)(iii) of the GATT 1994. Moreover, the Russian Federation advances an interpretation of Article XXI(b)(iii) which posits that the determination of an action that is necessary for the protection of a Member's essential security interests, and the determination of such Member's essential security interests, is within the sole discretion of that Member. It is clear that the Panel's conclusions regarding the interpretive issues raised by the Russian Federation could have far-reaching effects on the determination of the ambit of the covered agreements and on the WTO as a whole. In our view, these effects are radically different from those of the interpretation of one or another of the substantive provisions of the covered agreements. In the circumstances of this case, the Panel has concluded that it is in the interests of the WTO system as a whole that all of the third parties be granted such enhanced third-party rights as would enable them to engage fully on interpretive issues of such vital systemic importance.

1.14. The Panel is also, however, mindful of the sensitivities of the parties to discussion, during the course of this proceeding, of factual issues that potentially relate to their foreign policy and security interests. The Panel has therefore decided to grant the third parties enhanced third-party rights less

[24] See e.g. Panel Reports, *US – Coated Paper (Indonesia)*, Annex D-1, p. D-3; and *Indonesia – Import Licensing Regimes*, para. 7.1. We therefore agree with the Russian Federation that the European Union has failed to demonstrate that "third party benefits economically differentiated from the challenged measure, and its economic interest cannot be addressed by bringing a separate case." Letter from the Russian Federation dated 1 December 2017, p. 3.

[25] Letter from Australia, Canada, and the European Union dated 10 November 2017, paras. 4 and 5.

[26] See Letter from Ukraine dated 1 December 2017, paras. 3 and 8.

[27] Letter from Brazil dated 1 December 2017, pp. 1-2; Letter from China dated 1 December 2017, pp. 1-2; and Letter from Japan dated 1 December 2017, pp. 1-2.

[28] Letter from the Russian Federation dated 1 December 2017, pp. 2-3.

[29] Letter from the Russian Federation dated 1 December 2017, fn 4, p. 3.

[30] Letter from the Russian Federation dated 1 December 2017, pp. 4-5.

extensive than requested in the joint request. More specifically, the Panel has decided to grant enhanced third-party rights that it considers will enable the third parties to participate in the legal exchanges between the parties at the first substantive meeting regarding the interpretation of Article XXI(b)(iii) of the GATT 1994.

1.15. Accordingly, the Panel grants the following enhanced third-party rights to all of the third parties:

a. The right to attend the portions of the party session of the first substantive meeting at which the parties deliver their opening oral statements, and closing oral statements, respectively; and

b. The right to receive the provisional written versions of the parties' opening oral statements and closing oral statements, respectively, at the portions of the party session of the first substantive meeting at which those statements are delivered, as well as the final versions of such oral statements at the end of the day on which they are delivered.

1.16. In order to provide the third parties with an opportunity to comment on the parties' arguments presented in the opening oral statements in their third-party statements at the third-party session of the first substantive meeting, the Panel proposes to change the date of the third-party session of the first substantive meeting from 24 January 2018 to 25 January 2018.

1.17. The Panel advises that, when issuing questions to the third parties to which it wishes to receive responses in writing, following the first substantive meeting, it will endeavour to ensure that the third parties are given a full opportunity to address the interpretive issues raised by the parties during the party session of the first substantive meeting.

1.18. The Panel advises the third parties that, consistent with paragraph 11 of the Working Procedures, it reserves the right to pose questions to the third parties anytime during the proceedings of the dispute, including after the second substantive meeting, should the Panel consider that this can be of assistance to it in discharging its obligations under Article 11 of the DSU.[31]

1.19. The Panel will shortly distribute a revised Timetable and Working Procedures to the parties and third parties to reflect the foregoing.

[31] In the event that the Panel were to pose such questions to the third parties, it would ensure that the parties are afforded an appropriate opportunity to comment on the third parties' responses.

ANNEX B-2

CONFIDENTIALITY RULING

Issued by the Panel on 16 May 2018

1 INTRODUCTION

1.1. This ruling addresses the complaints, made by the Russian Federation (Russia) in its letter dated 14 March 2018, of violations by the European Union of its confidentiality obligations under Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Panel's Working Procedures.

1.2. The European Union published its third-party written submission and third-party statement at the first meeting of the Panel (hereafter, the European Union's third-party submission and statement) on the website of the European Commission's Directorate-General for Trade. Russia alleges that, owing to certain contents of the European Union's published third-party submission and statement, the European Union thereby disregarded the confidential nature of: aspects of the positions of Russia and certain third parties; contents of procedural documents; contents of the Panel's questions to the parties and third parties during the first substantive meeting; information regarding the Panel's timetable; and certain details relating to another ongoing dispute, *Russia – Pigs*.

1.3. By communication dated 16 March 2018, the Panel invited the European Union and any other third parties, as well as Ukraine, to comment on Russia's complaint by 21 March 2018. Accordingly, on 21 March 2018, the European Union, Australia, Brazil, Canada, the United States and Ukraine each provided comments on Russia's complaint. The Panel invited Russia to respond to these comments by 4 April 2018. On that date, Russia provided its response.

2 RUSSIA'S COMPLAINT AND REQUEST TO THE PANEL

2.1. In its letter dated 14 March 2018, Russia alleges that specific paragraphs in the European Union's third-party submission and statement go beyond the disclosure of the European Union's own positions and disclose information that is required to be treated as confidential under the DSU and the Working Procedures. These paragraphs of the European Union's published third-party submission and statement allegedly involve:

a. Disclosure of aspects of Russia's position, particularly with respect to the measures at issue[1], and Russia's defence under Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994)[2], as well as aspects of other third parties' positions[3];

b. Disclosure of the contents of other procedural documents pertaining to the Panel's proceedings[4];

[1] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party submission, paras. 6 and 8).

[2] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring, *inter alia*, to the European Union's third-party submission, paras. 8, 10, and 11; and the European Union's third-party statement, paras. 3 and 8).

[3] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, paras. 13 and 36).

[4] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2, which, in turn, refers to the Panel's ruling on the grant of enhanced third party rights).

c. Disclosure of the contents of the Panel's questions to the parties and third parties during the first substantive meeting[5];

d. Disclosure of information regarding the Panel's timetable, such as the dates of the first substantive meeting and of receipt of the third-party submissions[6]; and

e. Disclosure of the contents of the first substantive meeting and details relating to the ongoing dispute *Russia – Pigs.*[7]

2.2. In Russia's view, Article 18.2 of the DSU and paragraph 2 of the Working Procedures, as well as Article 12.1 read with paragraph 2 of Appendix 3 of the DSU, require that the above-referenced information be treated as confidential. Russia considers that, by publishing its third-party submission and statement on the website of the European Commission's Directorate-General for Trade, the European Union has disclosed the above-referenced information, which is required to be treated as confidential, thereby violating the DSU and the Working Procedures.

2.3. Russia requests the Panel to take all necessary actions and to request the European Union to withdraw all publicly available statements containing information of a confidential nature relevant to this dispute and to the *Russia – Pigs* dispute, and to refrain from such unauthorized disclosure or similar actions in the future.

3 COMMENTS OF THE THIRD PARTIES AND UKRAINE

3.1 European Union

3.1. The European Union considers that Russia's request is based on an erroneous interpretation of the relevant legal provisions and should be dismissed by the Panel. The European Union advises that, consistent with the second sentence of Article 18.2 of the DSU, the European Union has a "well-established and consistent policy" of making available to the public written submissions, as well as the written versions of the oral statements, made by the European Union to panels and to the Appellate Body. The European Union implements this policy by publishing those documents on the website of the European Commission's Directorate-General for Trade. The European Union omits from those documents any information properly designated as confidential by other parties, in accordance with the third sentence of Article 18.2 of the DSU, or with any specific confidentiality procedures adopted by a panel. Moreover, the European Union considers that other WTO Members follow similar practices and, as far as the European Union is aware, no Member has complained about such practices in the context of a previous dispute.[8]

3.2. The European Union acknowledges that its third-party submission and statement, as published on the website of the European Commission's Directorate-General for Trade, contain certain references to provisions of the covered agreements invoked by Russia, as well as to arguments made by Russia in its first written submission or statement to the Panel at the first meeting. The European Union explains that it did not redact those references from the published versions of the European Union's third-party submission and statement because Russia had not designated any of the information contained in its first written submission or statements at the first meeting of the Panel as confidential. Had Russia done so, the European Union would have refrained from disclosing it in the published version of its third-party submission and statement, in accordance with the third sentence of Article 18.2 of the DSU.

3.3. The European Union argues that it has fully complied with the confidentiality requirements in Article 18.2 of the DSU because it has not published the written submissions or statements of Russia or of any other party to this dispute, but only its own submissions and statements. The European

[5] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 38).

[6] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

[7] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 25).

[8] The European Union notes that Russia has been a party to many disputes in which the European Union was also a party and has not previously complained about the European Union's publication of its written submissions and statements in those disputes.

Union considers that Russia has erroneously interpreted the scope of the confidentiality requirement in Article 18.2 of the DSU, specifically the first sentence of Article 18.2, to prohibit the disclosure of any of the contents of other parties' written submissions (including the cited provisions of the covered agreements and legal arguments).

3.4. The European Union argues that its publication practice relies on the second sentence of Article 18.2 of the DSU, which provides that "[n]othing in this Understanding" shall preclude a party to a dispute from disclosing statements of its own positions to the public. According to the European Union, a party's "position" is to a very large extent defined and developed in relation to the positions and arguments of the other parties. If a party could not refer to the positions and arguments of the other parties in the course of stating its own positions, it would effectively be prevented from disclosing statements of its own positions to the public in a complete and meaningful manner.[9]

3.5. The European Union argues that Russia's interpretation of the prohibition contained in the first sentence of Article 18.2 of the DSU would also render redundant the third sentence of that provision, which provides that Members shall treat as confidential "information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." If the first sentence of Article 18.2 were interpreted to require absolute confidentiality in respect of all of the contents of written submissions, there would be no need to require, pursuant to the third sentence of Article 18.2, that a Member designate certain information as confidential.[10] Moreover, it is not possible to reconcile a requirement of absolute confidentiality in respect of all of the contents of written submissions with the fact that panels are required by the DSU to summarize in their reports the positions and arguments of the parties.

3.6. The European Union argues that Article 18.2 of the DSU should be read in a harmonious manner, such that the second sentence of that provision allows the parties to disclose their own submissions and statements, provided they respect the confidentiality of information properly designated as confidential by other parties in accordance with the third sentence of Article 18.2 or any applicable specific confidentiality procedures adopted by a panel.[11] Neither Russia, nor any other party has designated as confidential any of the contents of the submissions or statements to which the European Union referred in its published third-party submission and statement. In any event, the European Union considers that the references in its third-party submission and statement to Russia's first written submission relate exclusively to Russia's legal arguments. Legal arguments are "inherently non-confidential" and could not have been properly designated as confidential under the third sentence of Article 18.2 of the DSU or under any applicable confidentiality procedures adopted by the Panel.

3.7. The European Union notes that the first sentence of Article 18.2 of the DSU, which refers only to "written submissions", does not cover the content of panel questions and procedural documents, including the timetable. Nor are those documents part of the Panel's "deliberations" for purposes of paragraph 2 of the Working Procedures, or covered by paragraph 2 of Appendix 3 of the DSU which concerns public observation of panel meetings and does not address the different issue of whether a party may refer to procedural documents when disclosing its position in accordance with the second sentence of Article 18.2 of the DSU.

3.8. Finally, as regards the European Union's comments in its third-party statement of details relating to the *Russia − Pigs* dispute, the European Union considers that Russia has failed to explain why those comments would disclose information that Russia has designated as confidential in that

[9] The European Union considers that similar considerations apply with respect to the disclosure of the Panel's questions − a party could not meaningfully disclose publicly its positions with respect to an issue raised by a panel question without revealing the content of that question.

[10] The European Union points to analogous reasoning by the Appellate Body in *US − Continued Suspension*, Annex IV, para. 4.

[11] The European Union refers to the approach of the panel in *Argentina − Poultry Anti-Dumping Duties*, para. 7.14, as supporting this reading of the obligations contained in Article 18.2 of the DSU. It considers that the Appellate Body's practice in *US − Continued Suspension* of opening the Appellate Body hearings to public observation (and in so doing, rejecting arguments of some third participants that this practice would violate Article 17.10 of the DSU) confirms this reading of Article 18.2. In particular, the European Union notes that the Appellate Body permitted the participants and third participants who wished to do so to make their oral statements and responses to questions subject to public observation without requiring that they be modified to prevent the disclosure of arguments or positions of the other third participants who did not wish to make their oral statements subject to public observation.

dispute. In any case, it is manifestly beyond this Panel's terms of reference to rule on issues resulting from an alleged breach of confidentiality requirements in the context of a different dispute, over which this Panel has no jurisdiction.

3.2 Other third parties and Ukraine

3.9. Australia requests the Panel to decline Russia's request. Australia considers that Russia's interpretation of Articles 18.2 and 12.1 of the DSU, in conjunction with Appendix 3 of the DSU, is flawed and unsupported by the text of those provisions. Australia interprets the first sentence of Article 18.2 as requiring that the "submission in its entirety" be treated as confidential. However, it does not establish obligations with respect to the publication of arguments contained in submissions, extracts from submissions or non-confidential information contained in submissions. This is supported by the second to fourth sentences of Article 18.2. The second sentence of Article 18.2 permits Members to publish statements of their own positions, including by publishing their entire written submission. Statements of a Member's positions may support or rebut arguments put by another Member, include extracts from another Member's submission, and address information provided by that other Member (except where the other Member has designated that information as confidential). The third sentence of Article 18.2 would be obsolete if the confidentiality requirements elsewhere in the DSU were interpreted as requiring absolute confidentiality.

3.10. Brazil considers that a proper reading of Article 18.2 should secure a balance between a Member's right to disclose statements of its own positions and obligation to respect the confidentiality of written submissions of other parties or third parties to a dispute. Brazil notes that when Members publish their submissions containing a description of another party's arguments and opinions, there may be a risk of inaccuracy, misrepresentation or biased selections of statements or positions, all of which may give a different meaning or tone to the actual arguments of that other party. Brazil argues that Article 18.2 treads carefully in this regard, by stipulating that a party may disclose statements of its own "positions" (rather than "submissions"). Brazil considers that this indicates that a party that wishes to publicize its positions may therefore be required to do some drafting work in order to respect the confidentiality of the submissions of other parties to a dispute. However, Brazil also acknowledges that it may sometimes be difficult for a party to convey its own positions without referencing the positions of another party. Brazil suggests that the Panel take into account the fact that a party can request a non-confidential summary of the other party's arguments which could then be disclosed to the public. Such a summary could then be incorporated into the statement of positions of the party wishing to disclose its positions.

3.11. Canada considers that the Panel should reject Russia's request. Canada strongly supports the ability of a WTO Member to disclose its own positions to the public as provided for in Article 18.2 of the DSU. Canada considers that one way for a Member to disclose statements of its positions is to disclose its written submissions. Moreover, disclosure by a party of information that relates to the positions of another party, that has not been designated as confidential by that other party and that is purely ancillary to the disclosure of the first party's own positions, would not be contrary to Article 18.2 of the DSU.[12] Canada further considers that the protection of information that a Member has designated as confidential is important, but that it is incumbent on Members to carry out such designation in good faith, and to apply the designation only to information that is "truly confidential".[13] Finally, Canada submits that, to the extent that Russia's request pertaining to the disclosures concerning the *Russia – Pigs* dispute suggests that the Panel has the authority to make findings or recommendations to the European Union beyond the bounds of its submissions in this dispute, such request is outside the scope of the Panel's role.

3.12. The United States considers that Russia's request is in error and legally flawed, as well as outside the Panel's terms of reference. As to the legal flaws, the United States observes that Russia's request proceeds on the assumption that a Member's right under Article 18.2 to disclose statements

[12] Canada considers that explaining one's position will almost certainly entail including information about another party's position, or at least, providing information from which it is possible to infer that party's position. To require a party to avoid including such information would frustrate the party's right to disclose its own position.

[13] Canada also notes that the requirement for confidentiality is not static. Information that was once confidential may no longer be so where, for example, it is subsequently disclosed by the originating party, or by standard WTO processes, such as publication on the WTO website.

of its own positions is reduced and constrained so as to preclude that Member from disclosing any of its own statements that might, in turn, disclose material that Russia argues should be treated as confidential. Yet the only references in Article 18.2 to maintaining something as confidential are with respect to "written submissions to the panel" and "information submitted by another Member to the panel … which that Member has designated as confidential." The United States argues that, even based on Russia's assumption, a number of the disclosures to which Russia has objected are not within the scope of Article 18.2.[14] The United States also considers that Russia's request is premised on an allegation that the European Union has violated the requirements set out in the DSU. Yet the Panel's terms of reference do not include a claim that the European Union has breached the DSU. Any claim of breach of the DSU would need to be addressed in a separate dispute, in which the full due process afforded by the DSU would be available to the European Union to respond to the claim.

3.13. Ukraine considers that Russia has failed to show that all of the categories of information disclosed by the publication of the European Union's third-party submission and statement are, in fact, confidential. In this regard, Ukraine argues that Russia has failed to identify which "contents of the first substantive meeting" it refers to and where that information is disclosed in the European Union's published third-party submission and statement. In addition, the information relating to the ongoing proceedings in *Russia – Pigs* that is included in the European Union's third-party statement is publicly available. Ukraine therefore considers that the Panel should dismiss Russia's request with regard to these two categories of information. Ukraine notes that the European Union has not made public Russia's written submissions or information designated by Russia as confidential or as BCI. Ukraine considers that, unless the complainant and respondent have marked information in their written submissions as confidential in accordance with the third sentence of Article 18.2, a third party is not precluded by Article 18.2 from disclosing its own positions on issues of legal interpretation. Should Russia have wished to prevent a third party from disclosing that Article XXI of the GATT 1994 is at issue in these proceedings, it should have marked that information in its submission as confidential.

4 RUSSIA'S RESPONSE TO THE COMMENTS OF THE EUROPEAN UNION, THE OTHER THIRD PARTIES, AND UKRAINE

4.1. Russia argues that the first sentence of Article 18.2 sets forth an obligation to maintain the confidentiality of *information contained in* written submissions, which covers arguments, positions, views or opinions of a party to a dispute that it expresses in such written submissions.[15]

4.2. Russia points out that each sentence of Article 18.2 provides for a different type of "object[]": (first sentence) written submissions, (second sentence) statements of a party's own position, (third sentence) information designated as confidential, and (fourth sentence) information contained in a written submission. Russia disagrees with the positions of Canada and some other third parties[16] that the confidentiality requirement does not apply to the "entire submission" made by a party and applies only to the specific information designated by a party as confidential. Russia considers this view to be contrary to the "text of Article 18.2", which "expressly" states that a party's submissions to the panel are confidential in their entirety *as well as the information contained therein*.

4.3. Russia acknowledges that the confidentiality obligation in the first sentence of Article 18.2 is balanced with the right of a party to disclose statements of its own position. Nevertheless, nothing in the second and fourth sentences of Article 18.2 allows a party to disclose the positions of another

[14] The United States refers specifically to the disclosures concerning the measures at issue, the Panel's questions, and the procedural documents, as none of these are a "written submission" or "information submitted by another Member". In addition, the United States considers that it is not Russia's place to object to disclosures of the positions of other third parties.

[15] Russia supports this position by pointing to excerpts from the Appellate Body reports in *Canada – Aircraft* ("[T]he provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding.") and *Brazil – Aircraft* ("[A]ll Members are obliged, by the provisions of the DSU, to treat these proceedings of the Appellate Body, including written submissions and other documents filed by the participants and the third participants, as confidential."). Appellate Body Reports, *Canada – Aircraft*, para. 145; and *Brazil – Aircraft*, para. 119. (emphasis omitted)

[16] Here, Russia refers to a statement that Canada made in paragraph 6 of its response to Russia's request. The statement provides that "disclosure by a party of information that relates to the position of another party, that has not been designated as confidential, and that is purely ancillary to the disclosure of a party's own position would not be contrary to Article 18.2".

party or effectively to make its own version of a non-confidential summary of any other party's submissions to the panel.

4.4. Russia admits that logically, a party's "positions" in a dispute are, to a very large extent, defined and developed in relation to the positions and arguments of other parties. However, in Russia's view, this is not an excuse for a party to avoid its obligations under Article 18.2 not to disclose confidential information. Russia considers that, should a party wish to disclose information other than statements of its own positions, it has the right to obtain a non-confidential summary of that information. Because the European Union did not request Russia to provide a non-confidential summary of the information contained in Russia's written submissions, the European Union could not disclose to the public the information contained in Russia's submissions. Russia acknowledges that information contained in written submissions may be "transformed" into a non-confidential summary, but emphasizes that such transformation may be carried out only by the party that submitted the information to the panel. This is because, as noted by Brazil, Members may misrepresent the arguments and opinions of other parties. Such Members may also improperly assess what information another party may regard as confidential.

4.5. Russia disagrees with the third parties that have stated that the confidentiality requirements of Article 18.2 of the DSU are limited to information that a Member specifically designates as confidential under the third sentence of Article 18.2. In Russia's view, the third sentence addresses the limited situation where information is submitted to the panel by a Member (as opposed to a party to the dispute) which is not a written submission, a statement of its own positions, or a non-confidential summary of information contained in a written submission, within the meaning of the first, second and fourth sentences of Article 18.2, respectively. According to Russia, this reading of the third sentence of Article 18.2 of the DSU is supported by the fourth sentence, which states that a "Member" may request a non-confidential summary. Given that a requesting "Member" is not always a party to the dispute, the fourth sentence of Article 18.2 suggests that a non-party Member is only entitled to the non-confidential summary, and not to all of the information contained in the written submissions of the party receiving the request. The parties to the dispute, however, are entitled to obtain the full version of the written submissions by virtue of the first sentence of Article 18.2.

4.6. Russia argues that the European Union's proposed interpretation of the scope of the confidentiality obligations under Article 18.2 of the DSU would deprive the first-level of general protection of confidentiality of any meaning and lead to the result that, in order to protect the confidentiality of information submitted in a dispute settlement proceeding, Members would have to designate the entire text of their submissions as confidential and request the adoption of additional working procedures for the protection of confidential information.

4.7. Russia considers that the European Union's proposed interpretation would also make it possible for a party to publish a statement of its own positions under the second sentence of Article 18.2 of the DSU by introducing the words "[Member X] agrees/disagrees with the following:", and copying the text of another party's written submission verbatim. Russia says that if the confidentiality requirements in Article 18.2 were meant to operate in this manner, Article 18.2 could have been limited to the last two sentences, replacing the words "information contained in its written submissions" with "such confidential information" in the last sentence.

4.8. Russia does not believe that the existing publication practices of the European Union and certain other Members justify compliance with Article 18.2 of the DSU in this particular instance. Russia considers that the rights set forth in the second sentence of Article 18.2 should be read together with the confidentiality requirements contained in Article 18.2. For these reasons, Russia states that it has successfully challenged disclosure of confidential information in a number of disputes to which it is a party, involving different Members as the other party.

4.9. Russia clarifies that it does not request the European Union to delete from the public domain *all* information pertaining to this dispute. Rather, Russia requests the Panel to take all necessary actions and to request the European Union to withdraw all publicly available statements that contain information of a confidential nature relevant to the present dispute and to the dispute *Russia – Pigs*, and to refrain from any such unauthorized disclosure or similar actions in the future. Therefore, Russia may agree with Ukraine's suggestions to redact its third-party submission and statement to remove the confidential information, rather than remove the European Union's third-party submission and statement, in their entirety, from the website.

4.10. In respect of other procedural documents and information that were disclosed by the European Union but were not directly linked to Russia's submissions in these proceedings, Russia argues that prior jurisprudence clearly states that participants should treat dispute settlement proceedings as a whole as confidential.

5 ANALYSIS

5.1 Whether the Panel has jurisdiction to rule on Russia's complaint

5.1. We begin by addressing whether Russia's request for a ruling that the European Union has violated Article 18.2 of the DSU is outside this Panel's terms of reference.

5.2. The United States argues that the Panel's terms of reference do not include a claim of violation of Article 18.2 of the DSU, and any such claim would therefore have to be the subject of a separate dispute, initiated by consultations and panel requests. The European Union, Canada and United States also argue that Russia's complaints regarding the alleged disclosure of confidential information pertaining to the *Russia − Pigs* dispute is outside this Panel's terms of reference.

5.3. It is true that the Panel's terms of reference do not include a claim that the European Union has violated Article 18.2 of the DSU.[17] However, Russia does not ask the Panel to rule on whether a measure identified in Ukraine's panel request is inconsistent with Article 18.2 of the DSU. Rather, Russia complains that *in the course of these proceedings*, a third party has failed to comply with certain obligations contained in the DSU and in the Panel's Working Procedures concerning the confidential treatment of material presented in the proceedings. The issue that Russia asks the Panel to address is therefore, by its nature, only capable of arising once the proceedings in this dispute have commenced.

5.4. International adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives automatically from the exercise of their adjudicative function.[18] One aspect of this inherent jurisdiction is the jurisdiction to determine all matters arising in relation to the exercise of their substantive jurisdiction and inherent in the judicial function.[19] This includes matters concerning the conduct of the proceedings before the Panel. In providing for the confidential treatment of written submissions and particular information submitted to panels and the Appellate Body, Article 18.2 of the DSU regulates certain aspects of the panel and appellate processes.[20] A party's request that we address a complaint against a third party arising out of an alleged failure by that third party to observe confidentiality obligations applicable to these proceedings falls squarely within our inherent jurisdiction.

[17] This is not surprising, because the European Union is a third party in this dispute. Moreover, the complaint against the European Union is made by the respondent, not the complainant.

[18] See International Court of Justice, Nuclear Tests Case (Australia v. France) (1974) ICJ Reports, 253, pp. 259-260; and Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) (1963) ICJ Reports, 15, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function, see Appellate Body Report, *Mexico − Taxes on Soft Drinks*, para. 45.

[19] An important aspect of an adjudicative tribunal's inherent jurisdiction is the jurisdiction to determine its own jurisdiction (the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French). The Appellate Body has held that panels have the power to determine the extent of their jurisdiction, see Appellate Body Reports, *US − 1916 Act*, fn 30 to para. 54; and *Mexico − Corn Syrup (Article 21.5 − US)*, para. 36.

[20] Article 1.1 of the DSU provides that the DSU applies to all WTO dispute settlement proceedings, subject to certain special or additional rules and procedures on dispute settlement identified in Appendix 2 of the DSU. (See Article 1.2 of the DSU.) The DSU itself is also one of the covered agreements listed in Appendix 1 to the DSU. Other examples of provisions of the DSU that address the way in which panel proceedings are to be conducted include Article 12 (setting forth various practical arrangements concerning the adoption of working procedures and the establishment of the timetable, the filing of submissions, the contents of panel reports and notification to the DSB of the timing of the report), Article 14 (providing that panel deliberations shall be confidential, that reports of panels are to be drafted without the presence of the parties and that opinions expressed in panel reports by individual panelists shall be anonymous), and Article 15 (setting forth the process to be followed at the interim review stage). The Panel's Working Procedures similarly regulate procedural aspects of the present proceedings.

5.5. We therefore find that we have jurisdiction to address the complaints before us. In Sections 5.2 through 5.6 below, we address each of Russia's objections. Our rulings on these objections are set forth in Section 6.

5.2 Objection to disclosures of aspects of Russia's and certain third parties' positions

5.6. Russia objects to the disclosures of aspects of Russia's positions, particularly with respect to the measures at issue and Russia's defence under Article XXI of the GATT 1994, as well as aspects of other third parties' positions.[21] Russia's objection raises the issue of whether the confidentiality protections that attach to the written submissions submitted to a panel or the Appellate Body by virtue of the first sentence of Article 18.2 of the DSU, preclude a party from referring to any defences, legal arguments or positions expressed in or derived from a written submission, in any statement of its own positions that it discloses to the public pursuant to the second sentence of Article 18.2 of the DSU.

5.7. Article 18 of the DSU is entitled "Communications with the Panel or Appellate Body". Article 18.1 prohibits *ex parte* communications with the panel or Appellate Body. Article 18.2 provides:

> Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.[22]

5.8. Russia argues that, while the European Union has a right under the second sentence of Article 18.2 of the DSU to disclose statements of its own positions to the public, it cannot do so in a manner that would disclose Russia's written submissions, which for Russia, include information concerning Russia's invocation of Article XXI of the GATT 1994 and Russia's legal arguments, positions, views and opinions, without violating the first sentence of Article 18.2. The European Union and certain of the other third parties argue that a party exercising its right under the second sentence of Article 18.2 of the DSU to disclose statements of its own positions to the public is not precluded from referring to the positions of other parties.

5.9. We begin our analysis by recalling the Appellate Body's statement that, under the DSU, confidentiality is *relative and time-bound*.[23] Panel proceedings are based on a complainant's panel request, which sets forth detailed information about the measures at issue, the claims of violation, and the connection between the measures and claims, thus establishing the legal basis for the complaint sufficient to present the problem clearly. Panel requests are publicly disclosed, as a result of which their contents are not confidential or capable of being designated as confidential. Panel reports, which are disclosed to the public at the conclusion of the panel process, contain summaries of the arguments of parties and third parties, evaluations of those arguments, analysis of the facts

[21] Russia refers specifically to the positions of Brazil and Japan as expressed in their third-party submissions. Brazil provided comments on Russia's complaint but did not refer specifically to the alleged disclosure of its positions, and Japan did not make any comments on Russia's complaint.

[22] Article 18.2 of the DSU is reflected in paragraph 2 of the Panel's Working Procedures (although with slight differences in terminology) as follows:

> The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Information designated as confidential shall be used only for the purposes of the proceedings under the DSU, during which such information was submitted. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

[23] Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 5.

and other evidence, as well as the complainant's request for findings and recommendations. Panel reports also disclose details of the panel process, such as the dates of various stages of the proceedings[24], any requests for rulings on issues prior to the issuance of the interim report, and the interim review process. Public disclosure of panel reports, and Appellate Body reports, is an inherent and necessary feature of our rules-based system of adjudication.[25]

5.10. Article 18.2 of the DSU addresses the confidential treatment of documents submitted to panels or the Appellate Body and of certain information contained in those documents, in light of the right of parties to disclose statements of their own positions to the public. Article 18.2 comprises four sentences. The first sentence refers to "written submissions" to the panel or the Appellate Body. The second sentence concerns "positions" of parties. The third sentence addresses "information" submitted to a panel or the Appellate Body which a Member has designated as confidential, while the fourth sentence concerns confidential information contained in written submissions. In order to give meaning and effect to the terms in each sentence, it is necessary to read each sentence of Article 18.2 in the context of the other sentences of that provision, as well as in the context of the other provisions of the DSU.[26]

5.11. The third sentence of Article 18.2 acknowledges that Members may specifically designate certain information that they submit to panels or the Appellate Body as confidential, while the fourth sentence of Article 18.2 entitles other Members to obtain a non-confidential summary of that information that could be disclosed to the public.[27] The third and fourth sentences clarify the scope of the right contained in the second sentence of Article 18.2, which provides that *nothing in the DSU* shall preclude a party from disclosing statements of its own positions to the public.[28] Thus, the second, third and fourth sentences, read together, provide that a party is permitted to disclose statements of its own positions to the public, subject to treating as confidential information submitted by a Member which that Member has designated as confidential, in which case the disclosing party is entitled to request a non-confidential summary of such information that could be disclosed to the public.[29]

5.12. The scope of the right in the second sentence of Article 18.2 of the DSU informs the nature of the confidentiality protection attaching to written submissions set forth in the first sentence of

[24] These dates refer to the following phases in a particular dispute: (a) the organizational meeting, (b) the adoption of the Working Procedures, (c) the adoption of Additional Working Procedures for the protection of certain information, (d) the adoption of the Timetable, (e) the receipt of any requests for preliminary rulings, (f) the issuance of any preliminary rulings to the parties, (g) the receipt of the parties' first written submissions, (h) the receipt of the third-party submissions, (i) the first substantive meeting, (j) the third-party session, (k) the parties' written responses to questions posed by the panel after the first substantive meeting, (l) the receipt of comments by the parties on the responses provided by the other parties, (m) the issuance of the panel's descriptive sections of its draft reports to the parties, (n) receipt of comments on the descriptive sections of the panel reports, (o) the panel's issuance of the interim report to the parties, (p) the requests for revisions of specific aspects of the interim report, (q) the comments of each party on the other party's request, and (r) the issuance of the panel's final report to the parties.

[25] See Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 5.

[26] See e.g. Appellate Body Reports, *EC − Asbestos*, para. 95; *Canada − Dairy*, paras. 133-134; *US − Section 211 Appropriations Act*, para. 338; *US − Gasoline*, p. 23, DSR 1996:I, 3, at p. 21 ; and *Japan − Alcoholic Beverages II*, pp. 12-13, DSR 1996:I, 97 at pp. 105-106.

[27] Russia argues that the third sentence covers the very different (and limited) situation where a Member that is not a party or third party to the proceedings nevertheless submits information to a panel or the Appellate Body. While it may be possible to interpret the third sentence this way when read in isolation from the other three sentences of Article 18.2, it is not a credible interpretation when read in the context of Article 18.2 as a whole, which imposes obligations on parties and third parties to a dispute to treat certain documents and information submitted in those proceedings as confidential.

[28] The second sentence of Article 18.2 states that "*[n]othing in this Understanding* shall preclude a party to a dispute from disclosing statements of its own positions to the public." (emphasis added)

[29] Our reading of Article 18.2 of the DSU is consistent with that of the panel in *Argentina − Poultry Anti-Dumping Duties*, which interpreted the first two sentences of Article 18.2, read together and in the context of one another, to mean that, while one party could not disclose the "written submissions" of another party, each party was entitled to disclose statements of its own positions, subject to respecting the confidentiality of information designated as confidential under the third sentence of Article 18.2. The panel considered that the only limitation on a party's ability to disclose statements of its own positions to the public under the second sentence of Article 18.2 was its obligation to treat as confidential any information that the other party had specifically designated as confidential pursuant to the third sentence of Article 18.2, see Panel Report, *Argentina − Poultry Anti-Dumping Duties*, para. 7.14.

Article 18.2. The first sentence of Article 18.2, in stating that written submissions to the panel or the Appellate Body shall be treated as confidential, requires that parties and other persons authorized to have access to the written submissions to a panel or the Appellate Body, ensure that access to those submissions is restricted to authorized persons who are similarly bound to treat the submissions as confidential.[30]

5.13. We consider that an expansive reading of the first sentence of Article 18.2, in which the confidentiality protections attaching to the written submissions encompass also all of the information that is contained in or derived from those documents (i.e. defences, legal arguments, positions, opinions, facts and any other evidence), would render redundant the third sentence of Article 18.2. It is also difficult to envisage how, as a matter of logic, it would be possible to provide a "non-confidential summary" of such information contained in the written submissions (understood in the expansive sense above), as required by the fourth sentence. We note that the Appellate Body in *US − Continued Suspension* reached a similar conclusion regarding the relationship between Article 17.10 of the DSU, which provides that the proceedings of the Appellate Body shall be confidential, and Article 18.2. The Appellate Body explained that Article 17.10 must be read in light of Article 18.2, and that the third sentence of Article 18.2 would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings.[31] In our view, the same considerations apply with respect to the interpretation of the first sentence of Article 18.2 in relation to the third sentence of that provision.

5.14. In addition, we note that the term "information" as used in the covered agreements refers to facts or other evidence, as distinct from legal arguments, positions, or opinions of a party to a dispute.[32] Moreover, the Appellate Body has previously observed that questions of legal interpretation are not inherently confidential.[33] We similarly do not consider that the legal arguments, positions and opinions of parties in WTO dispute settlement proceedings are inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU.

5.15. For the foregoing reasons, we do not consider that Article 18.2 of the DSU precludes a party, in exercising its right to disclose a statement of its own positions to the public in accordance with the second sentence of that provision, from making reference to the corresponding positions of the other parties to the dispute.[34] While a party disclosing a statement of its own positions to the public

[30] See Appellate Body Report, *Thailand − H-Beams*, para. 74 (providing an example of an instance in which it appeared that access to a submission in an Appellate Body proceeding was provided to an unauthorized person or entity).

[31] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 4.

[32] E.g. Article 13 of the DSU, Article 6.5.1 of the Anti-Dumping Agreement, Article 12.4.1 of the SCM Agreement, and additional working procedures for the protection of BCI. For example, in *EU − Footwear (China)*, China attempted to define the term "information" in Article 6.5 of the Anti-Dumping Agreement as "communication of the knowledge of some fact or occurrence; knowledge or facts communication about a particular subject, event, etc.; news; intelligence". The panel considered that the definition of "information" encompassed the names of companies as complainants or supporters of the complainant in an original anti-dumping investigation or expiry review request. (Panel Report, *EU − Footwear (China)*, paras. 7.669-7.671.) See also Appellate Body Report, *US − Continued Zeroing*, para. 347 (quoting Appellate Body Report, *Canada − Aircraft*, para. 192.) For examples of *facts sought by a panel under Article 13* of the DSU, see Appellate Body Reports, *Canada − Aircraft*, paras. 185 and 199 (referring to a public company's financing of a particular transaction); *EC − Bed Linen (Article 21.5 − India)*, paras. 159, 165, and 166 (referring to stocks and capacity utilization used by an investigating authority to make its injury determination); *US − Large Civil Aircraft (2nd complaint)*, para. 1145 (instruments and contracts funded by a government programme); and *US − Continued Zeroing*, paras. 342 and 347 (detailed, transaction-specific margin calculations). For examples of *information that was treated as confidential by an investigating authority* in a trade remedies investigation and was examined to determine whether a non-confidential summary should have been prepared, see Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.195 (referring to Panel Report, *EC − Fasteners (Article 21.5 − China)*, fn 200 to para. 7.145). See also Panel Reports, *China − Autos (US)*, paras. 7.8, 7.9, and 7.11; *China − Broiler Products*, para. 7.306; *EU − Footwear (China)*, paras. 7.706, 7.707, 7.721, 7.736, and 7.776; *China − GOES*, paras. 7.150 and 7.158; *China − X-Ray Equipment*, paras. 7.330, 7.337, , 7.344, 7.348 and 7.349; and *China − HP-SSST (Japan) /China − HP-SSST (EU)*, paras. 7.308-7.310, 7.316, and 7.319 (supported by Appellate Body Reports, *China − HP-SSST (Japan)/ China − HP-SSST (EU)*, para. 5.109).

[33] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 9.

[34] Our interpretation of Article 18.2 would not permit a party to disclose a statement of its own positions to the public by simply appending the written submissions of another party with the introductory words, "We

may not refer to information designated as confidential by a Member in accordance with the third sentence of Article 18.2, the information eligible for such designation is limited to facts and other evidence submitted to a panel or the Appellate Body and additionally excludes any information that is already publicly available.

5.16. We therefore conclude that the disclosures in the published version of the European Union's third-party submission and statement of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994, as well as aspects of the positions of other third parties, for the purpose of setting forth the European Union's positions on those issues, are not inconsistent with the confidentiality obligations contained in Article 18.2 of the DSU.

5.17. Paragraph 2 of the Working Procedures reflects the obligations in Article 18.2 of the DSU.[35] Although there are differences in terminology between paragraph 2 of the Working Procedures and Article 18.2 of the DSU, we do not consider any of the differences to be relevant to the issue before us. Therefore, we reach the same conclusion with respect to the alleged violations of paragraph 2 of the Working Procedures.

5.18. In the light of the above, we find it unnecessary to take any action regarding the European Union's published third-party submission and statement based on the disclosure of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994.

5.3 Objections to disclosure of contents of other procedural documents pertaining to the Panel's proceedings

5.19. Russia objects to the European Union's disclosure, in its published third-party statement, of the following excerpts from the Panel's ruling on the joint request for enhanced third-party rights: [this proceeding presents] "an exceptional situation"; [this proceeding raises issues of] "vital systemic importance"; and [the Panel's conclusions regarding the interpretive issues raised by Russia will have] "far-reaching effects on the determination of the ambit of the covered agreements and on the WTO as a whole".[36]

5.20. The Panel's ruling on the joint request for enhanced third-party rights was circulated to the parties and third parties on 9 January 2018, and was marked as "Confidential" by the Panel.

5.21. The European Union's published third-party statement quotes directly from the Panel's ruling for the purpose of introducing points that it wishes to make on issues that are distinct from those addressed in the Panel's ruling. It is therefore not possible to discern the context in which the Panel made the excerpted statements. The outcome of the Panel's ruling on the joint request for enhanced third-party rights was not disclosed and the Panel's reasoning in support of the outcome was not disclosed, nor was the ruling itself published.

5.22. In these circumstances, we do not consider that the confidentiality of the ruling was compromised. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on the quotation of excerpts from the Panels' ruling on the joint request for enhanced third-party rights.

5.4 Objections to disclosure of the contents of the Panel's questions to the parties and third parties

5.23. Russia objects that the European Union has disclosed the contents of the Panel's questions to the parties and third parties during the first substantive meeting in stating in the published version of its third-party statement: "[f]inally, with regard to the Panel's question concerning indirect transit routes …".[37]

do not agree with the following". This would amount to a publication of the actual written submission of the other party, contrary to the first sentence of Article 18.2 of the DSU.

[35] See fn 22 above.

[36] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

[37] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 38).

5.24. Russia does not indicate which Panel question or questions it considers were thereby disclosed. However, the Panel notes that the advance questions which it sent to the third parties (with a copy to the parties) on 12 January 2018, were marked "Confidential", and included the following question:

> Leaving to one side the potential application of Articles XX and XXI of the GATT 1994, whether there are any circumstances in which a Member across whose territory goods are transiting may require that transit of such goods from a neighbouring Member not proceed directly across their mutual border, but through another country, without the designation of such "indirect" transit route amounting to a violation of Article V:2, first sentence.

5.25. The reference in the European Union's published third-party statement to "the Panel's question concerning indirect transit routes" was made by way of introduction to its statement of position on whether a particular route at issue in this dispute could be considered a "route most convenient".

5.26. In these circumstances, we do not consider that a reference to a "question concerning indirect transit routes" reveals the contents of the Panel's question so as to compromise the confidentiality of the Panel's questions to the parties and third parties. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on the reference to "the Panel's question concerning indirect transit routes".

5.5 Objections to disclosure of information regarding the Panel's timetable

5.27. Russia objects that the European Union disclosed the date of receipt of the third-party submissions and the date of the first substantive meeting of the Panel.

5.28. Russia does not identify where in the European Union's published third-party submission and statement the date of receipt of third-party submissions or date of the first substantive meeting is revealed directly, or if not revealed directly, how these dates are nevertheless revealed.[38] As Russia has not sufficiently explained the grounds for its objection, we decline to address it further.

5.6 Objections to disclosure of the contents of the first substantive meeting and details regarding the ongoing dispute of *Russia – Pigs*

5.29. Russia objects that the European Union disclosed the "contents of the first substantive meeting" and details relating to the ongoing dispute, *Russia – Pigs*.

5.30. Regarding the alleged disclosure of the contents of the first substantive meeting, it would appear from the paragraph of the European Union's published third-party statement to which Russia refers that Russia objects to the European Union's statement that, at the party session of the first substantive meeting, Russia referred to the amendments to Resolution No. 778 effected by Resolution No. 1292.

5.31. Paragraph 3 of the Working Procedures states that "[t]he Panel shall meet in closed session."

5.32. The European Union's reference to the fact that Russia referred to a particular amendment to Resolution No. 778 was made by way of introduction to a statement of the European Union's positions in *Russia – Pigs*, a dispute between the European Union and Russia, which is unconnected to the present dispute. Resolution No. 778 is one of the legal instruments set forth in Ukraine's panel request.[39] The panel request also refers to "any amendments …, extensions, implementing measures, and any other measures related to the measures listed above" which would include Resolution No. 1292.[40] In essence, the European Union has disclosed that, during the first substantive meeting, Russia referred to certain legal instruments implementing the measures at issue.

[38] Russia's letter dated 14 March 2018, pp. 1-3.
[39] Ukraine's request for the establishment of a panel, p. 2.
[40] Ukraine's request for the establishment of a panel, p. 3.

5.33. In these circumstances, we do not consider that the European Union has disclosed the contents of the first substantive meeting of the Panel and thus violated paragraph 3 of the Working Procedures. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on its reference to the fact that Russia referred to the amendments to Resolution No. 778 by Resolution No. 1292.

5.34. The details relating to the *Russia – Pigs* dispute that are the focus of Russia's other objection appear to concern the fact that the European Union disclosed, in its published third-party statement, that the reasonable period of time for Russia to have brought the measures in *Russia - Pigs* into compliance expired in December 2017, that Russia claimed that it had fully complied with the DSB recommendations and rulings in that dispute, and that the European Union considered that Russia had not complied. All of the information regarding these facts is publicly available, and therefore, is not confidential.[41]

5.35. Accordingly, we do not consider that the European Union's references to issues pertaining to the *Russia – Pigs* dispute in the European Union's published third-party statement contravene any confidentiality obligations to which the European Union is subject in these proceedings. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on its disclosures concerning the *Russia – Pigs* dispute.[42]

6 RULING

6.1. For the reasons set forth above, the Panel rules as follows:

a. The Panel has jurisdiction to address Russia's complaints that the European Union has failed to observe confidentiality obligations applicable to these proceedings[43];

b. The disclosures in the European Union's published third-party submission and statement of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994, as well as aspects of the positions of other third parties, are not inconsistent with the confidentiality obligations contained in Article 18.2 of the DSU[44] or with paragraph 2 of the Working Procedures[45];

c. The quotations of excerpts from the Panel's ruling on the joint request for enhanced third party rights in the European Union's published third-party statement do not, in the circumstances, compromise the confidentiality of that ruling[46];

d. The reference to a "question concerning indirect transit routes" in the European Union's published third-party statement does not compromise the confidentiality of the Panel's questions to the parties and third parties[47];

e. As Russia has not sufficiently explained the grounds for its objection to the European Union's alleged disclosure of the date of receipt of the third-party submissions and the date of the first substantive meeting of the Panel[48], the Panel need not rule on it;

[41] See WT/DS475/15, WT/DS475/16, and WT/DS475/17.
[42] We wish to add, however, that it is an altogether separate issue whether the European Union's statements, in these proceedings, of its positions in an unconnected dispute between the European Union and Russia, are relevant to the issues before this Panel, and thus whether it was appropriate for the European Union to have made such statements in these proceedings.
[43] See paragraphs 5.4 and 5.5 above.
[44] See paragraph 5.16 above.
[45] See paragraph 5.17 above.
[46] See paragraph 5.22 above.
[47] See paragraphs 5.25 and 5.26 above.
[48] See paragraphs 5.27 and 5.28 above.

f. The disclosure in the European Union's published third-party statement of the fact that, during the first substantive meeting, Russia referred to certain legal instruments is not a violation of paragraph 3 of the Working Procedures[49]; and

g. The reference by the European Union to the ongoing dispute in *Russia – Pigs* in its published third-party statement does not disclose any "confidential information" which was not publicly available.[50]

6.2. The Panel therefore declines to take action against the European Union in relation to the publication of its third-party submission and statement on the website of the European Commission's Directorate-General for Trade.

[49] See paragraphs 5.29, 5.32, and 5.33 above.
[50] See paragraphs 5.29, 5.34, and 5.35 above.

ANNEX B-3

ADMISSIBILITY RULING

Issued by the Panel on 23 July 2018

1 INTRODUCTION

1.1. This ruling addresses the request of the Russian Federation (Russia) that the Panel exclude Exhibit UKR-106 (BCI) from the record in this dispute. Russia regards the late submission of this exhibit as contrary to paragraph 7 of the Working Procedures and "an abuse of process" by Ukraine. Ukraine considers that Exhibit UKR-106 (BCI) is evidence submitted for purposes of rebuttal, which may be submitted after the first substantive meeting in accordance with paragraph 7 of the Working Procedures.

1.2. The issue before us is whether Ukraine's submission of Exhibit UKR-106 (BCI) at the second substantive meeting was timely in the circumstances, particularly in light of paragraph 7 of the Working Procedures. Paragraph 7 of the Working Procedures provides that:

> [E]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.3. Exhibit UKR-106 (BCI) is evidence that pertains to a disputed issue between the parties, namely, whether Ukraine has demonstrated that a category of measures, the "2014 transit bans and other transit restrictions", existed at the time of Ukraine's panel request.

1.4. Russia's basic position is that Exhibit UKR-106 (BCI) is factual evidence that is not *necessary* for purposes of rebuttal, within the meaning of paragraph 7 of the Working Procedures, given the nature of the exchanges between the parties on the issue at the first substantive meeting, and the fact that the evidence in question was available to Ukraine prior to the first substantive meeting and could have been submitted at the first substantive meeting.[1]

1.5. Ukraine's position is that Exhibit UKR-106 (BCI) directly rebuts Russia's argument, made at the first substantive meeting, that one of the legal instruments through which the measures in question are implemented (*Rosselkhoznadzor* instruction No. FS-NV-7/22886) does not apply, and has never applied, with respect to Ukraine.[2] Therefore, the requirement of paragraph 7 of the Working Procedures, that factual evidence be submitted no later than during the first substantive meeting, does not apply to the present situation, and Ukraine may submit this factual evidence at any point during the proceedings following the first substantive meeting.[3]

[1] Letter of the Russian Federation dated 13 June 2018, pp. 1 and 3.
[2] Ukraine's comments on Russia's response to Panel question No. 8, para. 37.
[3] Ukraine's comments on Russia's response to Panel question No. 8, para. 37. Ukraine also denies that its filing of Exhibit UKR-106 (BCI) with its opening statement at the second substantive meeting deprived Russia of the opportunity to verify the information contained in the exhibit and to prepare an appropriate response. It considers that Russia had opportunities to comment on this evidence in its closing statement at the second meeting of the Panel, or in its response to Panel question No. 8 following the second meeting with the Panel. (Ukraine's comments on Russia's response to Panel question No. 8, paras. 38-40.)

2 ANALYSIS

2.1. According to the Appellate Body, due process is best served by working procedures that provide for appropriate factual discovery at an early stage in panel proceedings.[4] Under standard working procedures, the complaining party is required to put forward its case, with a full presentation of the facts on the basis of the submission of supporting evidence, during the first stage of panel proceedings, that is, up to and including the first substantive meeting of the panel with the parties.[5] This requirement of the standard working procedures is reflected in paragraph 7 of the Working Procedures in this dispute. Paragraph 7 of the Working Procedures also recognizes that, as the proceedings develop, it may become necessary for a party to submit additional evidence in order to rebut arguments that have subsequently arisen, to respond to questions posed by the panel or other party, or to comment on answers to questions provided by the other party.

2.2. The question is whether Exhibit UKR-106 (BCI) falls under one of these exceptions. In the first round of arguments, Ukraine's arguments concerning the existence of the measures in question related to their legal existence in Russia's legal system without reference to any specific instances of application. That is, Ukraine's arguments related to the existence of the measures "as such".[6] Russia's answer was that Ukraine failed to prove that the measures were ever applied in respect of Ukraine.[7] At the second substantive meeting, Ukraine reiterated its "as such" argument while also submitting the contested exhibit concerning the application of the measure, in one instance, as evidence in support of its main argument.[8] But this does not make such evidence "necessary for purposes of rebuttal" within paragraph 7 of the Working Procedures.[9]

3 DECISION

3.1. We therefore grant Russia's request and exclude Exhibit UKR-106 (BCI) from the record, on the basis that it constitutes factual evidence that was not submitted in a timely manner as required by paragraph 7 of the Working Procedures, and does not fall within either of the exceptions provided for in that paragraph.

_____

[4] Appellate Body Report, *Thailand – Cigarettes*, para. 149 (referring to Appellate Body Report, *India – Patents (US)*, para. 95.) Due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party and that each party be provided with an opportunity to respond to claims made against it. (Appellate Body Report, *Thailand – Cigarettes*, para. 150 (referring to Appellate Body Report, *Australia – Salmon*, para. 278).)

[5] Appellate Body Report, *US – Gambling*, para. 271 and fn 316 thereto (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.)

[6] In its opening statement at the first substantive meeting, Ukraine notes that, because *Rosselkhoznadzor* instruction No. FS-NV-7/22886 entered into force on 30 November 2014 and continues to apply in its amended form, "[i]t is […] unclear why the Russian Federation now complains that Ukraine provided no evidence of the continuing application of the legal instruments through which the 2014 transit ban and other transit restrictions are imposed." Ukraine adds that the instruction at issue and the amendment thereto have not "expire[d] or los[t] their legal effects." (Ukraine's opening statement at the first meeting of the Panel, paras. 9-14.) Ukraine later clarifies in its second written submission that its claims as regards the instruction at issue and the amendment to the instruction are "as such" claims, and that Ukraine is not challenging the instructions "as applied". (Ukraine's second written submission, para. 25.) See also Ukraine's comments on Russia's response to Panel question No. 8, para. 32.

[7] Russia's opening statement at the first meeting of the Panel, para. 6.

[8] Ukraine submitted Exhibit UKR-106 (BCI) "[f]or the avoidance of any doubt on this matter" and to reinforce Ukraine's arguments. (Ukraine's opening statement at the second meeting of the Panel, para. 7.)

[9] This is apparent from Ukraine's comment on Russia's response to Panel question No. 8 that "the success of Ukraine's claims regarding the 2014 transit ban and other transit restrictions *does not depend* on evidence of the application of those instructions with respect to Ukraine." (Ukraine's comments on Russia's response to Panel question No. 8, para. 37. (emphasis added)) See also Ukraine's second written submission, para. 25; and opening statement at the second meeting of the Panel, para. 32.

ANNEX C

ARGUMENTS OF THE PARTIES

UKRAINE

RUSSIAN FEDERATION

ANNEX C-1

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. INTRODUCTION

1. The present dispute concerns various bans and other restrictionsimposed by the Russian Federation on traffic in transit by road and rail transportfromthe territory of Ukraine, through the territory of the Russian Federation, to the territory of Kazakhstan, the Kyrgyz Republic and certain other third countries in Central and Eastern Asia and the Caucasus, and the publication and administration of those bans and restrictions. Some measures at issue apply to traffic in transit of all goods, while others apply to traffic in transit of non-zero duty goods and goods from certain countries (the United States, the European Union, Canada, Australia, Norway, Albania, Montenegro, Iceland, Liechtenstein and Ukraine) of which the importation into the Russian Federation is prohibited ("Resolution No. 778 goods").

II. MEASURES AT ISSUE

2. Ukraine challenges four categories of measures of the Russian Federation:

- The 2014 transit ban and other transit restrictions, imposed by Instructions of Rosselkhoznadzor Nos. FS-NV-7/22886[1] and FS-AS-3/22903, prohibiting transit of veterinary Resolution No. 778 goods through the checkpoints of the Republic of Belarus; requiring that transit of such goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the Customs Union of the Eurasian Economic Union ("EAEU"); requiring that a permit is obtained in order for such traffic in transit to pass through the territory of the Russian Federation; and requiring that traffic in transit of plant Resolution No. 778 goods passes through the checkpoints across the state border of the Russian Federation.
- The 2016 general transit ban and other transit restrictions, imposed by Decree No. 1[2],prohibiting that traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic directly passes through the territory of the Russian Federationat the border between Ukraine and the Russian Federation, requiring that such traffic in transit passes via the Belarus route (which includes the entry and exit control point requirement)and satisfies the identification and registration card requirements.
- The 2016 product-specific transit ban and other transit restrictions, imposed byDecree No. 1[3], prohibiting that traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic directly passes through the territory of the Russian Federation, requiring that such traffic in transit passes via the Belarus route (which includes the entry and exit control point requirement), provided that the request and authorisation requirements are met and that the traffic in transit satisfies the identification and registration card requirements.
- The de facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit from the territory of Ukraine and destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan ("the de facto application of the 2016 general and product-specific transit bans").

3. Contrary to the Russian Federation's allegations, the 2014 transit ban and other transit restrictionscontinue to exist.On the one hand, Instruction No. FS-NV-7/22886 was formally amended by Instruction No. FS-EN-7/19132 on 10 October 2016. On the other hand, Decree No. 1 and Resolution No. 1 did not causeInstructions Nos. FS-NV-7/22886 and FS-AS-3/22903 to expire or lose their legal effect. Only in so far as there is a conflict will the provisions contained in Decree No. 1 and Resolution No. 1prevail over the provisions contained in Instruction No. FS-NV-7/22886in certain defined cases.

[1] As amended by Instruction No. FS-EN-7/19132.
[2] As amended by Decree No. 319 and Decree No. 643, and implemented by Resolutions Nos. 1, 147 and 276 (as amended) and PJSC Russian Railways Order No. 529r.
[3] Ibid.

4. The de facto application of the 2016 general and product-specific transit bansis an unwritten measure consisting of the application of a written measure of general and prospective application to a type of traffic in transit that is not covered by that written measure. Ukraine submits that its burden to show the existence of that measure cannot be identical to that which applies in case of an unwritten measure that is unrelated to a written measure of general and prospective application. Ukraine has shown that (i) the measure is attributable to the Russian Federation; that (ii) the content of the measure is the application of the general and product-specific transit bans in Decree No. 1, as amended, to transit destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan; and that (iii) the ban applied to transit destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan applies in general and in the future.

III. UKRAINE'S PANEL REQUEST SATISFIES THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

5. Ukraine asks the Panel to reject the Russian Federation's objections, raised in Section III of its opening statement at the first substantive meeting, as regards whether the Panel request properly identifies the specific measures at issue and provides a legal basis that is sufficient to present the problem clearly.

6. The fact that Ukraine decided to identify the specific measures at issue in this dispute by presenting them in two separate sections of its Panel request[4] does not automatically mean that, in doing so, the measures identified in each section must be presumed to "operate together".

7. Furthermore, the Russian Federation has not put forward any argument, based on an interpretation of Article 6.2 of theUnderstanding on rules and procedures governing the settlement of disputes ("DSU")and an assessment of the structure and the terms of the Panel request read as a whole, in support of its complaint that Ukraine did not identify whether the specific measure identified in the sixth paragraph of Section III.A of the Panel request is written or unwritten and is challenged as such or as applied. In that sixth paragraph, Ukraine identified as a distinct measure the application in fact of the measures introduced by Decree No. 1 and Resolution No. 1 to traffic in transit destined for territories other than those covered by Decree No. 1 and Resolution No. 1. By identifying that measure through, inter alia, the phrase "territories in Central and Eastern Asia and Caucasus", Ukraine did not refer to an open-ended list.

8. Finally, the Panel request puts the Russian Federation in a well-informed position so that it is able to defend itself against each claim made with respect to the specific measures at issue. On the plain terms of the Panel request, read as a whole, it is clear what case the Russian Federation must answer.

IV. CLAIMS UNDER ARTICLE V OF THE GATT 1994 AND PARAGRAPH 1161 OF THE WORKING PARTY REPORT

9. Ukraine submits that the 2014 transit ban and other transit restrictions, the 2016 general transit ban and other transit restrictions, the 2016 product-specific transit ban and other transit restrictions and the de facto application of the 2016 general and product-specific transit bans apply to traffic in transit as defined for the purposes of Article V of theGeneral Agreement on Tariffs and Trade 1994 ("GATT 1994") and, as a result, aresubject to the obligations laid down in that provision.

10. Ukraine claims that the Russian Federation, through the measures at issue, violates Articles V:2, first and second sentences, V:3, V:4 and V:5 of the GATT 1994. By establishing such violations, Ukraine has also, in each instance, shown a violation of paragraph 1161 of the Working Party Report[5].

A. Violation of Article V:2, first sentence, of the GATT 1994

[4] Russia – Measures Concerning Traffic in Transit – Request for the Establishment of a Panel by Ukraine, WT/DS512/3 (10 February 2017) ("Panel request").

[5] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization dated 17 November 2011, WT/ACC/RUS/70 and WT/MIN(11)/2 ("Working Party Report").

11. The first sentence of Article V:2 of the GATT 1994establishes the freedom of transit for traffic in transit to or from the territory of other World Trade Organization ("WTO") Members. Corresponding with that freedom is the basic obligation for all WTO Members to guarantee, as regards traffic in transit passing through their territory, freedom of transit via the routes most convenient for international transit.The qualification "via the routes most convenient for international transit" makes it clear that WTO Members must let foreign goods pass across their territory for the purpose of international transit and in a manner that facilitates trade by offering access to the most convenient routes of passage.

12. In making an objective assessment of the conditions under which international transit may occur, Ukraine considers that is relevant to consider, inter alia: (i) the mode of transport; (ii) the provenance of the goods; (iii) the destination of the goods; (iv) the length of the transit route; (v) the available access to the transit routes; (vi) the administrative formalities and charges incurred; (vii) the cost of using the transit routes; (viii) the operator's right to choose a mode of transport; and (ix) the product characteristics.

13. Ukraine submits that the 2014 transit ban, the 2016 general and product-specific transit bans and the de facto application of the 2016 general and product-specific transit bans violate Article V:2, first sentence, of the GATT 1994.Through those measures, the Russian Federation precludes traffic in transit from passing, via the most convenient routes, from the territory of either Belarus or Ukraine, through the territory of the Russian Federation, to the territories of certain third countries.More specifically:

- the 2014 transit banprohibits the entry of traffic in transit of veterinary Resolution No. 778 goods at the border between Belarus and the Russian Federation;

- the 2016 general transit ban prohibitsdirecttraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic and prohibits indirecttraffic in transit of such goods other than through the Belarus route;

- the 2016 product-specific transit ban prohibits direct traffic in transit and as good as prohibits indirect traffic in transit by road and rail transport of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and

- the de facto application of the 2016 general and product-specific transit bansprohibitsdirecttraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistanand, for Resolution No. 778 goods and non-zero duty goods, also prohibits indirecttraffic in transit through the territory of the Russian Federation.

14. Whereas the freedom of transit guaranteed by the first sentence of Article V:2 of the GATT 1994 is to be qualified by the specific rules as regards charges, regulations and formalities found in the other paragraphs of Article V, Ukraine submits that those specific rules do not provide that a measure *prohibiting* traffic in transit may nonetheless be consistent with Article V. In other words, where a measure is found to *prohibit* traffic in transit via the most convenient routes, that finding is sufficient to conclude that the measure is inconsistent with Article V:2, first sentence, of the GATT 1994.

15. Ukraine submits that the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions violate Article V:2, first sentence, of the GATT 1994, because those restrictions interfere with the freedom of transit via the most convenient routes. More specifically:

- the 2014 other transit restrictionsrequire that traffic in transit of veterinary Resolution No. 778 goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the EAEU Customs Union;

- the 2016 general other transit restrictionsrequire thattraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfiesthe identification and registration card requirements; and

- the 2016 product-specific other transit restrictionsrequire that traffic in transit of Resolution No. 778 goods and non-zero duty goodsby road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republicpasses via the Belarus route (which includes the entry and exit control point requirement), provided that the request and authorisation requirements are metand that the traffic in transit satisfies the identification and registration card requirements.

16. Ukraine claims that, by imposing each of those restrictions, the Russian Federation impedes the freedom of transit by rendering traffic in transit, and therefore possibly also exportation and importation, more burdensome, expensive, slow or even (nearly) impossible. In so far as the restrictions fall within the scope of the other paragraphs of Article V of the GATT 1994, Ukraine shows that those restrictions are inconsistent with the conditions laid down in those paragraphs.

B. Violation of Article V:2, second sentence, of the GATT 1994

17. Ukraine submits that the 2014 transit ban and other transit restrictions, the 2016 general and product-specific transit bans and other transit restrictions and the de facto application of the 2016 general and product-specific transit bans violate the Russian Federation's obligation under the second sentence of Article V:2 of the GATT 1994, by distinguishing between traffic in transit based on prohibited criteria. More specifically:

- the 2014 transit ban and other transit restrictions distinguish (i) based on the place of origin and entry of traffic in transit into the territory of the Russian Federation by prohibiting the entry of traffic in transit of veterinary Resolution No. 778 goods at the border between Belarus and the Russian Federation and by requiring that the entry of such traffic in transit occurs at a limited number of checkpoints located at the Russian part of the external border of the EAEU Customs Union; (ii) based on the place of destination of traffic in transit of veterinary Resolution No. 778 goods passing through the territory of the Russian Federation by imposing different transit permit requirements depending on whether the goods are destined for Kazakhstan or other third countries; and (iii) based on the place of origin by requiring that the movement of traffic in transit of plant Resolution No. 778 goods occurs through the checkpoints across the state border of the Russian Federation;

- the 2016 general transit banand other transit restrictionsdistinguish(i) based on the place of departure, entry, exit and destination of traffic in transit, by prohibiting the direct traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and (ii) based on the place of departure, entry, exit, and destination of traffic in transit, by subjecting traffic in transit from Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic to the Belarus route requirement (which includes the entry and exit control point requirement), together with the identification and registration card requirements;

- the 2016 product-specific transit banand other transit restrictions distinguish (i) based on the place of origin and destination of traffic in transit, by prohibiting traffic in transit of Resolution No. 778 goods and non-zero duty goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and (ii) based on the place of origin, departure, entry, exit and destination of traffic in transitfrom Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic, making the derogation from the ban on indirect traffic in transit dependent on the request and authorisation requirements and on compliance with the Belarus route requirement (which includes the entry and exit control point requirement), and the identification and registration card requirements; and

- the de facto application ofthe 2016 general and product-specific transit bans distinguish based on the place of origin, departure, entry and destination of traffic in transit, by prohibiting direct traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan, and by prohibiting all traffic in transit of Resolution No. 778 goods and non-zero duty goodsby road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

C. Violation of Article V:3 of the GATT 1994

18. Ukraine claims that the 2016 general and product-specific other transit restrictions violate Article V:3 of the GATT 1994 by subjecting traffic in transit through the territory of the Russian Federation, which has been entered at a customs house, to unnecessary delays or restrictions. In particular, the Belarus route requirement (which includes the entry and exit control point requirement), the conditional access to the Belarus route (for traffic in transit of Resolution No. 778 goods and non-zero duty goods),and the identification and registration card requirements result in delays or restrictions that go beyond what is necessary in order to put traffic in transit under a transit procedure in order to ensure that goods move through the territory (and eventually leave the territory) as traffic in transit instead of entering the territory (in the sense of importation). Those requirements have no bearing whatsoever on the objective of putting that traffic in transit under a transit procedure. Moreover, the identification and registration card requirements are unnecessary because traffic in transit made subject to those requirements is already put under a customs transit procedure and therefore has already been entered at a customs house upon starting the passage through the customs territory of the EAEU Customs Union.

D. Violation of Article V:4 of the GATT 1994

19. Ukraine submits that the Russian Federation violates Article V:4 of the GATT 1994 by imposing unreasonable regulations − meaning regulations that are not adequate and fair for achieving the purpose on the basis of which they are applied, taking into account the conditions of the traffic − on traffic in transit to or from the territories of WTO Members. In particular, the Russian Federation makes the derogation from the ban on traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic (meaning access to the Belarus route) dependent on the request and authorisation requirements. Ukraine has shown that the conditional access to the Belarus route in the form of the request and authorisation requirements is a regulation imposed by the Russian Federation on traffic in transit to or from the territory of other WTO Members, and that such conditional access is not reasonable, having regard to the conditions of the traffic. It renders the enjoyment of the freedom of traffic in transit entirely dependent on the unfettered discretion of both the third WTO Member for whose territory traffic in transit is destined and the WTO Member through whose territory traffic in transit would pass.

E. Violation of Article V:5 of the GATT 1994

20. Ukraine submits that the Russian Federation violates Article V:5 of the GATT 1994 by applying regulations in connection with transit that accord to traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan, the Kyrgyz Republic and certain other third countries in Central and Eastern Asia and the Caucasus treatment less favourable than that accorded to traffic in transit from the territory of another (non-)WTO Member and destined for the territory of another (non-)WTO Member.

21. In respect of the regulations and formalities imposed by the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions, Ukraine claims that the Russian Federation fails to accord, to traffic in transit from the territory of Ukraine, the treatment accorded to traffic in transit from the territories of other countries and destined for the territories of other countries. In particular, the less favourable treatment accorded to such traffic in transit is based on an express distinction based on the place of departure, origin, entry, exit and/or destination and therefore results in *de jure* discrimination. Ukraine has already established that Article V:2,second sentence,of the GATT 1994 prohibits distinctions made on the basis of those criteria. Where the treatment accorded as a result of such a distinction modifies the conditions of competition in the marketplace to the detriment of traffic in transit from or to a WTO Member, there is also a violation of Article V:5 of the GATT 1994.

22. In particular, through the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions, the Russian Federation treats traffic in transit from Ukraine less favourably than traffic in transit from the territory of other countries and destined for other countries, which has a detrimental impact on the conditions of competition for traffic in transit from the territory of Ukraine. More precisely:

- the 2014 other transit restrictionsrequire that transit of veterinary Resolution No. 778 goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the EAEU Customs Union; require that a permit is obtained from the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of Kazakhstan in order for such traffic in transit to pass through the territory of the Russian Federation to the territory of Kazakhstan; and require that traffic in transit of plant Resolution No. 778 goods passes through the checkpoints across the state border of the Russian Federation; and

- the 2016 general and product-specific other transit restrictions require that traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfies the identification and registration card requirements, and furthermore require that traffic in transit of Resolution No. 778 goods and non-zero duty goods from Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic meets also the request and authorisation requirements.

23. Finally, Ukraine has already shown that the 2014 transit ban, the 2016 general and product-specific transit bans and the de facto application of the 2016 general and product-specific transit bans make distinctions that are prohibited and therefore violate Article V:2, second sentence, of the GATT 1994. Those measures are also regulations in connection with traffic in transit. It follows that those measures violate Article V:5 of the GATT 1994, by failing to accord to traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic (the 2016 general and product-specific transit bans) and for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan (the de facto application of the 2016 general and product specific transit bans), the treatment given to traffic in transit from the territory of other countries and destined for other countries. The Russian Federation also accords, to traffic in transit of goods originating in the countries listed in Resolution No. 778, treatment less favourable than that accorded to traffic in transit of goods originating in other countries. Likewise, the less favourable treatment accorded to such traffic in transit is based on an express distinction based on the place of origin, departure, entry, exit and/or destination and therefore results in *de jure* discrimination.

V. CLAIMS UNDER ARTICLES X:1 AND X:2 OF THE GATT 1994 AND PARAGRAPHS 1426, 1427 AND 1428 OF THE WORKING PARTY REPORT

24. Ukraine submits that the fact that Article X:1 of the GATT 1994 does not expressly include the terms "traffic in transit" or "transit" does not mean that measures covered by Article V of the GATT 1994 fall outside the scope of the publication and administration requirements contained in Article X of the GATT 1994. Measures falling within the scope of Article V may, depending on their content, design and operation, pertain to "rates of … taxes or other charges" *and/or* affect the "transportation …, warehousing, inspection … or other use".

A. Violation of paragraph 1426 of the Working Party Report and Article X:1 of the GATT 1994

25. Ukraine submits that the Russian Federation violates both paragraph 1426 of the Working Party Reportand Article X:1 of the GATT 1994 by failing to publish promptly (i) Decree No. 319; (ii) PJSC "Russian Railways" Order No. 529r; (iii) PJSC "Russian Railways" Notice of 17 May 2016; and (iv) the de facto application of the 2016 general and product-specific transit bans.

26. While paragraph 1426 of the Working Party Report and Article X:1 of the GATT 1994 contain the same substantive obligation of prompt publication, paragraph 1426 expands the scope of application of that requirement in Article X:1vis-à-vis the Russian Federation. Indeed, Article X:1 applies to legal instruments pertaining to or affecting a limited list of subject-matters, while paragraph 1426 applies to the broader category of legal instruments "pertaining to or affecting trade in goods, services, or intellectual property rights".Consequently, a violation of Article X:1 of the GATT 1994 implies a violation of paragraph 1426 of the Working Party Report.

27. Ukraine submits that the prompt publication requirements apply to these four measures because they are laws or regulations of general application made effective by the Russian Federation which affect the transportation of goods.The Russian Federation did not (adequately) publish PJSC "Russian Railways" Order No. 529r, PJSC "Russian Railways" Notice of 17 May 2016 and the de facto application of the 2016 general and product-specific transit bans, and did not publish promptly Decree No. 319.

B. Violation of paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994

28. Ukraine submits that the Russian Federation violates both paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994 by making effective and enforcing the following measures prior to their publication: (i) Decree No. 319; (ii) PJSC "Russian Railways" Order No. 529r;(iii) the de facto application of the 2016 general and product-specific transit bans; and (iv) Decree No. 643. These measures are laws or regulations of general application made effective by the Russian Federation which affect the transportation of goods, and impose new and more burdensome requirements on imports. Ukraine submits that the Russian Federation did not (adequately) publish PJSC "Russian Railways" Order No. 529r and the de facto application of the 2016 general and product-specific transit bans, and enforced Decrees No. 319 and No. 643 prior to their publication.

29. As paragraph 1428 of the Working Party Report expands both the scope of application and the substantive publication requirement of Article X:2 of the GATT 1994, a violation of Article X:2 of the GATT 1994 implies a violation of paragraph 1428 of the Working Party Report.

C. Violation of paragraph 1427 of the Working Party Report

30. Ukraine submits that the Russian Federation violates paragraph 1427 of the Working Party Report, which creates a new obligation vis-à-vis the Russian Federation, by failing to publish the following twentymeasures prior to their adoption: (i) Resolution No. 778; (ii) Resolution No. 830; (iii) Resolution No. 625; (iv) Resolution No. 842; (v) Resolution No. 981; (vi) Resolution No. 1397; (vii) Resolution No. 1; (viii) Resolution No. 147; (ix) Resolution No. 157; (x) PJSC "Russian Railways" Order No. 529r; (xi) Resolution No. 276; (xii) Resolution No. 388; (xiii) Resolution No. 472; (xiv) Resolution No. 608; (xv) Resolution No. 732; (xvi) Resolution No. 897; (xvii) Resolution No. 1086; (xviii) Resolution No. 790; (ixx) Resolution No. 1292; and (xx) Decree No. 643.

31. Those measuresare regulations of general application pertaining to or affecting trade in goods.The Russian Federation did not adequately publish PJSC "Russian Railways" Order No. 529r before or after being finalised, and did not publish the nineteenother resolutions and the decree of the Russian Federationprior to their adoption, meaning before they were finalised.

VI. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994

32. Ukraine claims that the Russian Federation violates Article X:3(a) of the GATT 1994 by failing to administer Decree No. 1, as amended by Decree No. 319, in a reasonable manner.

33. First, the Russian Federation blocks, at the border between Belarus and the Russian Federation, the entry of traffic in transit by road and rail transport from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic without providing any explanation of the reasons underlying that decision.This failure to state reasons constitutesan unreasonable administration of Decree No. 1, as amended.

34. Second, the Russian Federation administers paragraphs 1.1 and 1.2 of Decree No. 1, introduced by Decree No. 319, in an unreasonable manner because − as a result of the absence of any criteria on the basis of which it decides whether or not to authorise a derogation from the 2016 product-specific transit ban so that traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of the Ukraine and destined for the territories Kazakhstan and the Kyrgyz Republic may, exceptionally, pass through the territory of the Russian Federation via the Belarus route − that regulation inherently contains the possibility of arbitrary decisions.

VII. THE RUSSIAN FEDERATION'S DEFENCE UNDER ARTICLE XXI(B)(III) OF THE GATT 1994 MUST FAIL

35. The Russian Federation argues that *all of the measures* challenged by Ukraine in these proceedings are, as regards *all of the claims* made by Ukraine, justified on the basis of Article XXI(b)(iii) of the GATT 1994. Besides asking the Panel to find that the measures at issue are not WTO-inconsistent, the Russian Federation also submits that neither the Panel nor the WTO as an institution enjoys jurisdiction to hear this dispute.

36. Ukraine submits that the Russian Federation cannot, on the one hand, argue that the Panel lacks jurisdiction to review the application of Article XXI of the GATT 1994 and, on the other hand, request the Panel to find that the measures at issue are not WTO-inconsistent. In any event, the Russian Federation's general jurisdictional objection is not supported by any valid legal argument and the Russian Federationhas not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994.

A. The Panel enjoys jurisdiction to examine the Russian Federation's invocation of Article XXI of the GATT 1994

37. Ukraine submits that there is no basis in the WTO covered agreements for the Russian Federation's position that the Panel is precluded from hearing and deciding on this dispute because it may not review the application of Article XXI of the GATT 1994.Accepting that all WTO Members may justify all of their otherwise WTO-inconsistent measures on the grounds of essential security interests without any possibility for scrutiny by a third party would seriously impair the functioning of the WTO and its dispute settlement system and possibly threaten its existence.

38. First, Article XXI of the GATT 1994 lays down an affirmative defence for measures which otherwise would be inconsistent with an obligation under the GATT 1994.As a result, Ukraine claims that it is for the Russian Federation to put forward evidence and legal arguments in support of its assertion that each of the measures at issue, with respect to which it invokes Article XXI(b)(iii) of the GATT 1994, satisfies the requirements of that provision.

39. Second, Article XXI of the GATT 1994 does *not* provide for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU.Conversely, the DSU itself does *not* contain a security exceptions clause. Nor does any other part of the GATT 1994 or the other WTO covered agreements offer a basis for excluding Article XXI of the GATT 1994 from the jurisdiction of WTO panels and the Appellate Body.

40. Third, taking into account the Panel's terms of reference, the Panel enjoys jurisdiction to examine and, where relevant, to make findings and recommendations with respect to each of the provisions of the WTO covered agreements cited by either Ukraine or the Russian Federation.Interpreting Article XXI of the GATT 1994 as being non-justiciable would undermine the Panel's terms of reference under Article 7 of the DSU and the general standard of review laid down in Article 11 of the DSU.

41. Fourth, as a result of the Russian Federation's argument, WTO Members would be authorised to adopt unilateral actions that may not be scrutinised by the WTO dispute settlement system. This would also mean that a WTO Member, instead of resorting to the WTO dispute settlement system for obtaining redress of violations of WTO rules, could instead turn to unilateral action based on Article XXI of the GATT 1994. Such unilateral actions would threaten the stability and predictability of the multilateral trade system and disregard Article 23 of the DSU.

42. Fifth, the Russian Federation disregards the distinction between the jurisdiction of the Panel and the applicable standard of review as regards the interpretation and application of the WTO covered agreements. The fact that the text of Article XXI of the GATT 1994 grants a certain degree of deference to the WTO Member invoking its security interestsdoes not mean that total deference is the appropriate standard of review.Should it be correct that Article XXI of the GATT 1994 grants WTO Members unfettered discretion to invoke the protection of their essential security interests, there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that otherwise is inconsistent with the GATT 1994.

43. Sixth, should the Panel be precluded from making an objective assessment of the entirety of the matter before it, it would also be precluded from making findings and recommendations regarding that matter. Its findings and recommendations would need to be limited to finding that the measures at issue are inconsistent with the GATT 1994. However, the Russian Federation expressly asks the Panel to find that the measures at issueare *not* inconsistent with its WTO obligations.

44. Seventh, the Russian Federation's position on jurisdiction cannot find support in the GATT dispute *US − Nicaraguan Trade*.Unlike what was the case in that dispute, the terms of reference of the Panel in these proceedings do not expressly exclude examining the invocation of Article XXI(b)(iii) of the GATT 1994.

45. The GATT 1994 and the DSU therefore confer on the Panel jurisdiction to examine the Russian Federation's reliance on Article XXI(b)(iii) of the GATT 1994.

B. Interpretation of Article XXI(b)(iii) of the GATT 1994

46. In order to successfully defend an otherwise WTO-inconsistent measure under Article XXI(b)(iii), the invoking WTO Member must show that (i) the measure was "taken in time of war or other emergency in international relations"; that (ii) the measure was taken "for the protection of its essential security interests; and that (iii) it considers the measure "necessary" to protect its essential security interests.

47. Unlike what is the case for the introductory paragraph of Article XXI(b) of the GATT 1994, the text of Article XXI(b)(iii)does not include the phrase "which it considers". It follows that the phrase "taken in time of war or other emergency in international relations" is to be given an objective meaning by a panel, and that a WTO Member invoking Article XXI(b)(iii) cannot unilaterally determine whether such circumstances exist. Ukraine submits that an emergency in international relations occurs where there is a serious disruption in international relations that demands action by a WTO Member so as to protect its "essential security interests".In order to enable a panel to establish whether the measure is "taken in time of war or other emergency in international relations", the WTO Member invoking Article XXI(b)(iii) must provide sufficient arguments and evidence showing that the measure at issue was taken in such circumstances.

48. The fact that the text of Article XXI(b) of the GATT 1994 expressly states that it is for a WTO Member to decide what action it considers necessary for protecting its essential security interests does not mean that a WTO Member enjoys total discretion.

49. First, the introductory paragraph of Article XXI(b) of the GATT 1994 makes it clear that the exception in Article XXI(b) is only triggered where a WTO Member acts "for the protection of its essential security interests".Ukraine submits that a panel must interpret the phrase "for the protection of its essential security interests" in accordance with the customary principles of interpretation and review whether a defending Member relies on Article XXI(b) in order to justify actions that protectits essential security interests. In order to do so, a panel must examine whether (i) the interests or reasons advanced by the defendant Member for imposing the measures fall within the scope of the phrase "its essential security interests" for the purposes of Article XXI(b)(iii) of the GATT 1994; and whether (ii) the measures are directed at safeguarding the defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.Through that analysis, a panel in essence verifies also whether the defending WTO Member has applied Article XXI of the GATT 1994 in good faith.

50. In order to enable a panel to conduct such an examination, a Member relying on Article XXI(b) of the GATT 1994must provide sufficient evidence,putting a panel in a position to reach a conclusion as to whether the advanced interests can reasonably be considered to correspond with the meaning of "essential security interests" and as to whether the measures at issue are capable of protecting the essential security interests pursued. Where no arguments and evidence are produced, a panel cannot reach any conclusions and must find that the respondent has failed to satisfy its burden of proof.

51. Second,the respondent WTO Member must consider the challenged measure to be "necessary" to protect its essential security interests.While a large degree of deference should be accorded to the Member taking the measure, Ukraine submits that a panel is to review whether, based on the facts available, the defending Member could reasonably arrive at the conclusion that the measures are necessary for protecting its essential interests.

C. The Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994

52. Ukraine submits that the Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994. Its sole argument in relying on this affirmative defence is the reference to an alleged emergency in international relations in 2014. This is insufficient to invoke successfully Article XXI(b)(iii) of the GATT 1994.

53. First, the Russian Federation failed toprovide arguments or evidence showing that the measures at issue were"takenin time of war or other emergency in international relations".As a result, Ukraine and the Panel are left in the dark as to what particular emergency in international relations caused the Russian Federation to adopt the measures at issue.

54. Second, the Russian Federation failed to produce arguments or evidencein order to put the Panelin a position to reach a conclusion as to whether the interests advanced by the Russian Federation can reasonably be considered to correspond with the meaning of "essential security interests" and whether the measures at issue are capable of protecting the essential security interests pursued. Without such evidence, the Panel is unable to determine whether the measures at issue aregenuinely taken for the protection of the security interests of the Russian Federation, and not for purely economic reasons.

55. Third, the Russian Federation has not demonstrated that it could reasonably arrive at the conclusion that the measures at issue are necessary for the protection of its essential interests.

56. Ukraine concludesthat the burden falls on the Russian Federation to show a serious disruption in international relations constituting an emergency that is sufficiently connected to the Russian Federation so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify action necessary to protect those interests.In relying on Article XXI(a) of the GATT 1994, the Russian Federation uses that exception to evade its burden of proof under Article XXI of the GATT 1994. Article XXI(a) exists, as an affirmative defence, in other to justify measures that otherwise would be inconsistent with transparency obligations under the GATT 1994, such as the publication requirements under Article X of the GATT 1994 and various obligations under the GATT 1994 to inform other WTO Members. It may not be invoked in order to evade the Russian Federation's obligations as a respondent WTO Member invoking an affirmative defence.

ANNEX C-2

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. INTRODUCTION

1. In these proceedings, the Russian Federation does not contest any of the claims made by Ukraine under Articles V and X of the GATT 1994 and under the Working Party Report. The Russian Federation's rebuttal is limited to: (i) raising new objections regarding Ukraine's Panel request; (ii) complaining that the 2014 transit ban and other transit restrictions no longer exist or were never applied with respect to Ukraine; and (iii) relying on Article XXI(b)(iii) of the GATT 1994 in order to justify all of the measures at issue with respect to all of the claims made by Ukraine. Unlike the Russian Federation, the third parties have addressed Ukraine's interpretation of Article V of the GATT 1994 in response to the Panel's questions. The Panel has also raised of its own motion a question relating to whether one of the measures was properly identified in the Panel request.

II. THE PANEL REQUEST SATISFIES THE CONDITIONS OF ARTICLE 6.2 OF THE DSU

2. The Panel raised of its own motion and prior to the first substantive meeting the question of whether the de facto application of the 2016 general and product-specific transit bans was properly identified in the Panel request. That matter has not been raised by the Russian Federation which, in its first written submission, complained only about an entirely separate question of fact, namely whether there was sufficient evidence of the existence of this unwritten measure.

3. The Russian Federation's response to the Panel's question was to raise a number of new challenges to the Panel request and the Panel's terms of reference.

4. The Russian Federation claimed that the Panel request failed, on the one hand, to identify adequately the specific measures at issue (and not only the *de facto* application of the 2016 general and product-specific transit bans) and, on the other hand, to establish the necessary nexus between the measures at issue and the relevant provisions of the WTO covered agreements which those measures violate. However, as demonstrated by Ukraine, the statements of the Russian Federation in its first and second written submissions show that the Russian Federation was well aware of the measures at issue and the claims made by Ukraine. Ukraine also rebutted each of the arguments made by the Russian Federation in its responses of 20 February 2018.

5. In its second written submission, the Russian Federation presented a new allegation, namely that due to the use of the phrase "each group of measures in Section I ("Background) of the Panel request, the specific measures at issue *are* the "First group of measures and the "Second group of measures. In its Panel request, Ukraine clearly indicated that the specific measures at issue are identified *in* Sections II and III of the Panel request and are organised in two groups. There is nothing in the Panel request to support that either group of measures *is* the specific measure at issue. Each section identifies the specific measures at issue as well as the legal instruments through which the Russian Federation imposes those measures (Sections II.A and III.A), followed by a clear explanation of the specific WTO provisions with which the measures identified in each section are inconsistent (Sections II.B and III.B).

6. In its second written submission, the Russian Federation also objected to the final paragraph of Section III.A of the Panel request. It argued that any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation may fall into this category of, what Ukraine assumes to be, the *de facto* application of the 2016 general and product-specific transit bans.

7. Ukraine argues that the Russian Federation's reading of the Panel request is not grounded in the words actually used in that request, considered as a whole. The sixth paragraph of Section III.A makes it clear that the matter before the Panel includes the *de facto* application of Decree No. 1 and Resolution No. 1, and thus the restrictions on traffic in transit imposed by both instruments to countries in Central and Eastern Asia and the Caucasus other than Kazakhstan and the Kyrgyz Republic. Furthermore, Ukraine has demonstrated that the phrase "Central and Eastern Asia and

Caucasus comprises a sufficiently precise and defined list of countries. Taking into account also Ukraine's submissions made during these proceedings − which the Panel may consult in order to confirm the meaning of the terms used in the Panel request − Ukraine submits that the Russian Federation has not shown how the terms of the Panel request have prejudiced its ability to defend itself.

8. Moreover, the Russian Federation fails to acknowledge that the final paragraph of Section III.A refers to "related measures, meaning measures that are connected or have a relation to other measures identified in the Panel request. By adding the final paragraph in Section III.A, Ukraine did no more than to ensure that measures bearing a relationship with the specific measures at issue, without changing the essence of those measures, fall within the Panel's terms of reference.

9. In light of the above, and taking into account Ukraine's previous submissions, Ukraine respectfully asks the Panel to confirm that the Panel request satisfies the conditions of Article 6.2 of the DSU.

III. THE 2014 TRANSIT BAN AND OTHER TRANSIT RESTRICTIONS CONTINUE TO EXIST AND APPLY WITH RESPECT TO UKRAINE

10. The Russian Federation continues to allege that Instructions Nos. FS-NV-7/22886 (the 2014 veterinary transit ban and other transit restrictions) and FS-AS-3/22903 (the 2014 plant transit restriction) impose measures that fall outside the Panel's terms of reference. Ukraine respectfully requests that the Panel rejects these arguments.

11. First, the Russian Federation wrongly assumes that, in order to challenge the measures imposed by Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903, Ukraine must show that those measures are applied to goods originating from Ukraine.

12. Second, Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 are not expired measures and continue to apply today. The fact that, on 1 January 2016, the 2016 general transit ban and other transit restrictions entered into force does not mean that the Instructions stopped applying or having any effect on traffic in transit passing through Ukraine or originating from Ukraine. Indeed, there is no evidence before the Panel that either instruction has been repealed (expressly or implicitly). Furthermore, by adopting Instruction No. FS-EN-7/19132, the Russian Federation expressly confirmed on 10 October 2016 (i.e. after the filing of the request for consultations) that Instruction No. FS-NV-7/22886, as amended, continued to apply. If neither instruction ever applied with respect to Ukraine, there would have been no need to adopt Instruction No. FS-EN-7/19132.

13. Third, in any event, the text of Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 make it clear that, even after the imposition of the 2016 general and product-specific transit bans and other transit restrictions, the measures which they impose apply with respect to certain traffic in transit passing through Ukraine. Ukraine emphasizes that the 2016 general and product-specific transit bans and other transit restrictions do not apply to, inter alia, traffic in transit from Ukraine and destined for territories *other than* those of Kazakhstan, Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Thus, although the legal provisions contained in Decree No. 1 and Resolution No. 1 prevail to the extent that there is a conflict over the legal provisions contained in both instructions, the instructions still apply to traffic in transit from Ukraine and of Ukrainian goods *not covered* by the 2016 general and product-specific transit bans and other transit restrictions. By admitting that Decree No. 1 effectively abolished any requirements set out in those instructions with respect to Ukraine, the Russian Federation in essence confirmed that, before 1 January 2016, both instructions imposed requirements with respect to Ukraine.

14. Fourth, the objections of the Russian Federation fail to recognise that Ukraine's claims regarding Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 are "as such. Therefore, the success of Ukraine's claims regarding the 2014 transit ban and other transit restrictions does not depend on evidence of the application of those instructions with respect to Ukraine.

15. For the avoidance of any doubt on this matter, and although Ukraine is not required to show the application of either instruction in order to demonstrate that the measures existed at the time of the establishment of the Panel, Ukraine submitted Exhibit UKR-106 (BCI) together with its opening statement at the second substantive meeting. Exhibit UKR-106 (BCI) shows that, even after the filing of the Russian Federation's first written submission, the Russian Federation continued to rely

expressly on Instruction No. FS-NV-7/22886 in order to ban traffic in transit arriving from Ukraine by train.

16. Exhibit UKR-106 (BCI) was filed as evidence in direct response to the Russian Federation's allegation that Instruction No. FS-NV-7/22886 does not apply and has never applied with respect to Ukraine. Taking into account that that allegation was made by the Russian Federation in its opening statement at the first substantive meeting, Ukraine may submit, according to paragraph 7 of the Panel's Working Procedures, this rebuttal evidence after the filing of its first written submission and after the first substantive meeting. Pursuant to paragraph 7, no good cause needs to be shown with respect to rebuttal evidence that is submitted after the first substantive meeting. Moreover, by filing Exhibit UKR-106 (BCI), Ukraine did not raise a new issue in these proceedings that was previously unknown to the Russian Federation or to the Panel. As a result, the submission of Exhibit UKR-106 (BCI) does not conflict with paragraph 7 of the Working Procedures and does not otherwise affect the Russian Federation's due process rights in these proceedings.

17. For these reasons, Ukraine respectfully requests the Panel to reject the Russian Federation's objection with regard to Exhibit UKR-106 (BCI) and to confirm that the 2014 transit ban and other transit restrictions fall within the Panel's terms of reference.

IV. UKRAINE HAS MADE A *PRIMA FACIE* CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLES V AND X OF THE GATT 1994 AND PARAGRAPHS 1161, 1426, 1427 AND 1428 OF THE WORKING PARTY REPORT

18. The Russian Federation did not present any meaningful argument or evidence in rebuttal of Ukraine's claims under Articles V and X of the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of the Working Party Report.

19. With regard to Article V of the GATT 1994, the Russian Federation's main rebuttal was that Ukraine suspended the operation of routes included in Map 1 of Exhibit UKR-104. Map 1 of Exhibit UKR-104 contains the principal road and rail routes which were used for transit of goods from Ukraine to Kazakhstan and the Kyrgyz Republic prior to 2014. While certain international checkpoints at the border between Ukraine and the Russian Federation, which are included in Map 1 of Exhibit UKR-104, are currently not open, Ukraine emphasizes that 10 out of the 17 international road checkpoints and four out of the six international rail checkpoints remain open. Those international checkpoints are currently being used for bilateral trade and, in the absence of the measures at issue, could be used also for international transit covered by those measures.

20. The only other response with regard to Article V of the GATT 1994 is the Russian Federation's assertion that Ukraine has allegedly taken a number of measures. Ukraine reiterates that this case is *not* about any measures which Ukraine might have taken. The main question at issue in this dispute and falling within the Panel's jurisdiction concerns the Russian Federation's decision not to allow traffic in transit from Ukraine and destined for Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan to pass the border between Ukraine and the Russian Federation. In that regard, Ukraine also asks the Panel to be mindful of its terms of reference in this dispute and of Ukraine's rights of defence in other WTO dispute settlement proceedings.

21. Besides the suspension of the operation of routes included in Map 1 of Exhibit UKR-104 and the measures allegedly taken by Ukraine, the Russian Federation has neither contested Ukraine's interpretation or application of Article V of the GATT 1994 nor disputed any facts put forward by Ukraine in support of its claims.

22. However, as several third parties addressed the meaning of Article V of the GATT 1994 in response to the questions raised by the Panel, Ukraine offers its own views on those questions.

23. First, on the question of whether a violation of the freedom of transit in the first sentence of Article V:2 of the GATT 1994 follows necessarily from a violation of any other part of Article V of the GATT 1994, including the second sentence of Article V:2, Ukraine reiterates its position that where a measure applies to goods transiting via the most convenient routes of passage and is found to violate other parts of Article V of the GATT 1994, including the second sentence of Article V:2 of the GATT 1994, then such a measure is also inconsistent with the obligation of a WTO Member to guarantee the freedom of transit via the most convenient routes. In that situation, Ukraine submits that a claim under the first sentence of Article V:2 of the GATT 1994 may be consequential.

24. A separate question arises where a measure applies to traffic in transit passing via routes *other than* the most convenient routes. Ukraine submits that the obligations under Article V of the GATT 1994 should be interpreted as applying, unless otherwise stated (such as in the first sentence of Article V:2 of the GATT 1994), to all traffic in transit passing through the territory of a WTO Member, irrespective of whether the route taken is part of the most convenient routes. In other words, unlike the first sentence of Article V:2 of the GATT 1994, the obligations in Articles V:3 to V:6 of the GATT 1994 apply to traffic in transit passing through the territory of a WTO Member irrespective of the route through which such traffic moves. In the event that the Panel agrees with that interpretation, Ukraine submits that this should not alter the Panel's assessment of whether Ukraine has made a *prima facie* case with respect to each of its claims. As Ukraine explained in its first written submission, it has submitted arguments and evidence in order to make a *prima facie* case for each claim under different paragraphs of Article V of the GATT 1994.

25. Second, Ukraine submits that the purpose for which a delay or restriction on traffic in transit may be "necessary within the meaning Article V:3 of the GATT 1994 is that of putting traffic in transit under a transit procedure in order to ensure that goods move through the territory (and eventually leave the territory) as traffic in transit instead of entering the territory (in the sense of importation). Delays or restrictions that are not necessary for that purpose and do not involve a failure to comply with applicable customs laws or regulations result in a violation of Article V:3 of the GATT 1994. Ukraine adds that other legitimate purposes are recognised in the exceptions clauses in the GATT 1994. Such clauses have a distinct function and impose separate obligations.

26. Ukraine also considers that, in the context of the present proceedings, it is not necessary for the Panel to take a position on whether, as one third party submitted, *force majeure* might be a reason explaining why delays or restrictions unrelated to compliance with customs laws and regulation might nonetheless be necessary. In any event, any finding that *force majeure* precludes the wrongfulness of an unnecessary delay or restriction would not be based on an objective recognised in Article V:3 of the GATT 1994 or an affirmative defence for which the GATT 1994 provides. It would be based on general international law.

27. Third, Ukraine reiterates that charges, regulations or formalities in connection with transit must respect the MFN obligation in Article V:5 of the GATT 1994. Insofar as such charges, regulations or formalities also fall within the scope of Article V:3 of the GATT 1994, they must comply with that provision. Although the obligations laid down in Articles V:3 and V:5 of the GATT apply together, the type of obligation differs: Article V:5 sets out a discrimination obligation whereas Article V:3 prohibits a WTO Member from subjecting traffic in transit to delays and restrictions that are not necessary for the purposes recognised under that provision and the charges that are not expressly identified therein. It is thus appropriate to consider those measures falling within the scope of both obligations first under Article V:3.

28. Fourth, Ukraine repeats that it does *not* argue that every violation of the second sentence of Article V:2 of the GATT 1994, due to a distinction based on place of origin, departure, entry/exit and destination, violates also Article V:5 of the GATT 1994. Rather, a successful challenge under Article V:5 of the GATT 1994 requires comparing the treatment accorded and establishing that the treatment given modifies the conditions of competition in the marketplace to the detriment of traffic in transit from or to the WTO Member alleging the violation.

29. Ukraine respectfully asks the Panel to find that Ukraine has made a *prima facie* case as regards its claims under Articles V and X of the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of the Working Party Report, and to make the relevant recommendations.

30. Ukraine also requests the Panel to make findings and recommendations as regards the two amendment measures adopted by the Russian Federation, namely Decree No. 643 and Resolution No. 1292. Those measures, which fall within the Panel's terms of reference, were not published in accordance with paragraph 1427 of the Working Party Report. Furthermore, by making effective and enforcing Decree No. 643 prior to its publication, the Russian Federation violated both paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994.

V. THE RUSSIAN FEDERATION'S DEFENCE UNDER ARTICLE XXI OF THE GATT 1994 MUST FAIL

31. Ukraine asks the Panel to confirm that it enjoys jurisdiction in these proceedings to review the Russian Federation's reliance on Article XXI of the GATT 1994, to conclude that the Russian Federation has not satisfied its burden of proof under Article XXI of the GATT 1994 in order to justify the measures at issue and to make findings and recommendations as regards the measures at issue.

32. Ukraine does not contest the right of every WTO Member to take measures for the protection of its essential security interests. However, by acceding to the WTO, each WTO Member has accepted that its right to take otherwise WTO-inconsistent measures for this purpose must be exercised in accordance with the requirements laid down in Article XXI of the GATT 1994. The GATT 1994 provides for limited and conditional exceptions clauses allowing WTO Members to pursue certain non-trade objectives to derogate from the substantive obligations in the GATT 1994. In these proceedings, the Russian Federation has made no attempt at showing that those conditions are satisfied.

A. The Panel enjoys jurisdiction to review the Russian Federation's invocation of Article XXI of the GATT 1994

33. All third parties, save one, agree with Ukraine that the GATT 1994 and the DSU confer on the Panel jurisdiction to interpret and review the application of Article XXI(b)(iii) of the GATT 1994 by the Russian Federation in these proceedings.

34. The United States and the Russian Federation argue in essence against such jurisdiction, submitting that the Panel's mandate is limited to acknowledging that the Russian Federation has invoked Article XXI of the GATT 1994 and concluding that it cannot make findings on whether the measures at issue are consistent with the Russian Federation's WTO obligations or formulate recommendations.

35. At paragraphs 92 to 119 of its opening statement at the first substantive meeting, Ukraine set out the many reasons why the Panel enjoys jurisdiction. Ukraine also notes that the United States and the Russian Federation have mostly *not* responded to those arguments as well as to the reasons put forward by other third parties.

36. The argument that, whilst the Panel has jurisdiction to hear the present dispute, it may not make findings or formulate recommendations in this dispute is based primarily on the interpretation of the phrase "which it considers as meaning that all of the conditions laid down in Article XXI(b)(iii) of the GATT 1994 are self-judging.

37. Ukraine strongly objects to the position that the entirety of Article XXI(b)(iii) of the GATT 1994 is self-judging and that therefore total deference is due to a respondent. Rather, the discretion which the phrase "which it considers confers on a WTO Member is limited to the question of the necessity of the action. Should the phrase "which it considers be read to mean that a WTO Member enjoys absolute discretion with regard to an action taken for the purpose of protecting essential security interests, there would have been no need to include in the text of Article XXI(b) the conditions laid down in subparagraphs (i) to (iii). Nor would there be any ground to review whether measures allegedly imposed for the protection of essential security purposes are in fact disguised restrictions on trade or taken for purposes recognised in other exceptions clauses in the GATT 1994. Although the United States and the Russian Federation insist on the need to respect the wording used in Article XXI, Ukraine and most other third parties ask the Panel to interpret and give effect to all of the wording used in that provision and not only to the phrase "which it considers or the term "essential security interests.

38. Ukraine underscores that these proceedings are by no means the first instance in which the question of a State's reliance on essential security grounds is put before an international court or tribunal. The practice of other courts and tribunals shows that a phrase such as "which it considers and the fact that deference is due as regards the necessity of an action do not mean that judicial review is excluded.

39. Ukraine submits that the negotiating history of Article XXI of the GATT 1994 does *not* support interpreting Article XXI in a manner that excludes the possibility of judicial review. Rather, the negotiating history shows that the drafters were concerned with, on the one hand, laying down conditions in Article XXI that would ensure that that provision serves the specific purpose of protecting essential security interests and, on the other hand, avoiding that, under the guise of essential security, a WTO Member seeks to justify GATT-inconsistent measures for the protection of a purpose that, as a matter of WTO law, may not be invoked.

40. Finally, in stressing that the multilateral trading system is concerned with trade, and not security, relations, the United States and the Russian Federation ignore the fact that, as the Appellate Body has recognised, the WTO Agreement, as a whole, reflects the balance struck by WTO Members between trade and non-trade-related concerns. In fulfilling their task, panels and the Appellate Body must interpret the WTO covered agreements in a manner that upholds that balance as reflected in the text of the WTO covered agreements.

B. Interpretation of Article XXI(b)(iii) of the GATT 1994

41. Assuming the Panel confirms that it enjoys jurisdiction to review the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994, it must then consider what is the appropriate order of analysis, the burden of proof and the standard of review to be applied.

Ukraine submits that an objective assessment of the invocation of Article XXI(b)(iii) of the GATT 1994 entails a three-step test that is to be applied with respect to each of the specific measures at issue for which the Russian Federation relies on that defence. The first step is whether the measure at issue is "taken in time of war or other emergency in international relations. The second step is whether the measure at issue is an "action … for the protection of its essential security interests. The third step is whether the measure at issue is an "action which it considers necessary for the stated objective. All of these questions must be answered by the Russian Federation. As the Russian Federation has failed to provide those answers, it cannot prevail in its defence under Article XXI(b)(iii) of the GATT 1994. Furthermore, it is not the task of the Panel itself to seek from Ukraine the answers which the Russian Federation failed to provide.

42. Therefore, for each of these steps, the Panel is to assess whether the Russian Federation has satisfied its burden of proof and is to review the arguments and evidence submitted. Each step assists in establishing whether Article XXI(b)(iii) is being applied in good faith for the protection of essential security interests and is not used in order to pursue protectionist objectives and/or to apply disguised restrictions on trade. Article XXI(b)(iii) should not be abused or misused for purposes for which it was not designed.

43. Thus, a mere statement that Article XXI(b)(iii) of the GATT 1994 is invoked is insufficient. Nor is it enough for the Russian Federation to rely on a hypothetical question. The Russian Federation itself has reiterated during these proceedings that the relevant elements are provided in the legal acts imposing the measures. No prompt and positive solution of this dispute may be found based on hypothetical questions bearing no connection with the specific measures at issue or the specific circumstances that led the Russian Federation to adopt these measures.

44. Furthermore, the fact that the measures at issue might not economically protect the sectors of the WTO Member invoking the affirmative defence is not one of the three elements of a successful invocation of Article XXI(b)(iii) of the GATT 1994.

1. First step: whether the measure is "taken in time of war or other emergency in international relations

45. If the measures at issue are not "taken in time of war or other emergency in international relations, they may not be justified on the basis of Article XXI(b)(iii) of the GATT 1994. Unlike what is the case for paragraph (b) of Article XXI of the GATT 1994, the phrase "which it considers does not appear in subparagraph (iii).

46. A panel must examine whether the invoking Member has shown that all of the measures at issue were taken in time of war or other emergency in international relations. Ukraine interprets Article XXI(b)(iii) of the GATT 1994 to mean there must be a serious disruption in international relations constituting an emergency that is alike a war and sufficiently connected to the defendant WTO Member so as to result in a genuine and sufficiently serious threat to that Member's security interests. Furthermore, there must be a temporal connection between the action taken and the emergency in international relations.

47. The burden falls on the invoking Member to identify and demonstrate the war or other emergency in international relations at the time at which the measures at issue were taken. The invoking Member bears the burden of establishing both the legal and factual elements of its defence.

48. Ukraine strongly disagrees with the Russian Federation's position that there is no room for review for a panel to determine whether a sovereign State is at war or not. Accepting the Russian Federation's interpretation would mean that WTO Members may resort to self-help without any means of review. Unlike what is the case for paragraph (b) of Article XXI of the GATT 1994, the phrase "which it considers does not appear in any of the subparagraphs of Article XXI(b) of the GATT 1994. If total deference would be due to the respondent, which could suffice with the statement that the conditions of Article XXI(b)(iii) of the GATT 1994 are satisfied without any possibility for review, there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests and circumstances that may be invoked in order to justify an otherwise WTO-inconsistent measure.

2. Second step*: whether the measure constitutes "action … for the protection of its essential security interests*

49. If the measures at issue are not designed to protect a WTO Member's essential security interests, they may not be justified on the basis of Article XXI(b)(iii) of the GATT 1994. Thus, assuming that a WTO Member invoking Article XXI(b)(iii) of the GATT 1994 demonstrates that the measures at issue are "taken in time of war or other emergency in international relations, a panel must examine next whether it has been shown that the measures at issue constitute action for the protection of the "essential security interests of that Member.

50. Although it is for each WTO Member to decide what are its essential security interests and what level of protection of those interests it pursues, a panel must interpret, pursuant to Article 3.2 of the DSU, the phrase "for the protection of its essential security interests in accordance with the customary rules of interpretation of public international law. In light of its interpretation, a panel must then establish whether the interests or reasons advanced by the defendant Member for imposing the measures at issue fall within the scope of the phrase "its essential security interests for the purposes of Article XXI(b)(iii) of the GATT 1994.

51. Under the second step of the analysis under Article XXI(b)(iii) of the GATT 1994, a panel must examine what content is given by the invoking Member to the concept of "essential security interests in the context of the measures at issue. A panel must also review whether that content can reasonably be considered as falling within the meaning of the phrase "its essential security interests. If a panel decides that this is the case, the panel must then make an objective assessment of whether the measures at issue are designed to protect the security interests of the invoking Member. In other words, a panel must be satisfied that there is a rational relationship between the measures at issue and the protection of the essential security interests.

52. Where no arguments and evidence are produced, and a WTO Member invoking Article XXI(b)(iii) of the GATT 1994 merely states that its measures protect its essential security interests without any explanation, a panel cannot reach any conclusions on the merits of the defence. In those circumstances, a panel must find that that Member has failed to satisfy its burden of proof. The identification of the essential security interests must be specific enough to allow a panel to assess whether there is a reasonable link or connection between the invoking Member's decision to take the action and the essential security interests identified by that Member. A panel may not assume that such a connection exists.

3. Third step: whether the measure constitutes "action which it considers necessary …

53. Assuming that the WTO Member invoking Article XXI(b)(iii) of the GATT 1994 has shown that the measures at issue are "taken in time of war or other emergency in international relations and constitute "action … for the protection of its essential security interests, a panel must then establish whether that Member plausibly could conclude that the measures at issue are necessary for protecting those interests.

54. The wording of the phrase "which it considers suggests that the standard of review under Article XXI of the GATT 1994 cannot be the same as that with respect to the necessity test under Article XX of the GATT 1994. More deference must be accorded to the WTO Member taking the measure. The text of Article XXI indicates that the necessity of the measure is a matter for the consideration of the defendant WTO Member. Thus, it is for that Member to assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake.

55. The specific task of a panel is, as regards the third step of the analysis, to determine whether, based on the facts available, the invoking Member could plausibly arrive at the conclusion that the measures taken are necessary for protecting its essential security interests. In that regard, Ukraine finds support in the decision of the Arbitrators in *EC − Bananas II (Ecuador) (Article 22.6 − EC)*. That task also comprises an assessment of whether any discretion which Article XXI(b)(iii) of the GATT 1994 might confer on the invoking Member was exercised in good faith, including whether the interests of third parties were taken into account. In accordance with Article 11 of the DSU, that review must be based on an objective assessment of the facts. It cannot be based entirely on the subjective intention of the WTO Member invoking the defence.

C. Application of Article XXI(b)(iii) of the GATT 1994

1. The Russian Federation has not demonstrated that the measures at issue are "taken in time of war or other emergency in international relations

56. The Russian Federation has, in the present proceedings, failed to explain what are the circumstances causing it to impose the measures at issue. As a result, the Russian Federation failed to show that the measures at issue were taken in time of war or other emergency in international relations.

57. At the first substantive meeting, the Russian Federation made it clear that it was neither required nor able to provide any reasons. Its explanation was, on the one hand, that the circumstances leading to the imposition of the measures at issue were publicly available and known to Ukraine and, on the other hand, that the Russian Federation was not required to disclose any information which it considers to be contrary to its essential security interests.

58. The Russian Federation also insisted that the information included in the legal acts imposing the measures at issue shows that Decree No. 1 was adopted on the basis of the Federal Law No. 281-FZ and due to the suspension of the application of the Free Trade Agreement within the Commonwealth of Independent States in respect of Ukraine (CIS FTA). The latter is, according to the Russian Federation, suspended due to the exceptional circumstances affecting the interests and economic security of the Russian Federation and requiring immediate measures.

59. In its second written submission, the Russian Federation argued that the basis for imposing the measures as well as the original circumstances that led to their imposition were publicly available and known to Ukraine and are available on the internet. It also advanced that the measures at issue and Resolution No. 778 were adopted because of internationally wrongful acts or unfriendly acts of certain foreign state or their bodies and officials.

60. Those are the only facts deemed relevant by the Russian Federation to its defence in these proceedings and on which the Panel must decide. Arguments and facts that were not invoked by the Russian Federation may not be relied upon by the Panel in order to decide on the Russian Federation's defence. Moreover, the Panel may not make the case for either party or make good the absence of argumentation on a party's behalf. It is also not for the Panel to second-guess the events to which the Russian Federation appears to refer.

61. Ukraine asks the Panel to disregard the Russian Federation's arguments.

62. First, Ukraine submits that it is of no consequence, in relying on Article XXI(b)(iii) of the GATT 1994, that the basis for and circumstances leading to the imposition of certain measures are publicly available or known to the complainant.

63. The Russian Federation appears to allege that it is no longer necessary for a respondent to produce argument and evidence in order to satisfy its burden of proof as regards an affirmative defence. The consequence of the Russian Federation's position is that that burden should be placed on the complainant and the Panel: it is sufficient that they carry out an internet search in order to establish the justification of the measures at issue. Such a position on the burden of proof lacks any basis in law. Furthermore, the Russian Federation's position risks altering altogether the character of provisions such as Articles XX and XXI of the GATT 1994. In fact, the burden would fall on the complainant to show that it did *not* know what caused the defendant to impose the measures at issue.

64. Second, the Russian Federation has offered no rebuttal of Ukraine's position that, in accordance with well-established case-law, the sole fact that a measure refers to an objective and, *a fortiori*, a law such as Federal Law No. 281-FZ is not, in and of itself, sufficient to establish that a measure is designed to achieve that objective. A panel would not make an objective assessment of the matter before it if, in reviewing whether a defendant has shown that the measures are taken in time of war or other emergency in international relations, it would verify only the legal basis under national law for those measures.

65. Third, the Russian Federation failed to explain why the unilateral suspension of the application of the CIS FTA with respect to Ukraine is a circumstance that is relevant under Article XXI(b)(iii) of the GATT 1994. It is not for Ukraine to comment on why the Russian Federation has neglected to produce any argument on this question. Ukraine nonetheless notes that a closer look at the texts of Resolutions Nos. 842 and 959 and of Decree No. 1 shows that the suspension of the CIS FTA is expressly tied to the entry into force of the EU-Ukraine Association Agreement.

66. The objective evidence available before the Panel shows that what is known is that the Russian Federation adopted Decree No. 1 in light of its unilateral suspension of the CIS FTA with respect to Ukraine. In turn, that suspension − as are many other measures that apply as of 1 January 2016 − is linked to the application of the EU-Ukraine Association Agreement. As a result, should the Panel uphold the Russian Federation's defence with regard to the 2016 general and product-specific transit bans and other transit restrictions, it would mean that, in essence, a WTO Member may invoke Article XXI of the GATT 1994 in order to justify WTO-inconsistent measures taken in response to other WTO Members' exercise of the right under Article XXIV of the GATT 1994.

67. Fourth, the Russian Federation's attempt to justify the measures at issue by pretending they are a response to Ukraine's economic sanctions has no factual basis. The 2014 transit ban and other transit restrictions and the 2016 general transit bans and other transit restrictions are measures taken *before* Ukraine allegedly adopted any of the measures to which the Russian Federation refers in its second written submission. Furthermore, when looking at the text of Resolutions Nos. 778 and 842, it becomes clear that the application of the import ban to goods from Ukraine was expressly linked to when paragraph 1 of Resolution No. 959 became effective and *not* to any economic sanctions applied by Ukraine. In turn, the application of the import duties in Resolution No. 959 depended entirely on whether or not Ukraine applies the EU-Ukraine Association Agreement.

68. Ukraine therefore respectfully requests that the Panel concludes that the Russian Federation has not shown that the measures at issue are "taken in time of war or other emergency in international relations. As a result, Russian Federation's defence under Article XXI(b)(iii) of the GATT 1994 fails.

2. The Russian Federation has not shown that the measures at issue constitute "action … for the protection of its essential security interests

69. The Russian Federation has failed to identify what are the essential security interests to be protected by each of the measures at issue. Nor has it provided evidence and arguments explaining the connection between the measures at issue and the essential security interests which they are allegedly designed to protect.

70. According to Ukraine, the fact that the text of certain measures at issue refers to Federal Law No. 281-FZ is an insufficient basis for the Panel to conclude that the measures are designed for the protection of the Russian Federation's essentials security interests. Nor can that conclusion be based on solely the reference in those measures to the Russian Federation's decision to suspend the application of the CIS FTA with respect to Ukraine.

71. The Russian Federation continues to refuse offering an explanation of the essential security interests that are at issue in these proceedings on the ground that it is not required to disclose such information. It relies on Paragraph 1 of the 1982 Decision concerning Article XXI of the General Agreement in order to argue that the disclosure of information regarding the measures taken under Article XXI of the GATT is subject to the exceptions of Article XXI(a) of the GATT 1994.

72. Ukraine submits that Article XXI(a) of the GATT 1994 addresses a situation distinct from that covered under Article XXI(b) of the GATT 1994. Indeed, Article XXI(a) may be invoked by a WTO Member in order to justify not complying with information and transparency obligations found in the GATT 1994. In these proceedings, the Russian Federation has not invoked Article XXI(a) of the GATT 1994 in order to justify measures at issue that are inconsistent with its obligations under Articles X:1 and X:2 of the GATT 1994 and paragraphs 1426, 1427 and 1428 of the Working Party Report.

73. According to Ukraine, Article XXI(a) of the GATT 1994 may not be used in order to evade a WTO Member's burden of proof in relying, in the context of dispute settlement proceedings, on an affirmative defence. An overly broad interpretation of Article XXI(a) of the GATT 1994 would render subparagraphs (i) to (iii) ineffective. Thus, as the Russian Federation has failed to provide certain information on the basis of Article XXI(a) of the GATT 1994, it must accept that, as a possible consequence, it will be found not to have met its burden of proof under Article XXI(b) of the GATT 1994.

74. If the Panel finds that the measures at issue are taken in time of war or other emergency in international relations, Ukraine respectfully requests that the Panel rejects the Russian Federation's reliance on Article XXI(b) of the GATT 1994 for failure to identify the essential security interests pursued by the measures at issue and to demonstrate that the measures at issue are designed to protect those interests.

3. The Russian Federation has failed to show that the measures at issue constitute "action which it considers necessary …

75. If the Panel would find that the measures at issue are taken in time of war or other emergency in international relations and are designed to protect the essential security interests of the Russian Federation, Ukraine respectfully requests that the Panel rejects the Russian Federation's reliance on Article XXI(b) of the GATT 1994 for failure to provide an explanation of how the Russian Federation could plausibly arrive at the conclusion that the measures taken are necessary for protecting its essential security interests.

D. Conclusion

76. The Russian Federation has failed to show, as regards each and every measure at issue, what is the emergency in international relations that caused the Russian Federation to adopt all of the measures at issue, what are the essential security interests which the Russian Federation is seeking to protect through these measures, and whether the Russian Federation plausibly could conclude that the measures at issue are necessary for protecting these interests. As a result, the Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994.

ANNEX C-3

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

A. INTRODUCTION

1. The Russian Federation expresses its deepest concerns regarding Ukraine's decision to challenge the fundamental rights of the WTO Members related to the protection of their essential security interests despite Ukraine's full awareness of the original circumstances that led to the imposition of the measures at issue. These attempts to disguise a politically motivated onset as a regular trade dispute presents a deliberate threat to the multilateral trading system and undermines the role of the WTO as an international trade forum that has long been guarded by other WTO members.

2. The Russian Federation would like to stress the importance and sensitivity of the issues related to protection of national security, not only for the Russian Federation, but also for any other WTO Member. The outcome of this dispute will have far-reaching consequences for the Membership and the entire multilateral trading system, requiring a great measure of care when approaching the issues raised in this dispute in relation to Article XXI of the GATT.

B. PRELIMINARY ISSUES.

3. In Russia's view, Ukraine failed to meet the minimum standards applied to a request for the establishment of a panel[1], as it failed to establish clearly the grounds upon which it found its case and the nexus between the elements (measures) within each group of the challenged measures. In particular, Ukraine in its Panel Request identified the specific measures at issue by dividing them into two "groups of measures"[2] and failed to clarify what particular elements (measures) at issue constitute the first or the second group of measures and how these elements operate together (collectively)[3], what is a common rational behind them as well as what particular treaty provision is violated by each of the elements challenged. Ukraine failed to clarify this even in its First Written Submission, rearranging the challenged measure into four new groups.

4. In a similar vein, Ukraine's First Written Submission presented the challenged measures in a completely different manner setting them out as four individual measures that are not connected and do not operate together.

5. In this regard, the Russian Federation as a respondent is placed in an uncertain situation in presenting its defense because it has to guess what the panel would identify as the measures at issue on the basis of the panel`s interpretation of the substance of the alleged violation.[4]

6. In the Panel Request Ukraine intends to challenge de facto application of Decree No. 1 to the transit to the countries in Central and Eastern Asia and Caucasus. Taking into account the number of countries that can be considered as part of these regions, as well as the second element in combination with the third element identified by Ukraine in its Panel Request as a measure at issue in the second group of measures, Russia cannot be expected to discern whether the measure in question is challenged as such or as applied, as written or unwritten, and what the geographic scope of the application of the challenged measure is. Ukraine also failed to specify whether it challenges a written or an unwritten measure. The measure in question constitutes an imprecise open-ended list that can be expanded by the claimant at any moment. Therefore, in addition to the fact that Ukraine failed to identify how the three elements set out in the "Second Group of Measures" in its Panel Request or in its First Written Submission operate together as a group, the measures identified by Ukraine as the second and the third elements in the Section pertaining to the "Second Group of Measures in the Panel Request cannot be reasonably expected to be the measures against which Ukraine launched its challenge in its First Written Submission as the measures allegedly applied to transit destined to Mongolia, Tajikistan, Turkmenistan and Uzbekistan. "[S]uch an 'open ended' list

[1] Appellate Body Report, *EC – Bananas III*, para. 142.; Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22; Appellate Body Report, *Korea – Dairy*, para. 127.

[2] WT/DS512/3, p. 1.

[3] See Panel Report and Appellate Body Report, *China – Raw Materials.*

[4] Appellate Body Report, EC – Selected Customs Matters, para. 136.

would not contribute to the 'security and predictability' of the WTO dispute settlement system as required by Article 3.2 of the DSU."[5]

7. Thus, Ukraine`s Panel Request, in general and in respect of separate elements (measures), fails to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU; it fails to establish the nexus between the elements (measures) within each group of the measures claimed; it fails to give the opportunity to the Russian Federation to defend itself by providing claims that change their form and content from the Panel Request to its First Written Submission; Ukraine fails to act in a predictable way by challenging the "open ended" list of the measures at issue; it fails to identify "de facto application of the 2016 general and products-specific transit bans in Decree No.1, as amended, to transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" in a manner that satisfies the requirements of Article 6.2 of the DSU, as Ukraine failed to indicate the nature of the measure and the gist of what is at issue.[6] Deciding otherwise will erode the disciplines of Article 6.2 of the DSU allowing Members, when requesting the establishment of a panel, to claim any abstract measure that could be applied by another Member, thus depriving the respondent of any adequate notice of the challenge brought against it.

C. "2014 TRANSIT BAN AND OTHER TRANSIT RESTRICTIONS".

8. The "2014 transit ban and other transit restrictions", as challenged by Ukraine, were introduced by the Letters of Rosselkhoznadzor No. FS-NV-7/22886 and FS-AS-3/22903 of 21 November 2014 as amended.[7]

9. Firstly, we would like to note that the Letter (Instruction) of the Rosselkhoznadzor No. FS-AS-7/22903 of 21 November 2014 does not exist. Taking into account the possibility of a typographical error in the Panel Request, the Russian Federation would presume that Ukraine actually implied in this case the Letter (Instruction) No. FS-AS-3/22903. Otherwise, we would like to request the Panel to disregard any parts in Ukraine's First Written Submission that refer to No. FS-AS-3/22903 since this document is not covered by the Request for Consultations and the Panel Request and thus falls outside the scope of the Panel's Terms of Reference.

10. Secondly, the Russian Federation draws the Panel's attention to a general rule established in the WTO jurisprudence, according to which the measure covered by a panel`s terms of reference must be a measure in existence at the time of the establishment of the panel.[8]

11. In accordance with the mentioned Letters of Rosselkhonadzor the transit of goods included in the list set out by the Resolution of the Government of the Russian Federation of 7 August 2014 No.778 (hereinafter Resolution 778) is only allowed through the designated checkpoints situated on the State border of the Russian Federation. Resolution 778 contains a list of particular goods originating from particular countries (also listed in the Resolution) that adopted a decision to introduce and apply economic sanctions in respect of legal and natural persons of the Russian Federation as well as countries that have joined such a decision.

12. When the Letters of Rosselkhoznadzor in question were adopted, Ukraine was not included in the list of the countries contained in Resolution 778. Therefore, the measures contained in the said Letters could not and were not applied to the goods originating from Ukraine.

13. On 1 January 2016 Ukraine was added to the list of countries set out in Resolution 778, and Decree No. 1 and Resolution No. 1 were adopted, allowing the transit of goods from Ukraine only through the checkpoint situated on the state border of the Russian Federation inside its Russia-Belarus sector. The measures adopted by the Government of the Russian Federation override the measures taken by Rosselkhoznadzor. As a result, the measures contained in the Letters of Rosselkhoznadzor have never been applied to the transit of goods from Ukraine.

14. The Russian Federation notes that no evidence was provided by Ukraine in support of the continuing application of the Letters of Rosselkhoznadzor in respect of Ukraine, not to mention evidence showing that the transit ban was introduced by these Letters. In this regard, the Russian Federation contests the credibility of the complainant's allegations that the Letter No. FS-NV-7/22886 applies in respect of Ukraine. Thus, the Russian Federation states that the measure at issue does not exist.

[5] Panel Report, *China – Raw Materials*, paras. 11-13.
[6] Appellate Body Report, *US – Continued Zeroing*, para. 168-169.
[7] First Written Submission of Ukraine, para. 55.
[8] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

15. There are no measures that "prolong, replace, amend, implement, extend or apply transit prohibition" of goods subject to veterinary and phytosanitary surveillance through the checkpoints of Belarus introduced since 30 November 2014, as well as there are no measures regarding issuance of the transit permits, as alleged by Ukraine. Moreover, Ukraine has failed to identify the source of this prohibition, which, according to the Appellate Body in *US − Gambling*, deprives the responding party of a possibility to prepare adequately its defense.[9]

16. Thus, transit prohibition and other transit restrictions of 2014, as challenged by Ukraine, are outside the Panel`s Terms of Reference as they did not exist at the time of the establishment of the Panel and there is no legal instrument enacted prior to, on or after the date of the establishment of the Panel that extends the term of the measures identified in the Panel Request. A non-existing measure cannot have any benefits nullification or impairment effect under the covered agreements.[10]

17. If the Panel considers that these measures do exist and are within the Panel's terms of reference, the Russian Federation would like avail itself of the provisions of GATT Article XXI(b)(iii).

D. DE FACTO APPLICATION OF THE 2016 GENERAL AND PRODUCT-SPECIFIC TRANSIT BANS IN DECREE No. 1, AS AMENDED, TO TRAFFIC IN TRANSIT DESTINED FOR MONGOLIA, TAJIKISTAN, TURKMENISTAN AND UZBEKISTAN.

18. In the light of the facts presented by Russia, "the de facto application of the 2016 general and products-specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" does not exist as Ukraine failed to prove the opposite.

(i) Ukraine failed to substantiate its "as such" claims in respect of "de facto application"

19. Ukraine is wrong in asserting that the "de facto application" of the 2016 general and product-specific transit bans in Decree No. 1 constitutes a separate claim and is inconsistent with Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3 (a) of the GATT 1994 as well as paragraph 2 of Part I of the Accession Protocol of the Russian Federation.

20. As the Appellate Body noted in *US- Certain Anti-Dumping Methodologies (China)* and *Argentina − Import Measures*, the specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged.[11]

21. In its First Written Submission Ukraine referred to the following features of the "de facto application": 1) unwritten character of the measure; 2) the challenged measure is neither comprised of individual instances of application of a measure, nor constitutes a rule or norm of general and prospective application, but, instead, it shares certain attributes of both; 3) the measure is challenged "as such".

22. This inventive approach, in particular, the position that the measure at issue is challenged by Ukraine as "a measure sharing certain attributes of both" is based on a highly selective, incoherent and misquoted use of Appellate Body's jurisprudence.

23. Contrary to the elaboration by the Appellate Body on the notion of "as such" claims in *US − Oil Country Tubular Goods Sunset Reviews*, Ukraine failed to provide evidence showing that the challenged measure affects existing trade and also the security and predictability needed to conduct future trade.[12] Contrary to the Appellate Body's pronouncements in previous disputes,[13] Ukraine failed to provide any evidence demonstrating the general and prospective application of the challenged measure. Similarly, Ukraine failed to bring "as such" claim independently, so it would not share the attributes of application of the challenged provisions in specific instances.

24. Ukraine also claims that "de-facto application of the 2016 general and product-specific transit bans" is an unwritten measure. Contrary to the high standard for challenging unwritten measures

[9] Appellate Body Report, *US − Gambling*, para. 125

[10] Appellate Body Report, *US − Upland Cotton*, para. 263

[11] Appellate Body Report, *US- Certain Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina − Import Measures,* paras. 5.108 and 5.110)

[12] Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 82.

[13] Appellate Body Report, *US- Certain Anti-Dumping Methodologies (China)* para. 5.127; Appellate Body Report, *US − 1916 Act*, paras. 60 − 61; Appellate Body Report, *US − Zeroing*, paras. 231 − 232.

set out by the Appellate Body in *US − Zeroing*,[14] Ukraine failed to demonstrate that: the alleged "rule or norm" is attributable to the respondent; its precise content; and that it has general and prospective application.

25. In this regard given the unwritten form of a measure called "the de facto application of the 2016 general and product-specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" challenged by Ukraine, the latter failed to formulate the content of this measure and the claims in respect of this measure clearly as well as to demonstrate the general and prospective[15] application of this measure. Thus, such measure cannot be successfully challenged "as such", and cannot be found inconsistent with the Russian Federation`s obligations under the covered agreements.

(ii) "De facto Application" does not exist

26. Furthermore, the Russian Federation disputes the existence and operation of the mentioned measure, as Ukraine did not provide any credible evidence in support of its "as such" challenge.

27. Due to the unwritten character of the measure as well as the absence of any evidence of its general and prospective application, the Panel should be very careful in assessing the claims purported by Ukraine, in particular the evidence describing the content of the measure and demonstrating its alleged attribution to the Russian Federation.

28. The unwritten character of the measure requires the Panel to consider the appropriate relevance, credibility, weight and probative value of the evidence, while exercising caution in its assessment of the facts of the case.[16]

29. The Russian Federation believes that the evidence provided by Ukraine regarding the operation of the measure at issue has limited value and cannot be given any evidentiary weight.

30. All the evidence presented by Ukraine in order to prove the existence of "de facto application of the ban" is presented in only one exhibit. This evidence is limited in time, in terms of the cases identified, and the goods' coverage. Thus, even if one presumed that during the two weeks covered by the exhibit there were some occasional problems, this is not enough to assert the existence of the measure as it is formulated by Ukraine. Other evidence submitted on this issue also cannot be relied upon as it was presented by interested Ukrainian parties and the Panel should exercise great caution in giving evidentiary weight to such information.

31. Further, Ukraine attributes the application of the measure to customs and other authorities of the Russian Federation and claims that decisions to refuse transit through the Russian territory to the territory of Mongolia, Tajikistan, Turkmenistan and Uzbekistan from Ukraine are acts of the organs of a state.[17] However, Ukraine does not provide any evidence in support of sufficient government involvement, in any case sufficient to sustain the challenge against these measures.

32. Furthermore, the data provided by the Federal Customs Service of the Russian Federation clearly demonstrates that transit from Ukraine through the Russian territory to Mongolia, Tajikistan, Turkmenistan and Uzbekistan continues and was not suspended either in 2016 or in 2017.

33. Thus the evidence presented shows that the alleged unwritten measure attributable to Russia does not exist.

34. However, should the Panel find that such measure exists, the Russian Federation would like avail itself of the provisions of GATT Article XXI(b)(iii).

E. ARTICLE XXI OF THE GATT.

35. In respect of the measures (groups of measures) challenged by Ukraine in this dispute, the Russian Federation would like to state that these measures and the legal acts that contain such measures were introduced by the Russian Federation in time of emergency in international relations and such measures are considered by the Russian Federation as actions necessary for the protection of essential security interests of the Russian Federation taken in time of emergency in international relations, as provided for in the GATT Article XXI.

[14] Appellate Body Report, *US − Zeroing*, paras. 196 − 198.
[15] Appellate Body Report, *US − Zeroing,* paras. 231 − 232.
[16] Panel Report, *Argentina − Import Measures*, para. 6.115.
[17] First Written Submission of Ukraine, para. 146.

36. The basis for the imposition of such measures as well as the original circumstances that led to the imposition of such measures were publicly available and known to Ukraine. The wording of the acts implementing the measures in question challenged by Ukraine is also unambiguous, explicitly providing that the actions were taken for the purpose of protection of national security of the Russian Federation. The underlying act is the Federal Law of 30 December 2006 No. 281-FZ "On Special Economic Measures". In accordance with this Federal Law the President of the Russian Federation adopts special economic measures, in particular, when circumstances require immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state or its bodies and officials, when such act poses a threat to the interests and security of the Russian Federation and/or violates the rights and freedoms of its citizens.

37. In the absence of any panel`s or Appellate Body rulings on the interpretation and/or application of the GATT Article XXI, the Russian Federation would like to state the following.

38. Article XXI of the GATT represents an all-embracing exception, established by its mandatory chapeau language "nothing in this Agreement shall be construed […]". Should one examine the background of the GATT Article XXI in the historic perspective in order to establish its object and purpose, the following is of relevance to the present case.

39. In 1949, when addressing restrictions on export to Czechoslovakia, it stated that "every country must be the judge in the last resort on questions relating to its own security".[18]

40. In 1961, Ghana justified its boycott of Portuguese goods on the basis of the provisions of Article XXI: (b) (iii), noting that "each Contracting Party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests".[19]

41. In 1982 the EEC justified its measures against imports from Argentina by stating that "every Contracting Party was − in the last resort − the judge of its exercise of these rights", meaning rights under Article XXI. As was claimed by the EEC, the measures taken constituted a general exception, constitute its inherent right and did not require "neither notification, justification nor approval, procedure confirmed by thirty five-years of implementation of the General Agreement".[20]

42. The United States at the same time noted that "the General Agreement left to each Contracting Party the judgment as to what it considered to be necessary to protect its security interests. The Contracting Party had no power to question that judgment [] Forcing GATT […] to play a role for which it was never intended, could seriously undermine its utility, benefit and promise for all contracting parties".[21]

43. In 1985 the United States justified its restrictions on imports of all goods and services of Nicaraguan origin and all US exports to Nicaragua on the basis of Article XXI. The US Government stated that the exception left it to each contracting party to judge what action it considered necessary for the protection of its own essential security interests.[22] Furthermore, the United States argued that GATT`s effectiveness in addressing trade issues would only be weakened if it became a forum for debating political and security issues.

44. In 1991 the EC, Australia, Austria, Canada, Japan, New Zealand, Norway, Sweden, Switzerland and the United States adopted certain restrictive measures (economic sanctions) against Yugoslavia, including suspension of trade concessions granted to Yugoslavia under bilateral cooperation agreement with the EC. The EC justified its measures with a reference to its essential security interests and GATT Article XXI.[23]

45. There are many reasons why Article XXI of the GATT was drafted the way we see it today as there are many reasons why this particular Article of the GATT was never subject to the interpretation by the Membership, even though there have been numerous instances throughout GATT/WTO history when measures necessary for protection of national security were taken by

[18] Summary Record of the Meeting, *United States − Restrictions on Exports to* Czechoslovakia, GATT/CP.3/SR.22, Corr. 1.

[19] Summary Record of the Session, SR.19/12, p. 196.

[20] Minutes of Meeting of Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, C/M/157, p. 10.

[21] Minutes of Meeting of Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, C/M/157, p. 8.

[22] Panel Report, *United States − Trade Measures Affecting Nicaragua*, para. 4.6, L/6053.

[23] Communication from the Permanent Mission of the Socialist Federal Republic of Yugoslavia, *EEC − Trade Measures Taken for Non-Economic Reasons*, DS27/2, dated 10 February 1992.

Members, both with and without invocation of Article XXI of the GATT or similar provisions of other multilateral trade agreements.

46. The national security of a State is a multifaceted matter, covering all issues pertaining to functioning of a State, ensuring the well-being of its population. Determining the exact elements of national security of a State are within the sole discretion of that State. Those elements might vary from one State to another. For some states climate change will not be part of national security strategy, while for others it will be the main factor determining the nation's existence; states can have very diverse views on exhaustible natural resources or public health as areas falling within the ambit of their national security.

47. The Russian Federation is of the view that Article XXI (a) and (b) of the GATT is of a self-judging nature. Each of the WTO Members individually and without any external involvement determines what its essential security interests are and how to protect them. Other reading of this Article will result in interference in internal and external affairs of a sovereign state.

48. The outcome of this dispute will have far reaching consequences for the Membership and the entire multilateral trading system. Throughout the existence of the GATT/WTO system its Members protected by the provisions of Article XXI of the GATT have been adopting and maintaining measures not only aimed at protection of their national security individually but also those required to protect peace and security in the world, including exports control and non-proliferation commitments. The change in balance of rights and obligations of the Members under Article XXI as a consequence of its interpretation, even the slightest and the most reserved one, may change the level of legal protection of such measures with respective negative consequences for their WTO legality. Such risks are high and should be avoided.

49. Any examination of the wording contained in the GATT Article XXI (b)(iii) must be limited to a simple conclusion: 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 and nothing shall prevent that Member from taking any such actions in such form, with such coverage and for such duration as it considers necessary.

50. In Ukraine's view, given the fact that it claims that measures taken by the Russian Federation are inconsistent with certain provisions of the WTO Agreement, such provisions should have prevented the Russian Federation from taking the measures challenged by Ukraine. However, this is contrary to what is provided for in the GATT Article XXI, i.e. "nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interest taken in time of war or other emergency in international relations". Any ruling sustaining Ukraine`s claims would in itself be a prevention of a Member from taking such actions and, consequently, inconsistent with Article XXI of the GATT and Article 3.2 of the DSU providing that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

51. In accordance with the preamble of Decree No.1 that is titled "On the Measures Ensuring the Economic Security and National Interests of the Russian Federation in the course of the International Transit from the territory of Ukraine to the territory of Republic of Kazakhstan or Republic of Kirgizstan through the territory of the Russian Federation", the Decree was adopted on the basis of the Federal Law No.281-FZ and due to the suspension of the application of the Free Trade Agreement within the Commonwealth of Independent States in respect of Ukraine (CIS FTA).

52. The CIS FTA was suspended in accordance with the Decree of the President of the Russian Federation of 16 December 2015 No.628. The preamble of the latter Decree establishes that this measure is taken due to the exceptional circumstances affecting the interests and economic security of the Russian Federation that require immediate measures.

53. Similarly, the Decree of the President of the Russian Federation of 6 August 2014 No.560 was adopted for the purpose of protection of national interests of the Russian Federation and in accordance with the Federal Law No.281-FZ and Federal Law of 28 December 2010 No.390-FZ "On Security", as provided for in this Decree.

54. The Federal Law No/390-FZ "On Security" as set out in Article 1 thereof defines the fundamental principles and content of the activities on ensuring the security of the State, public security, environmental security, personal security and other types of security provided for in the legislation of the Russian Federation, i.e., the national security of the Russian Federation.

55. Implementing Resolutions of the Government of the Russian Federation adopted in pursuance of the Presidential Decrees at issue have the same scope and underlying grounds, as evident from the text of each and every Resolution.

56. Therefore, these acts, both on their face and in substance, establish that the actions set out therein and the implementing measures are taken for the purpose of, and are necessary for, the protection of Russia's essential security interests taken in the time of war or other emergency in international relations.

57. The Russian Federation believes that, for the purposes of the Panel's consideration of the arguments presented by the parties in relation to Article XXI of the GATT, it is highly relevant and important to keep in mind subparagraph (a) in Article XXI of the GATT.

58. Implying that the Russian Federation is required to provide any information additional to that it has already disclosed in respect of the measures challenged in this dispute would be inconsistent with the provisions of Article XXI(a) of the GATT, as nothing in that Agreement shall be construed to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests. The Russian Federation believes that disclosure of any such additional information would be contrary to Russia's essential security interests. This is confirmed by the text of the Decision Concerning Article XXI of the General Agreement of 30 November 1982 that creates a link between the provisions of Article XXI(a) and (b).

59. While Russia never asserted that the Panel in this dispute was established with the specific terms of reference other than those provided in accordance with Article 6.2 of the DSU, it has made it clear that this does not mean that the Panel has jurisdiction to evaluate the measures taken with reference to Article XXI of the GATT. Neither the Panel nor the WTO has jurisdiction over the matters related to the measures necessary for the protection of Member`s national security interests. This is explicitly reflected in the wording of Article XXI of the GATT, leaving the necessity, the form, design and the structure of such measures within the sole discretion of the Member invoking the Article.

60. The WTO, being a trade organization, does not deal with, and has no competence over, the issues that relate to politics, national security or international peace and security. Therefore, the WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case. All of these issues go beyond the scope of trade and economic relations among Members established in Article II:1 of the Marrakesh Agreement establishing the World Trade Organization. Consequently, all of these issues are outside the scope of the WTO.

F. CONCLUSION.

61. Therefore, we request the Panel:

(1) to evaluate the defects of the complainant's Panel Request and the unlawful attempts of Ukraine to cure those defects in its First Written Submission that prevent Ukraine from meeting the requirements of Article 6.2 of the DSU.

(2) to establish, in particular, that "2014 transit ban and other transit restrictions" allegedly imposed by the Letters of Rosselkhoznadzor and de facto application of "2016 general and product specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan", did not exist as at the date of the Panel Request.

(3) with respect to the measures in respect of which Article XXI of the GATT was invoked to limit Panel's findings to the recognition of the fact of such invocation without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT.

ANNEX C-4

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

A. DEFECTS IN UKRAINE'S PANEL REQUEST

1. Ukraine had failed to meet the minimum standards applied to a request for the establishment of a panel. In order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize the language used in the panel request.[1]

2. The Appellate Body has explained that, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed" and "only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer and begin preparing its defense'"[2], in other words "which 'problem' is caused by which measure or group of measures".[3]

3. It is evident from the Panel Request in this dispute that "each group of measures" set out therein is alleged to be WTO inconsistent, but not the distinct measures (elements) forming such group. The legal basis for the complaint as it is set out in the Panel Request is provided only in respect of "each of the groups" of measures set out in the Panel Request (the first group of measures in Section II and the second group of measures in Section III).

4. If Ukraine intended to challenge each particular element of each of the groups identified in the Panel Request, in addition to identification of such elements as "measures at issue", it should have specified which concrete provision(s) is (are) allegedly violated by "each of the measures at issue", not by "each group of measures".

5. The issue of "grouping" of the challenged measures is not a problem merely with the structure of the Panel Request or that of the subsequent submissions of Ukraine. This is a matter that affects the Panel's terms of reference. Since defects of Ukraine's Panel Request "cannot be 'cured' in the subsequent submissions"[4], they prevent Ukraine from challenging the measures as they are described in its First Written Submission. The opposite will prejudice the ability of the Russian Federation to defend itself as Ukraine's Panel Request does not meet the requirements under Article 6.2 of the DSU.

6. The choice of the "structure" in combination with the existent WTO jurisprudence requires the Complainant to show what particular elements comprise each group of measures, what particular treaty provision is violated by each of the elements challenged, and how these elements operate together.

7. In its First Written Submission Ukraine challenged four distinct measures, shifting its claims from the two groups of measures and their legal basis as they were formulated in the Panel Request. By replacing two groups of measures by four individual measures Ukraine modified the subject matter of the dispute and broke the link between the measures in question and the relevant provisions of the WTO Agreements that are allegedly violated by such measures.

8. Therefore the four individual measures as they are put forward by Ukraine in its First Written Submission are outside the terms of reference of the Panel as their individual operation was not covered by the Panel Request.

9. Furthermore, in respect of particular elements constituting each of the two groups of measures identified in the Panel Request Ukraine failed to provide any evidence of their existence. It also failed to show how the elements of each of the two groups operate together. Ukraine has not provided any

[1] Appellate Body Report, *EC – Fasteners*, para. 562.
[2] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162, citing Appellate Body Report, *Thailand – H-Beams*, para. 88.
[3] Appellate Body Report, *China – Raw Materials*, para. 220.
[4] Appellate Body Report, *EC – Bananas III,* para. 143.

evidence of inconsistency with a particular provision of the WTO Agreements of any of the two groups or the particular elements that each of the groups.

10. In addition to that, the way Ukraine formulated certain measures does not allow to present the problem clearly. In particular, the second group of measures identified in the Panel Request[5] contains two elements:

"Second, the Russian Federation also imposes restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic.

Third, due to the fundamental lack of transparency concerning some of the measures at issue and the Russian Federation's failure to observe the transparency and publication obligations of the GATT 1994 and of its Accession Protocol, this Panel Request also covers any other related measures adopted and/or applied by the Russian Federation concerning traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation, including measures that implement, complement, add to, apply, amend or replace any of the measures mentioned in Section II.A or Section III.A."

11. The so-called "de facto application of the 2016 general and product-specific transit bans" might be the compilation of these two elements. According to this wording of the second element of this measure ("restrictions on the traffic in transit") in combination with the third element of this measure ("any other related measures concerning traffic in transit") provided for in the Panel Request any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation may fall into this category making it an open-ended list of measures.

12. It took two Written Submissions from the Complainant to bring some certainty that it was not Ukraine's intention to challenge, in particular, the entire Customs Code of the Eurasian Economic Union that applies to traffic in transit through the territory of the Russian Federation to any destinations, including countries of Central/Eastern Asia and Caucasus. However, it is still not clear for the Russian Federation why Ukraine believes that the list of "measures applied in respect traffic in transit to the countries of Central/Eastern Asia and Caucasus" should apparently be limited to the four countries listed in Ukraine's First Written Submission, i.e. Mongolia, Tajikistan, Turkmenistan and Uzbekistan. By Ukraine's logic, if in the course of consultations the parties to a dispute have discussed measures applied only in respect of Mongolia, this would have been sufficient to include in a first written submission the measures applied only in respect of China, as long as the request for consultations and the panel request had such a broad geographical scope as provided for in Ukraine's Panel Request. This comment on the geographical scope of a measure in question is also relevant in the context of the second element of the second group of measures.

13. An open-ended list does not contribute to the security and predictability of the WTO dispute settlement system as required by Article 3.2 of the DSU. Therefore, the measures formulated by Ukraine as "open-ended" should not fall within the Panel's terms of reference and shall not be examined by the Panel.

14. These inconsistencies of Ukraine's Panel's Request with the requirements of Article 6.2 of the DSU severely prejudice the ability of the Russian Federation to defend itself in this dispute.

B. TRANSIT REQUIREMENTS IN QUESTION

15. Ukraine believes that when a claimant raises an "as such" claim it is not under obligation to provide evidence regarding the application of a measure challenged "as such".[6] This assertion by Ukraine, in particular, relates to its claims related to the Letters of Rosselkhoznadzor and the "de facto application of 2016 general and product-specific transit bans".

[5] Request for the establishment of a panel by Ukraine (WT/DS512/3), Section III.
[6] Ukraine`s Second Written Submission, para. 25.

16. Ukraine failed to establish *prima facie* case in support of its claims that such measures indeed existed, exist and, moreover, will continue to exist in the future. Ukraine did not provide any evidence in support of its claims regarding the Letters of Rosselkhoznadzor. The sole evidence in respect of the so-called "de facto application" is limited by a two-week period from two years ago. The statistics provided by the Russian Federation[7] au contraire proves that the transit allegedly banned by the Russian Federation continues to flow unrestrictedly.

17. During the Second Substantive meeting Ukraine filed Exhibit UKR-106 that contained new factual evidence in respect of its claims on the Letters of Rosselkhoznadzor. In Russia's view, this Exhibit is not necessary for the purposes of rebuttal, answers to questions or comments on answers provided by the other party and therefore its submission at such a late stage is inconsistent with the Working Procedures adopted in this dispute. Russia's detailed position on this issue is set out in its Request dated 13 June 2018.

C. ARTICLE XXI OF THE GATT

18. The measures challenged by Ukraine in this dispute in respect of which Russia has invoked the provisions of Article XXI of the GATT are the actions that the Russian Federation considers necessary for the protection of Russia's essential security interests taken in time of emergency in international relations and in response to the circumstances that arose in 2014, evolved between 2014-2018 and remain in place to this date. The Russian Federation considers that all actions taken were necessary for protection of such interests at the time of their adoption. Moreover, such measures are still necessary and attain the purposes for which they have initially been adopted.

19. The information regarding the basis for the imposition of the measures is set out in the Decrees of the President of the Russian Federation and the relevant implementing acts. In addition, the original circumstances that led to the imposition of the measures are publicly available in abundance, in particular, in the Internet. More importantly, the text of the relevant legal acts expressly provides for the rationale behind them and the circumstances that have called for their adoption.

20. The measures at issue are the response of the Russian Federation to the circumstances that required immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state or its bodies and officials, when such act poses a threat to the interests and security of the Russian Federation and/or violates the rights and freedoms of its citizens. Such internationally wrongful acts or unfriendly acts of certain foreign state or their bodies and officials resulted in application of the measures in question, as well as in the adoption of the list of such states or their unions.

21. This list is set out in the Resolution of the Government of the Russian Federation of 7 August 2014 No.778[8] and includes the states or unions of states that have adopted a decision to introduce and apply economic sanctions in respect of legal and natural persons of the Russian Federation as well as countries that have joined such a decision.

22. Besides Ukraine, this list includes a number of third parties to this dispute, including the EU. For the purposes of these proceedings the EU for obvious reasons attempts to shift the focus away from such unilateral actions that are applied in respect of Russia[9], in particular, by the EU and Ukraine, in violation of the UN Charter and that are impairing the authority of the UN Security Council.

23. From the beginning of this dispute Russia was consistent in demonstrating that the situation that is the matter of these proceedings and surrounding circumstances are of political nature, involving not measures aimed at regulation of trade, but measures designed to protect national security of the Russian Federation, the essential security interests of our State.

[7] Exhibit RUS-9.

[8] Exhibit – RUS 7.

[9] European Union`s responses to the questions from the Panel to the third parties following the first substantive meeting, paras. 4-5.

24. Map 1 produced in Exhibit UKR-104 by Ukraine identifies the principal road and rail routes which were used for transit of goods from Ukraine to Kazakhstan and the Kyrgyz Republic prior to 2014. However, Ukraine has omitted the fact that traffic through railway corridor 8 Chervona Mohyla (or Krasnaya Mogila) was suspended by Ukraine pursuant to Article 29 of the Statute of Ukrainian Railways (on the basis of "force majeure circumstances") by virtue of the telegram of 6 June 2014 No. CZM-14/946.[10] Traffic through the checkpoint Izvaryne (E40) was suspended in May 2014 by the Ministry of Revenue and Duties of Ukraine.[11] Traffic through the checkpoint Uspenskaya–Kvashino was suspended in accordance with the telegram of Ukrainian Railways of 8 July 2014 No. CZM-14/1134 on the basis of "force majeure circumstances" as well.[12] Furthermore, the Regulation of the Cabinet of Ministers of Ukraine No. 106-r of 18 February 2015 suspended traffic through 23 checkpoints on Ukraine-Russia border.[13] Therefore, the operation of the routes mentioned by Ukraine was suspended by Ukrainian side.

25. Moreover, by virtue of the Resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147 "On the ban on imports of goods originating from the Russian Federation to the customs territory of Ukraine"[14] Ukraine has adopted an import ban on certain products originating from the Russian Federation which is in force until 1 January 2019.

26. Furthermore, the Cabinet of Ministers of Ukraine adopted the Resolution of 20 January 2016 No. 20[15] which restricts transit of goods listed in the Resolution No. 1147 through the designated checkpoints at the border with the Russian Federation and Belarus.

27. The Decree of the President of Ukraine of 15 May 2017 No. 133/2017 "On Decision of the National Security and Defense Council of Ukraine of 28 April 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"[16] contains consolidated list of special economic measures ("sanctions") applied by Ukraine in respect of legal and natural persons of the Russian Federation. The basis for adoption of this Presidential Decree of Ukraine was the Law of Ukraine of 14 August 2014 No. 1644-VII "On Sanctions"[17] that provides for application of special economic and other restrictive measures (sanctions).

28. The number of "sanctions" adopted by Ukraine in respect of Russia continued to expand in 2018. Among others, Ukraine adopted a ban on exportation of certain Ukrainian civil aviation products to the Russian Federation by virtue of a Decree of the President of Ukraine of 6 March 2018 No. 58/2018 "On Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 "On Emergency Measures on Protection of National Security of the State in the Sector of Aviation Motors Building".[18] The list of special economic and other restrictive measures (sanctions) was further expanded in accordance with the Decree of the President of Ukraine of 6 March 2018 No. 57/2018 "On Entry into Force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 "On Application of personal special economic and other restrictive measures (sanctions)".[19] These measures include export restrictions, transit restrictions, limitations on supply of services, restrictions in respect of particular natural and legal persons.

29. The Russian Federation would like to reiterate that the basis for the imposition of the measures provided for in the Decrees of the President of the Russian Federation and the relevant implementing acts as well as the original circumstances that led to the imposition thereof may be well established on the basis of the submissions already made by Russia, both on the basis of the texts of the acts

[10] Exhibit RUS – 14.
[11] Exhibit RUS – 15.
[12] Exhibit RUS – 18.
[13] Exhibit RUS – 17.
[14] As amended by Resolution of the Cabinet of Ministers of Ukraine of 20 January 2016 No. 28 "On amendments to list of goods originating in the Russian Federation and prohibited for imports into Ukraine", Resolution of the Cabinet of Ministers of Ukraine of 6 July 2016 No. 417 "On amendments to the resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147", Resolution of Cabinet of Ministers of Ukraine of 20 December 2017 No. 1022 "On amendments to resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147" (Exhibit RUS – 19).
[15] Exhibit RUS – 16.
[16] Exhibit RUS – 20.
[17] Exhibit RUS – 21.
[18] Exhibit RUS – 22.
[19] Exhibit RUS – 23.

cited by Russia in its First Written Submission[20] and Statements at First Substantive Meeting[21], as well additional explanation provided by Russia in respect of the operation of these acts.

30. It is at discretion of a Member taking the measures under GATT Article XXI(a) and (b) to determine, inter alia, whether its national security interests are at stake, whether such interests are essential ones, whether a particular action is necessary for the protection of such interests.
31. A statement by that Member that the measures taken are the actions which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations, as the case may be, is sufficient for that Member to benefit from the exception set out in Article XX(b) of the GATT. This assessment by a Member cannot be doubted or re-evaluated by any other party or judicial bodies, as the measures in question are not ordinary trade measures regularly assessed by the WTO panels.

32. Thus, Russia is not in a position to disclose information that is related to the ongoing emergency, besides the information it has already provided, fully satisfying the burden of proof. The reasons for that, include not only the matters of confidential information and national security of the Russian Federation, but also the efforts of the Russian Federation to keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters.

33. In respect of the judgments of the International Court of Justice referred to by Ukraine the Russian Federation would like to note the following.

34. By citing certain extracts from the *Military and Paramilitary Activities in and against Nicaragua* case and *Oil Platforms* case Ukraine tries to create an impression that the ICJ came to a conclusion that Article XXI of the GATT, in particular paragraph (b) thereof, is not of a self-judging nature. Ukraine attempts to present the judgments of the ICJ in these two cases as if the ICJ has ruled that even though the two treaties in question do not contain the language similar or identical to the language of Article XXI of the GATT, in particular the "it considers" language, this wording is implied in the text of the respective provisions of the treaties in question, which nevertheless does not prevent the ICJ from examining the cases and concluding that the respondent in those cases was under an obligation to show that its actions were indeed necessary for the purpose of protection of its essential interests. Moreover, Ukraine seems to suggest that the ICJ adopted the element of "taken in the time of war or other emergency in international relations" of GATT Article XXI(b)(iii) in the context of its judgments, even though the relevant language is not present in the text of the treaties examined by the ICJ.

35. Ukraine's assessment of the ICJ's judgement is erroneous for the following reasons.

36. Article XXI(1)(d) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua reads as follows:

"The present Treaty shall not preclude the application of measures:

…

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

In accordance with Article XX(1)(d) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran:

"The present Treaty shall not preclude the application of measures:

…

[20] First Written Submission by the Russian Federation, paras. 16 – 19.
[21] First Substantive Meeting Opening Statement by the Russian Federation, paras. 30-36.

(d) necessary to fulfil the obligations of a High Contracting Party for maintenance or restoration of international peace and security, or necessary to protect its essential security interest".

37. These two provisions are similar to each other. However, they are conceptually different from the relevant part of Article XXI(b) of the GATT. This difference was expressly reflected in the judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*. Ukraine cited certain provisions from this judgment of the ICJ. However, it failed to provide the full quote from paragraph 222 thereof.

38. In this paragraph the ICJ states clearly "that the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such"[22].

39. Thus, the ICJ has made the explicit distinction between Article XXI of the Treaty of Friendship, Commerce, and Navigation of 1956 and Article XXI of the GATT.

40. Ukraine misinterprets the conclusions of the ICJ.[23] In paragraph 282 of the ICJ Judgment in *Military and Paramilitary Activities in and against Nicaragua* the Court expressly stated that "by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as Court has emphasized (paragraph 222), purely a question for a subjective judgment of the party; the text does not refer to what a party "considers necessary" for that purpose. We would like to highlight the following: "by the terms of the Treaty itself" and "the text does not refer to what a party "considers necessary" for that purpose".

41. Ukraine draws false conclusions both regarding the limits of the scope of "necessity" and the possibility of any measures taken to protect essential security interest be subject to judicial review.[24]

42. The Russian Federation notes that the conclusion of Ukraine regarding judicial review is partially correct. Some measures taken for the purpose of protection of essential security interests may indeed be subject to judicial review. However, as the ICJ has pointed out, the objective judgment in that respect should be allowed by the terms of a treaty itself. For that purpose, quoting the ICJ again, the treaty should "not refer to what a party "considers necessary"".

43. The conclusions of the ICJ in *Oil Platforms* Judgment are also taken by Ukraine out of context. That leads to flawed conclusions by Ukraine. To sum up, the overall logic of Ukraine relies upon one particular phrase in that judgment containedin paragraph 43 thereof. The ICJ examined the application of Article XX(1)(d) of the US-Iran Treaty and came to a conclusion that:

"On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests."

44. Based on this sentence Ukraine comes to a far-reaching conclusion that what the ICJ did was ruling that the "it considers" language is implied in the text of the US-Iran Treaty. However, that is not the case. The ICJ merely stated that certain measures may or may not be justified on the basis of the provisions of a particular treaty. The provisions of US-Iran Treaty and US-Nicaragua Treaty allowed for this scenario as well as an assessment by the ICJ. The reason for that was the text of the particular treaties, which did not contain the "it considers" language.

45. Therefore, contrary to what Ukraine suggests, in *Oil Platforms* the ICJ did not add any new elements to what have already been established on this issue in *Military and Paramilitary Activities in and against Nicaragua.* Notably, the ICJ merely confirmed that a State may consider that the

[22] ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 222.
[23] Second Written Submission of Ukraine, para. 85.
[24] Second Written Submission of Ukraine, para. 86.

measure it has taken is necessary for the purpose of protection of its essential security interests. However, whether such assessment is correct is of self-judging nature and is at full discretion of that State or may be subject to objective review by a court depends on the particular treaty provisions. In case of US-Nicaragua and US-Iran treaties objective assessment by the ICJ was possible due to the relevant provisions of the treaties in question. These provisions are substantially different from the GATT Article XXI(b) as the ICJ has emphasized in paragraph 222 of its judgment in *Military and Paramilitary Activities in and against Nicaragua*: unlike Article XXI(b) of the GATT, the US-Nicaragua Treaty, "on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such".

46. It shall also be noted that certain aspects of the conclusion by the Court regarding the criteria of proportionality and necessity borrowed by Ukraine from *Oil Platforms* Judgment are completely irrelevant for the purposes of these proceedings for yet another reason.

47. The *Oil Platform* dispute dealt simultaneously with two issues. First, the interpretation by the US of Article XX of the US-Iran Treaty. Second, the invocation by the US of the right to self-defense.

48. In the context of the claims by the US that it considered in good faith that its certain actions were necessary to protect its essential security interests, the ICJ states that "the Court does not have to decide whether the United States interpretation of Article XX, paragraph 1(d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion". The Court will therefore turn to the criteria of necessity and proportionality in the context of international law on self-defence"[25]. Therefore, the ICJ does not provide any guidance in respect of the provision of the US-Iran Treaty in question that could be relevant to the issues raised in the present dispute.

49. The cases referred to by Ukraine only highlight the critical difference between the provisions of the relevant treaties examined by the ICJ and the GATT Article XXI. The Russian Federation sees that difference in two main elements: the "it considers" language and "taken in time of war or other emergency in international relations".

50. The UN Charter and the Statute of the ICJ provide for broad jurisdiction of the Court. As the Russian Federation has already stated, the World Trade Organisation is a trade organization. The Marrakesh Agreement established specific area of competence of this organisation[26]. The DSB being a body of this trade organisation may not in any way assume the functions of the ICJ. However, this is exactly what Ukraine compels the DSB to do.

51. The Russian Federation also notes that, in our view, Ukraine mistakenly links the principle of good faith in the context of the issue of exercise of discretion by a State with the jurisprudence developed by the ICJ in *Oil Platforms* and *Military and Paramilitary Activities in and against Nicaragua*[27]. Paragraph 145 of the Judgment by the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters* refers to the said disputes involving the US in the context of the issues of competence of the Court. The issue of good faith principle is, however, referred to in the context of *The Certain Interests in Polish Upper Silesia* and *Free Zones of Upper Savoy and the District of Gex*. Therefore the conclusions drawn by Ukraine from *Certain Questions of Mutual Assistance in Criminal Matters* are also flawed and not relevant to this particular dispute.

52. The Russian Federation also notes that Ukraine follows the EU in referring to the ECJ jurisprudence and the EU *aquis*. Although such references by the EU might be understandable, they are completely irrelevant for the purpose of these proceedings.

[25] ICJ, *Oil Platforms,* para.73.
[26] Para. 6 of Russia's Closing Statement at First Substantive Meeting.
[27] Para. 92 of the Ukraine's Second Written Submission.

D. CONCLUSION

53. Ukraine attempts to present its case as if the measures in question adopted by the Russian Federation were adopted for a sole purpose of economic protectionism. As Russia has indicated on numerous occasions, the measures in respect of which the provisions of Article XXI of the GATT were invoked were adopted by the Russian Federation solely for the purpose of protection of its national security and do not even by their design or nature result in "economic protectionism", mainly because there are no specific economic interests that may be hypothetically protected by the measures in question. There is no industry or a single producer of the Russian Federation that would be afforded protection as the result of these measures.

54. The Russian Federation would like to highlight once again that the conclusions that will be made by the Panel in this dispute will have far-reaching consequences for the multilateral trading system.

55. These conclusions would not only affect the ability of sovereign States to appropriately react to international emergencies for the purpose of protection of their national security on an *ad hoc* basis. These conclusions will inevitably have spillover effects, including on the existing systems of exports control and non-proliferation commitments. These systems currently operate under the umbrella of Article XXI, in particular paragraph (b) thereof. The change in balance of rights and obligations of the Members under Article XXI, as a result of its interpretation, even a slightest and reserved one, may change the level of legal protection of such measures causing respective negative consequences for their WTO consistency.

56. The risk of abuse of Article XXI of the GATT is indeed high. Moreover, current trends show that these risks manifest themselves at a speed of an avalanche. However, Article XXI of the GATT itself provides a counterbalance for such potential risks.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (the GATT 1994) as well as the rights and obligations of WTO Members and the proper function of panels provided for under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

II. THE EXCEPTIONAL NATURE OF THE SECURITY EXCEPTION

2. Australia recalls that Article XXI(b) is an exception to a Member's obligations under the GATT 1994, and its use is explicitly limited by the text of the provision.

3. This text reflects the shared concerns of the drafters, understandable in light of two world wars, regarding the interplay of national security and sovereignty in the realm of international trade. The specific reference to fissionable materials reflects concerns regarding the devastating nuclear experience during World War II. A call for coherence with the United Nations Charters reflects the expectation that the "International Trade Organisation" would function as a UN organisation, like other Bretton Woods institutions.

4. The US delegation that contributed to drafting the original security exception expressly observed the delicate balance the provision would need to address, stating:

> … we cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial focus.[1]

5. In addition, the Norwegian Chair of the Working Group foresaw that the spirit in which Members interpreted these provisions would be the only guarantee against abuse.[2]

6. This spirit is best reflected in the restraint WTO Members have demonstrated for the past 20 years. It is no accident that, in over two decades of WTO jurisprudence, this is the first time a WTO panel has been called upon to consider a Member's invocation of Article XXI.

7. In light of the balance of sensitive interests Article XXI seeks to accommodate − as well as the responsibility of Members to guard against undue use of this exception − Australia submits that each invocation of Article XXI must be considered carefully on a case-by-case basis.

III. JURISDICTION OF A PANEL TO REVIEW A MATTER WHERE A MEMBER INVOKES ARTICLE XXI(b)

8. In its First Written Submission, Russia appears to suggest that a Member's invocation of Article XXI(b) automatically takes a dispute outside the jurisdiction of a panel.[3]

9. Russia submits that neither the Panel nor the WTO as an institution has jurisdiction over this *matter*[4] on the basis that the measures Ukraine has challenged were introduced pursuant to Russia's right "to take any action which it considers necessary for the protection of its essential security interests in the time of war or other emergency in international relations".[5]

(i) Does the Panel have jurisdiction to consider this matter?

10. Article 7(1) of the DSU defines a panel's standard terms of reference as: to examine the matter referred to it, in the light of the relevant provisions in the covered agreement(s) cited by the

[1] EPCT/A/PV/33, p. 20-21 and Corr.3.
[2] GATT/CP.3/SR.22, Corr.1
[3] First Written Submission of the Russian Federation, para. 47.
[4] First Written Submission of the Russian Federation, para. 7. (emphasis added)
[5] First Written Submission of the Russian Federation, para. 5.

parties to the dispute; and make such findings as will assist in making the recommendations or rulings provided for in the relevant agreement(s). Article 7(2) of the DSU further provides that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

11. The Appellate Body has explained that the use of the words "shall address" indicates that panels are in fact "*required* to address the relevant provisions in any covered agreement or agreements *cited by the parties* to the dispute".[6]

12. The Panel in this dispute was established with these standard terms of reference.[7]

13. In this dispute, Ukraine has cited Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3(a), XI:1 and XXIII:1 of the GATT 1994, claiming that the measures at issue violate Russia's obligations with respect to these provisions. Russia has cited Article XXI(b)(iii) of the GATT 1994 as a complete defence to Ukraine's claims of violation (while also advancing additional arguments related to temporal matters).

14. In Australia's view, it follows that Article 7 of the DSU vests the Panel with the jurisdiction to examine and make findings with respect to each of the "relevant provisions in the covered agreements" that Ukraine and Russia have cited. Australia therefore disagrees with Russia's submission that the Panel does not have jurisdiction over this matter.

(ii) Does the Panel have the discretion to decline to exercise its jurisdiction?

15. As outlined above (at paragraphs 11 and 12), Article 7 of the DSU does not simply *empower* a panel to address the relevant provisions of the covered agreements cited by the parties, but in fact *requires* a panel to do this.

16. In discharging this adjudicative function, Article 11 of the DSU obliges a panel to:

> … make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, 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.

17. More broadly, Article 3.2 of the DSU recognises that the dispute settlement system: (i) is a "central element in providing security and predictability to the multilateral trading system"; and (ii) serves to preserve the rights and obligations of Members under the covered agreements. This is reinforced by Article 3.3 of the DSU, which highlights that the ability of Members to bring disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

18. In addition, Article 19.2 of the DSU prohibits a panel from making findings that would "add to or diminish the rights and obligations provided in the covered agreements".

19. The Appellate Body has confirmed that the dispute settlement system is the fundamental means through which Members' rights and obligations are enforced:

> … allowing measures to be the subject of dispute settlement proceedings … is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements".[8]

20. The Appellate Body has also recognised that, while panels enjoy some discretion in discharging their core adjudicative function, "this discretion does not extend to modifying the substantive provisions of the DSU".[9]

[6] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. (emphasis added)
[7] Dispute Settlement Body – Minutes of meeting held in the centre William Rappard on 21 March 2017 (WT/DSB/M/394).
[8] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.
[9] Appellate Body Report, *India-Patents (US)*, para. 92. (emphasis added)

21. In addition, in examining a panel's obligation in Article 11 of the DSU, the Appellate Body has observed that "[i]t is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".[10]

22. Furthermore, the Appellate Body has noted that a Member's right under Article 3.3 of the DSU to initiate a WTO dispute when it considers that benefits accruing to it are being impaired by another Member implies that a Member "is *entitled* to a ruling by a WTO panel".[11]

23. It was on the basis of these rights and obligations − with respect to both Members and panels − that the Appellate Body upheld the panel's conclusion in *Mexico − Taxes on Soft Drinks* that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in that case that ha[d] been brought before it".[12]

24. In Australia's view, if the Panel were to decline to exercise its jurisdiction in this matter, this would deprive Ukraine of its rights under Articles 3.2 and 3.3 of the DSU to bring a dispute in order to remedy the benefits it considers Russia's measures are impairing.

25. Australia considers that declining to exercise jurisdiction in this dispute would also be inconsistent with the Panel's obligations under Articles 7, 11 and 19.2 of the DSU to:

(i) address the relevant provisions of the covered agreements cited by Ukraine and Russia;
(ii) make an objective assessment of this matter, including an objective assessment of the facts and the applicability of and conformity with the relevant provisions of the GATT 1994; and
(iii) not add to or diminish the rights and obligations of either Ukraine or Russia.

26. Accordingly, in order to give full effect to the rights and obligations provided in the DSU, Australia submits that the Panel cannot decline to exercise its jurisdiction to address the matters before it.

IV. SCOPE OF REVIEW OF ARTICLE XXI(B) OF THE GATT 1994

27. By its terms, Article XXI(b) provides that nothing in the GATT 1994 shall be construed to prevent a Member "from taking action which it considers necessary for the protection of its essential security interests" in three specific factual circumstances.

28. Australia considers that the use of the words "it considers necessary" in Article XXI(b) of the GATT 1994 indicates that it is for a *Member* to determine "its essential security interests" and the actions "it considers necessary" for the protection of those interests.[13] In Australia's view, a panel's task in reviewing the "necessity" aspect of Article XXI(b) is limited to determining whether the Member *in fact* considers the action necessary (such as by having regard to the Member's statements and conduct).

29. Accordingly, in this dispute, Australia submits that Article XXI(b) does not require the Panel to make its own determination of what "it considers necessary" (such as by engaging in a proportionality analysis) or to substitute its determination for that of Russia's. In this light, considerations of "reasonableness" or "plausibility" risk infringing upon the deference that must be accorded to Russia under Article XXI(b) by having the Panel second-guess what Russia considers necessary.

30. However, this deference to Russia does not preclude the Panel from undertaking *any* review of Russia's invocation of Article XXI(b) or dispense with the Panel's obligation to undertake an

[10] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 51.
[11] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 52. (emphasis original)
[12] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 57. See also Appellate Body Report, *Canada − Measures Affecting the Export of Civilian Aircraft*, para. 187 (quoting *The Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1283); Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 89.
[13] Australia's third party oral statement at the first meeting of the Panel, para. 11.

objective assessment of the matter before it, including an objective assessment of the facts of the case.

31. While Australia considers that the text of Article XXI(b) empowers a Member to determine for itself what action "*it considers necessary*" − and, accordingly, a panel's nature and scope of review of this "necessity" aspect is limited − Australia sees a *broader* role for a panel in determining whether that (necessary) action was taken "*for the protection of*" the Member's essential security interests.

32. Australia observes that the ordinary meaning of "for" is "[w]ith the object or purpose of"; "with a view to"; "conducive to; leading to; giving rise to; with the result or effect of".[14] In Australia's view, a factual assessment of this "purposive" aspect of Article XXI(b) requires a panel to examine whether there is a "sufficient nexus" between the action taken and the Member's essential security interests.[15] If the action taken by a Member is not "*capable* of making … *some* contribution"[16] to protecting the essential security interests identified, it would be reasonable for a panel to determine that the action was not *in fact* taken "*for*" such a purpose, consistent with Article XXI(b).[17]

33. In Australia's view, this factual analytical framework allows a panel to discharge its obligations under the DSU to make an objective assessment of the matter before it,[18] while giving effect to the explicit deference accorded to Members under Article XXI(b).

34. Accordingly, in this dispute, Australia submits that it is for Russia to determine for itself what action "it considers necessary" under Article XXI(b). However, the Panel must undertake a factual analysis of whether Russia does *in fact* consider the action necessary; and, if so, whether that (necessary) action was *in fact* taken "*for the protection of*" Russia's essential security interests.

V. CONCLUSION

35. In order to give proper effect to Members' rights and obligations under the WTO covered agreements, and to the Panel's obligations and terms of reference under the DSU, Australia submits that the Panel should exercise its jurisdiction to address all relevant provisions in the GATT 1994 cited by Ukraine and Russia in this dispute, including Article XXI(b)(iii).

36. Article XXI(b)(iii) reflects the critical importance of national security interests to Members' fundamental sovereignty. Deference to a Member's determination of what action "*it considers necessary*" to protect its essential security interests is explicit in the text of this provision and must be given proper effect. However, in Australia's view, this deference is not absolute.

37. In Australia's view, in undertaking its objective assessment of this matter, the Panel should determine:

(i) whether Russia in fact considers the actions it has taken are *necessary* for the protection of its essential security interests (such as by having regard to Russia's statements and conduct); and

(iii) whether those (necessary) actions were in fact taken *for the protection of* Russia's essential security interests.

[14] *The New Shorter Oxford English Dictionary*, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 996.

[15] European Union's third party submission, para. 56; Appellate Body Report, *EC − Seal Products*, para. 5.169.

[16] Appellate Body Report, *EC − Seal Products*, para. 5.228, cited in Appellate Body Report, *US − COOL (Article 21.5 − Canada and Mexico)*, para. 5.209.

[17] European Union's third party submission, para. 53; Appellate Body Report, *Colombia-Textiles*, para. 5.68.

[18] *Understanding on Rules and Procedures governing the Settlement of Disputes* Article 11.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil made four main points in its third party submission and oral statement: (I) a proper application of the security exceptions of Article XXI of the GATT 1994 requires an adequate balance between two competing interests; (II) the mere invocation of the security exceptions of Article XXI does not exclude a Panel's jurisdiction over the matter before it; (III) the subparagraphs of Article XXI(b) provide for objective circumstances which condition the recourse to the security exception of that literal; and (IV) Members invoking security exceptions have the burden of at least indicating the reasons why they consider certain measures necessary for the protection of their essential security interests.

I. A proper application of the security exceptions of Article XXI involves the balancing of two competing interests.

2. In its first written submission, Brazil focused on the two competing interests to be taken into account when considering the invocation of security exceptions. On the one hand, there is a Member's unquestionable right to protect its essential security interests; on the other, there is the need to prevent the abuses that could ensue if security exceptions were misused to exempt measures of a strictly commercial nature from the agreed GATT disciplines. A proper balance must be struck between those two.

II. The mere invocation of the security exceptions of Article XXI does not exclude the Panel's jurisdiction over the matter brought before it.

3. Brazil considers that Article 7 of the DSU bestows upon the panel the jurisdiction to examine and to make findings in relation to each of the "relevant provisions in the covered agreements" cited by the parties. More specifically, Article 7(2) does even more than that, as it does not simply *allow* the panel to address the provisions invoked by the parties, it *requires* the panel to do so. Therefore, the fact that Russia chose to cite Article XXI of the GATT 1994 as a defense obliges the Panel to examine this provision.

4. As a result, unless otherwise justified by the exercise of true judicial economy, a panel is required by WTO law to examine and to make findings with respect to *all* provisions cited by the parties, which in the current proceedings include Article XXI.

III. Subparagraphs (i) through (iii) of Article XXI(b) provide for objective circumstances which condition the recourse to the security exception of that literal.

5. Brazil argued that, in its relevant part, Article XXI(b) states that nothing in the GATT shall be construed to prevent a Member from taking any action *it considers* necessary for the protection of its essential security interests *under three specific sets of circumstances*. In other words, Article XXI(b) does not stop at the chapeau. It goes on to list an exhaustive number of circumstances under which the exceptions apply.

6. Therefore, Article XXI(b) contains both a subjective component – i.e., the judgment regarding the necessity of the measure – and an objective component – which relates to the presence of at least one of the circumstances exhaustively listed in subparagraphs (i) through (iii).

7. Accordingly, the Panel's first step should be the assessment of whether one or more of the circumstances in subparagraphs (i) through (iii) – as invoked by the party asserting the defense – are present.

8. As Russia has invoked the security exception of Article XXI(b)(iii), it is Brazil's understanding that the Panel must be satisfied that the challenged measures to be justified under the

exception constitute actions "taken in time of war or other emergency in international relations".

9. Furthermore, Brazil considers that, since the recourse to exceptions is in the nature of an affirmative defense, it is the burden of the Member invoking Article XXI(b)(iii) to adduce evidence of the fact that the challenged measures constitute actions taken in time of war or other emergency in international relations. This means that it is not enough for a Member to simply "refer" to one of the circumstances in article XXI; it must present evidence to demonstrate that the circumstance exists.

IV. Members invoking security exceptions have the burden of at least indicating the reasons why they consider certain measures necessary for the protection of their essential security interests.

10. Brazil argued that although the language of Article XXI – "it considers" – confers a great deal of discretion regarding the necessity of the measure, that does not mean that the autonomy accorded by this provision is completely unfettered. In this respect, Brazil understands that Members invoking Article XXI bear the burden of at least justifying their assertion of necessity. Therefore, it is not sufficient for Members to state *that* they consider certain measures necessary; they must also explain *why* they consider those measures necessary.

11. In explaining the reasons for considering the challenged measures necessary, the invoking member should offer some indication as to which essential security interests motivated the challenged measures. Otherwise, it would be impossible for the panel to ascertain whether they are indeed interests related to security and whether there is a connection with the circumstances provided for in subparagraphs (i) to (iii), as raised by the Member.

12. Brazil considers that only essential interests related to *security* may serve as the basis for the recourse to the exceptions in Article XXI(b). Interests pertaining to different areas, but which may also affect trade obligations, are covered by the general exceptions of Article XX.

13. Moreover, the Panel must be satisfied that there is a connection between the challenged measure and the war or emergency deemed present pursuant to subparagraph (iii) of Article XXI(b). Brazil believes that the need for this connection is justified because precluding this analysis could lead to untenable results, as a Member would be allowed to disregard its obligations under the GATT in relation to *all* WTO members, in a manner that could be entirely unrelated to the particular situation of war or emergency.

14. Finally, the Panel should also be satisfied that there is a plausible link between the challenged measure and the purpose stated in its motivation. Brazil believes that a Member is not required to delineate in detail what its "essential security interests" are, since this could be sensitive information in the sense of Article XXI(a). However, it should, at a minimum, justify the actions taken in the name of protecting its "essential security interests" in a manner that allows the Panel to assess if the action was reasonable or plausible in view of, in the present case, the events described in Article XXI(b)(iii), i.e., "war or other emergency in international relations".

Main points made by Brazil in its answers to the Panel's questions

15. With regard to the degree of specificity to be provided by a Member in relation to the essential security interests it aims to protect, Brazil considers that the level of detail expected of the invoking Member "will necessarily vary from measure to measure, provision to provision, and case to case"[1] and that there should be no rigid formula as to what information a Member's explanation must contain. In any case, the information provided by the Member invoking Article XXI(b) must be sufficient for the panel to be able to assess whether the recourse to the security exception is legitimate or whether it constitutes abuse. In this sense, the essential security interests at stake only need to be identified to the extent necessary for the panel to be able to conduct its analysis.

[1] Appellate Body Report, *US – Shirts and Blouses*, pg. 14.

16. With regard to the Panel's analysis of good faith, Brazil believes that findings that a Member has *not* invoked Article XXI(b) in good faith should be limited to situations in which there is a flagrant lack of logical consistency in the Member's argumentation.

17. With regard to the interaction between Article XXI(a) and Article XXI(b), Brazil considers that the two provisions deal with very different situations. On the one hand, Article XXI(a) is concerned with a scenario in which a Member is required to provide pieces of information the disclosure of which is, *in itself*, a threat to essential security interests. It would seem that the core of Article XXI(a) is related to a request for information and to transparency obligations. On the other hand, Article XXI(b) deals with situations in which actions that would otherwise violate obligations assumed under the GATT are nonetheless needed to protect essential security interests. In this context, it would seem that explaining why a measure is necessary for security purposes is not *per se* incompatible with Article XXI(a). Thus, the party invoking Article XXI(b) has to achieve a minimum evidentiary threshold that enables the panel to discern genuine invocations of Article XXI(b) from abuses.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE XXI OF THE GATT 1994

1. Canada is of the view that Article XXI is a needed part of the international rules-based trading system but that Members should be prudent and sparing in their use of Article XXI. While Members must be able to take actions necessary for their security, they must also not abuse the international rules-based trading system of which they are willing parties and beneficiaries. The WTO is not intended or equipped to resolve security issues or conflicts and, as a general matter, Canada urges Members involved in such situations to proactively and constructively engage to peacefully resolve the situation and avail themselves of any means that may assist them in doing so.

A. Article XXI is justiciable

2. If Article XXI is invoked by a Member in a dispute then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference. In a letter to the Chairman of the Panel, Canada observed that: "the DSU makes it clear that panels do not have the discretion to decline exercising the jurisdiction conferred on them by those terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11". Canada also concurs with the analysis set out in Australia's third party submission in paragraphs 4-22 regarding the jurisdiction of a panel.

B. A panel must make an objective assessment of the invoking Member's good faith belief that the elements required to invoke Article XXI exist

3. All obligations in the WTO Agreements must be interpreted in good faith and in light of their object and purpose. Each Article must also be interpreted on its own merits. Canada cautions against importing tests developed in jurisprudence to interpret other Articles, such as Article XX, as tools to interpret Article XXI. Unlike Article XX, the chapeau of Article XXI does not include any conditions and is thus broad in scope, though still subject to interpretation in the overall context of the treaty and its object and purpose.

4. Article XXI(b), of which subparagraph (iii) has been invoked by Russia, provides for a subjective standard with the following language: "... any action which it considers necessary for the protection of its essential security interests ". It is the invoking Member which determines the interests, the actions and the necessity of the actions. Canada is of the view that this subjective standard also applies to the language of sub-paragraph (iii) as it completes the phrase begun in the opening words of paragraph (b) and it would defeat the broad discretion accorded to the invoking Member if the assessment of the situation that gave rise to the need for the action were to be subject to a different standard from that set out in the chapeau. At the same time, a panel is tasked under Article 11 of the DSU to make an objective assessment of the matter before it. As such, for Article XXI, the panel should make an objective assessment of a subjective perspective; in other words, the panel's task is to determine whether the invoking Member believes in good faith that the elements required to invoke Article XXI exist.

C. The invoking Member must substantiate its good faith belief that the elements required to invoke Article XXI exist

5. The subjective standard and the particularly sensitive nature of the subject matter of Article XXI mean that an invoking Member must be accorded a high level of deference by a panel. However, to guard against abuse of the provision, Canada is of the view that an invoking Member must substantiate its good faith belief that the elements for invoking Article XXI exist, for example with regard to Article XXI(b)(iii), that there is an "essential security interest", that the action taken is necessary and relates to the protection of this essential security interest, and that the action is "taken in a time of war or other emergency in international relations". The threshold required for substantiation would be low and appropriate to the factual situation but would need to be more than

a simple assertion that Article XXI is invoked. A complete lack of substantiation would be grounds for finding that use of the Article is not justified.

6. Information required to substantiate the good faith belief of a Member invoking Article XXI that the action was "taken in a time of war or other emergency in international relations", will depend on the case. If the situation is self-evident and there is a general awareness among a broad number of States of the "emergency in international relations", it is possible a reference or brief description will suffice. A strong indication of such awareness would be consideration of the situation by relevant multilateral fora, notably the United Nations Security Council. In other cases the invoking Member may need to provide more information. The panel would be able to act pursuant to DSU Article 13 to seek information. However, in so doing the panel should exercise caution appropriate to the subject matter and be cognizant of the high level deference to be accorded to the Member invoking Article XXI.

7. Depending on the case, evidence that could be considered with regard to the requirement that the invoking Member believes in good faith that the action taken was necessary for the protection of its essential security interests includes, in no particular order, and is not limited to: records of consideration in the invoking Members' legislature, speeches from the leader or other high-ranking government members of the invoking Member, language contained in the measure that indicates the measure's purpose, documents that accompany the measure that were produced as part of the invoking Member's legal processes to institute the measure, decisions of courts in the invoking Member's territory, decisions of international courts or international dispute settlement mechanisms, documentation from other relevant international fora, and news reports from media outlets.

D. Articles XXI(a) and (b) must be interpreted in good faith and read harmoniously so as to give effect to both paragraphs

8. It is very difficult to foresee a circumstance where reliance on Article XXI(a) could be used to nullify the requirement to provide substantiation of any sort under Article XXI(b). It is equally difficult to foresee a situation where a Member would have no information whatsoever that falls outside the scope of paragraph (a) that could be presented as substantiation with regard to paragraph (b). At the very least a Member would be able to offer information that is in the public domain. The precise interplay of paragraphs (a) and (b) will depend on the case but the simultaneous existence of a requirement to substantiate under paragraph (b) and a requirement not to provide sensitive information under paragraph (a) demonstrates that the threshold for substantiation under paragraph (b) is low but not non-existent.

II. ARTICLE V OF THE GATT 1994

9. Article V generally, and the notion of freedom of transit specifically, is an important element of the WTO trade regime, but the right to freedom of transit is not absolute. While Article V:2, first sentence, declares that there shall be freedom of transit, the remainder of Article V, including the rest of Article V:2, sets out the limits that WTO Members may impose on this freedom without thereby violating the obligation it entails. The ordinary meaning of the term "freedom" must be interpreted in the context in which the term appears. That context indicates that it is in fact subject to limitations, both within Article V:2 itself, and on the basis of the other paragraphs in Article V.

10. A measure that violates one of the other paragraphs of Article V would entail a consequential violation of the right set out in the first sentence of Article V:2. The corollary to that conclusion, however, is that measures restricting traffic in transit that comply with the requirements of those paragraphs would not constitute a violation of the first sentence of Article V:2, even though they may have the effect of impeding traffic in transit in some way.

11. The panel in *Colombia – Ports of Entry* referred to second element of the first sentence of Article V:2 as imposing a "limiting condition on the obligation". According to that panel, "a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones 'most convenient' for transport through its territory". However, the panel did not address who determines whether a given route is "most convenient", or what criteria are to be used in making such a determination.

12. The WTO Member through whose territory the traffic in transit wishes to pass cannot be the sole arbiter of which routes are "most convenient". Granting such discretion solely to the transit state would render the freedom illusory. However, it cannot be left entirely to the discretion of the owner/shipper or carrier of the traffic in transit. Governmental authorities have legitimate interests that should be taken into account when determining whether any particular route is "most convenient". Whether a given route is "most convenient" can therefore only be determined having regard to all of the circumstances relevant to the traffic in transit, including, for example, the "conditions of the traffic".

13. The obligation in Article V:2, second sentence, is more stringent than a MFN obligation. The use of the term "no distinction" – as compared to the phrases, "treatment no less favourable" or "any advantage, favour, privilege or immunity granted…shall be accorded immediately and unconditionally…" – must be given proper meaning.

14. The closed list in Article V:2 and the existence of the less stringent MFN obligation in Article V:5 suggest that the drafters intended for the two provisions to cover two different classes of measures: those that differentiated on the basis of the criteria set out in the second sentence of Article V:2; and, those that differentiated on the basis of other criteria. The drafters realized that drawing distinctions on the basis of the criteria enumerated in Article V:2 would be antithetical to the very notion of freedom of transit. They were also aware that WTO Members can have legitimate reasons for drawing distinctions between traffic in transit. Imposing a "no distinction" legal standard on measures other than those captured by the list in the second sentence of Article V:2 would represent an undue limitation on Members' sovereignty and right to regulate.

15. The reference to "applicable customs laws and regulations" in Article V:3 should not be read to indicate that only measures that fall within the scope of this phrase can constitute legitimate constraints on traffic in transit in the sense of giving rise to "necessary" delays or restrictions. A purposive reading suggests that Article V:3 provides a right for WTO Members to require that traffic in transit be registered with their customs authorities but that the exercise of that right must not result in any unnecessary delays or restrictions. Necessary delays or restrictions would appear to include the consequences arising from a failure on the part of the traffic in transit to comply with "applicable customs laws and regulations". At the same time, there is nothing in Article V:3 that expressly limits permissible delays or restrictions to the application of customs laws and regulations.

16. Canada disagrees with Ukraine that Article V:3 creates a limited and conditional exception to the obligation in Article V:2 to provide freedom of transit. Canada would also oppose any suggestion that the initial burden of proof with respect to whether a given delay or restriction was consistent with the stipulations in Article V:3, and therefore also consistent with the obligation to provide freedom of transit, should fall on the respondent Member in a dispute under Article V. In Canada's view, the text of the provision does not support a finding that Article V:3 sets out an exception. Apart from the word "except", there are no textual or contextual indicators that the provision is meant to be an exception to an obligation. In addition, Canada considers that characterizing a right as a "limited and conditional exception" gives undue weight to the notion of freedom of transit. In its view, Article V:3, and Article V more generally, reflects a carefully negotiated balance between the legitimate interests of WTO Members to be able to ship their goods across the territory of other WTO Members in order to reach third country markets, and the undoubted rights of WTO Members through which such traffic passes to regulate such traffic for legitimate reasons.

17. Ukraine points to Articles 11.6 and 11.7 of the Agreement on Trade Facilitation (TFA) to support its interpretation of Article V:3. Canada is of the view, however, that Article 11.7 of the TFA does not do so. Article V:3 refers to delays and restrictions arising from putting "traffic in transit under a transit procedure", which would include the formalities and documentation requirements that are part of entering the traffic at the proper customs house. Article 11.7, however, concerns itself with delays and restrictions arising after the "goods have been put under a transit procedure and have been authorized to proceed from the point of origination" in the Member whose territory is being transited. Nothing qualifies the reference to delays and restrictions in Article 11.7 to delays or restrictions arising specifically from the application of customs laws or regulations, and the reference to such delays or restrictions arising after the traffic in question has been put under a customs procedure suggests that such delays or restrictions could arise from causes other than customs requirements.

18. From an architectural standpoint, Ukraine argues that, for a measure to comply with Article V:4, it must also comply with Article V:3. Canada disagrees that compliance with Article V:3 is a *sine qua non* for compliance with Article V:4. The two provisions set out distinct obligations, dealing with distinct aspects of the regulation of traffic in transit. Both provisions also impose consequential limitations on the right to freedom of transit set out in Article V:2, first sentence.

19. Ukraine argues that the scope of the term "regulations" as used in Article V:4 must be understood in the context of Article V:3, and should therefore be limited to same subset of measures permissible under that provision. In other words, according to Ukraine, for a "regulation" to be "reasonable", it must pertain to compliance with "applicable customs laws and regulations", and must not result in "any unnecessary delays or restrictions".

20. Canada disagrees with the Ukraine's assertion that the reference to "regulations" in Article V:4 is limited to what is covered by the reference to "applicable customs laws and regulations" in Article V:3. First, it is far from conclusive that the reference in Article V:3 to delays and restrictions is itself limited to the application of customs laws and regulations. Second, Article V:4 itself refers to "all" regulations, without further qualifying the term. Had the drafters intended the term "regulations" to be limited to "applicable customs laws and regulations", they could have drawn an explicit link to Article V:3 or they could have repeated the phrase "customs laws and regulations" in Article V:4. They did not do so. Third, the drafters used different terms in the two provisions. The use of different language − the word "on" in Article V:4 and the words "in connection with" in Article V:5 − must be presumed to be deliberate, and to be intended to signal a difference in scope between the two provisions. Specifically, the use of different terms reflects a difference in the relationship between the enumerated measures and traffic in transit for the purposes of the two obligations. This intent should be given effect by the Panel in interpreting and applying the two provisions. Fourth, the phrase "shall be reasonable, having regard to the conditions of traffic" would be redundant if the term "regulations" in Article V:4 was limited to "applicable customs laws and regulations", since those measures are already subject to a necessity requirement. It seems highly unlikely that a regulation that results in an unnecessary delay or restriction could ever be considered reasonable. It seems equally unlikely that a regulation that results in a "necessary" delay or restriction would nevertheless be deemed unreasonable.

21. Canada also disagrees with Ukraine that compliance with Article V:3 is a necessary element to establish compliance with Article V:5. In Canada's view, the two provisions contain distinct obligations and non-compliance with one does not entail consequential non-compliance with the other.

22. In Canada's view, to demonstrate less favourable treatment under Article V:5, it would not suffice for a complaining party to show that the impugned measure draws a distinction between goods in transit based on place of origin, departure, entry/exit or destination. A long line of jurisprudence indicates that the phrase "treatment no less favourable" as used in Article III:4 of the GATT should be understood to require WTO Members to provide "equality of competitive conditions" or "effective equality of competitive opportunities" in their measures affecting trade. Canada believes that this interpretive approach also applies in the context of the regulation of traffic in transit.

23. In *Korea − Various Measures on Beef*, the Appellate Body rejected the panel's finding that any regulatory distinction that is based exclusively on criteria relating to the nationality or origin is incompatible with Article III, observing in paragraph 136 that "a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4". The Appellate Body said in paragraph 137, "[w]hether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of the imported products".

24. Canada considers that this guidance is equally relevant to the interpretation and application of the "treatment no less favourable" element in Article V:5. A panel confronted with a claim that a measure is inconsistent with Article V:5 is required, not only to determine whether the regulatory treatment of traffic in transit originating in different WTO Members differs or is the same, but also, and more importantly, whether that treatment modifies the conditions of competition in the relevant market to the detriment of traffic in transit from one WTO Member as compared to traffic in transit from another WTO Member.

III. ARTICLE X OF THE GATT 1994

25. Article X:1 covers measures subject to Article V insofar as such measures are "[l]aws, regulations, judicial decisions and administrative rulings of general application" and are measures "affecting" the "transportation" of "products". Article X:1 sets out two broad categories of measures. The second category comprises measures affecting "their" sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

26. Transportation is a key word in the second category. The definition of "traffic in transit" in Article V:1 makes it clear that such traffic, by definition, involves the transportation of goods or products. Thus, measures that affect traffic in transit would be measures affecting the transportation of goods or products. The second category also refers to measures affecting their transportation. In Canada's view, the possessive pronoun "their" in the first sentence of Article X:1 cannot refer to "imports or exports". It makes little sense, contextually, for the reference to "their… transportation" to cover only imports and exports. If "their" in Article X:1 were interpreted to be limited to imports and exports, it would mean that WTO Members are not under an obligation to publish measures regulating the transportation of domestic products, thus potentially frustrating other WTO Members' efforts to ensure that their exports are not treated in a manner that violates Article III:4.

27. More generally, Article X:1 is concerned with transparency and the prompt publication of trade measures of general application. It lists a broad range of measures that affect trade and are subject to the disciplines set out in other provisions of the GATT 1994. This broad scope is also reflected in the title of Article X, which refers to publication of trade regulations generally, rather than to the publication of measures affecting imports and exports. In Canada's view, it would be incongruous for the reference in Article X:1 to "their…transportation" to cover imports and exports only, when the coverage of the GATT as a whole, including Article V, goes well beyond this scope.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. China considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI and Article V of the General Agreement on Tariffs and Trade 1994 (the GATT 1994), as well as the rights and obligations of WTO Members. Therefore, without prejudice to any party's right and obligation under the covered agreements, China explains the fundamental question that whether a panel has jurisdiction to review a dispute invoking Article XXI of the GATT 1994, and offers comments to the Panel, in order to assist the latter to make objective assessment for the dispute invoking Article XXI of the GATT 1994. China also provides some clarifications for the interpretation of Article V of the GATT 1994.

I. PANEL'S JURISDICTION TO REVIEW THE DISPUTE INVOKING ARTICLE XXI OF THE GATT 1994

2. China observers that the Dispute Settlement Body (DSB) sets up the terms of reference of the Panel to this dispute[1], pursuant to Article 7.1 and 7.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). These terms of reference confirms the jurisdiction of the Panel to address the relevant provisions in the covered agreement cited by the parties to the dispute.

3. As Chine notes, the Russian Federation invokes Article XXI of the GATT 1994 to defend Ukraine's claims of violation in its First Writing Submission[2]. Therefore, in China's view, this Panel undoubtedly has the discretion to address Article XXI of the GATT 1994, and examine the relevant measures introduced by the Russian Federation.

4. China notes that certain WTO Member claims that '[the] Panel lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute'.[3]While China does not take any particular position on the factual aspects in this dispute, China respectfully disagrees with this view, referring to the observation hereinabove.

5. Furthermore, China opines that certain preparatory work of the GATT, including the discussions in Geneva in 1947 in connection with Article 94 (which was the relocation of the provisions now contained in Article XXI of the GATT 1994), and Decision concerning Article XXI adopted on 30 November 1982 by GATT contracting parties, support that the measures under Article XXI of the GATT 1994 could be reviewed by the dispute settlement mechanism.

II. THE GENERAL PRINCIPLE TO MAKE OBJECTIVE ASSESSMENT FOR THE DISPUTE INVOKING ARTICLE XXI OF THE GATT 1994

6. China understands that Article 11 of the DSU requests the Panel to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'.

7. China has no intention to identify any specific methodology for the objective assessment of the dispute invoking Article XXI of the GATT 1994, but rather to offers comments for the general principle to make such assessment, in order to assist the Panel to accomplish its task.

8. As China notes, this is the first time a Panel is requested to rule on a defense based on Article XXI of the GATT 1994. Despite the lack of jurisprudence from previous disputes, the preparatory work of the GATT demonstrates that, Article XXI of the GATT 1994 is a sensitive provision relating to the sovereignty and security interests of WTO Members, and potentially has a very broad scope

[1] Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.
[2] First Written Submission of the Russian Federation, para. 5.
[3] U.S. letter in Russia − Measures Concerning Traffic in Transit (DS512), November 7, 2017.

of application which allows Members to derogate from any other provision of the covered agreements. [4]

9. Therefore, China opines that the Panel should keep extreme caution during the assessment, by maintaining the delicate balance for the following aspects. On the one hand, any abuse of Article XXI of the GATT 1994, which leads to the evading of the obligation in bad faith under the covered agreements, shall be prevented. On the other hand, Member's rights to protect its essential security interests shall not be nullified or impaired, and Member's discretion relating to its own security issue, which is authorized by the covered agreement, shall not be prejudiced.

10. China also views 'Good Faith' as another fundamental issue for the objective assessment. China opines that, should a WTO member intend to take any action, which *it considers necessary for protection of its essential security interests*[5], in according to Article XXI of the GATT 1994, it should adhere to the principle of good faith sustainedly. In China's view, the faithful fulfillment of its obligations and commitments under the covered agreements by WTO Member constitutes a legitimate foundation for the invocation of Article XXI of the GATT 1994.

III. INTERPRETATION OF THE ARTICLE V:2 OF THE GATT 1994, FIRST SENTENCE

11. China notes that the previous jurisprudence provides a full explanation of Article V:2 of the GATT 1994, first sentence.[6]Such interpretation identifies that the substantive obligation of the Article V:2 of the GATT 1994, first sentence is 'freedom of transit', and the 'via the routes most convenient' imposes a limiting condition of the substantive obligation. Former Panel further interprets 'freedom of transit' as

> 'extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport'.[7]

In other words, pursuant to Article V:2 of the GATT 1994, first sentence, WTO Member across whose territory goods are transiting is obliged to facilitate convenience to traffic in transit to other WTO Members, in order to expand the trade of goods.

12. China opines that, 'the routes most convenient' should be interpreted from two aspects. On the one hand, the route is convenient for relevant interested parties (such as owner/shipper or carrier of the goods) to facilitate the traffic in transit. On the other hand, the route is also convenient for the WTO Member across whose territory goods are transiting to maintain its legitimate rights, since this issue is highly related to the sovereignty of the latter, which has legitimate authorization to control the specific trajectory for transit with in its territory. Hence, Panel is advised to take deliberative consideration of this issue as an ex ante approach to make the interpretation of the Article V:2 of the GATT 1994, first sentence.

13. Regarding 'routes most convenient', China does not agree with Japan that 'Article V:2 of the GATT 1994, first sentence requires that a complainant first make a *prima facie* case that there is a more convenient route than the designated one'.

14. In China's view, if a complainant alleges that a WTO Member does not facilitate freedom of transit via the routes most convenient pursuant to Article V:2 of the GATT 1994, first sentence, it might imply the existence of another more convenient route to accomplish such traffic in transit. Nevertheless, in order to make a *prima facie* case, the complainant is neither required to identify such 'most convenient route for traffic in transit', nor to make comparison between the route which has been challenged and the route which is more convenient.

15. This understanding is also supported by the previous jurisprudence.[8] According to such finding, former Panel recognized that the key measure which constitutes the inconsistency of Article V:2 of the GATT 1994, first sentence, is that Colombia limited the modes of transport for the traffic

[4] EPCT/A/PV/33, p. 20-21 and Corr.3; see also EPCT/A/SR/33, p. 3.
[5] .GATT 1994, Article XXI (b) chapeau.
[6] Panel Report, *Colombia – Ports of Entry*, para. 7.399-400.
[7] Panel Report, *Colombia – Ports of Entry*, para. 7.401.
[8] Panel Report, *Colombia – Ports of Entry*, para. 7.423.

in transit into trans-shipment, but not that Colombia did not facilitate the traffic in transit via routes most convenient. In this regard, the limitation of the mode of transport could be understood as a substantive violation of the 'extending unrestricted access via the most convenient routes for the passage of goods in international transit'.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union makes these third party submissions because of its systemic interest in the correct and consistent interpretation and application of the GATT 1994.

II. THE EU'S SUBSTANTIVE COMMENTS

A. Ukraine has made a *prima facie* case that the measures at issue are inconsistent with various provisions of the GATT 1994

2. The European Union considers that Ukraine has shown in a compelling way that the various measures at issue are inconsistent with the various provisions of the GATT 1994 cited by Ukraine, including, in particular, Article V of GATT 1994.

3. The European Union notes that Russia does not appear to contest that the four measures at issue are inconsistent, in principle, with the provisions cited by Ukraine. The European Union would observe, in relation to the first issue, that the mere fact that the product scope of the second measure encompasses that of the first measure does not have the necessary implication that the second measure has superseded the first measure and that this measure therefore ceased to exist. It is not uncommon that the importation or entry of a category of products be subject simultaneously to various restrictions based on different grounds. Russia has not explained on which legal base, or through which legal mechanism, the second measure at issue would have superseded the first measure.

B. Russia's invocation of the security exceptions

Justiciability of Article XXI of GATT 1994

4. Russia, with the support of the United States, alleges that Article XXI is not a justiciable provision. The EU disagrees. Article XXI is an affirmative defence. It may be invoked to justify an otherwise WTO inconsistent measure. It does not provide for an exception to the rules of jurisdiction laid down in the DSU. Interpreting Article XXI as a non-justiciable provision would make it impossible for the Panel to fulfil its task under Article 11 of DSU. The "matter" before the panel includes Article XXI as raised by Russia.

5. If Article XXI was interpreted as a non-justiciable provision, a WTO Member, rather than the DSB, would be deciding the outcome of a dispute unilaterally. This would question the "rules-based" approach to international trade. Non-justiciability of an international dispute amounts to a lack of jurisdiction. In the rules-based framework of the WTO, the legal operability of Article XXI of GATT 1994 rather revolves around the concepts of standard of review and discretion.

6. Therefore, the concept of justiciability and the concept of discretion (linked to the Panel's standard of review) need to be distinguished. The rules of the GATT, including Article XXI are justiciable with the DSB being the ultimate arbiter. Some rules may grant WTO Members discretion. Article XX (a) as interpreted by the Appellate Body in *EC – Seal Products* is a ready example. Article XXI is another example. Yet, the jurisdiction over the question whether a Member remained within its discretion unequivocally rests with the DSB.

Burden of proof

7. A WTO Member that invokes Article XXI (b) (iii) bears the burden of proof. Russia has failed to meet its burden of making even a *prima facie* case. Neither has it explained the legal test that it deems appropriate, nor has it adduced any facts which would allow the Panel to make findings. Russia limits itself to citing various unilateral statements from Contracting Parties to the GATT 1947 but fails to shed light on the relevance of these statements under Articles 31 and 32 of VCLT.

8. A party invoking an affirmative defence Russia has the *onus probandi*. Russia's vague allusion to unspecified events in 2014 is not sufficient to meet its burden of proof under

Article XXI(b)(iii). It is not the Panel's role to second guess and specify the events to which Russia refers to as the emergency in international relations that occurred in 2014, notably because some of the measures were adopted after 2014. Article 13 of DSU gives the Panel the right to seek information from any relevant source. However, a panel is not entitled to make the case for the party failing to satisfy its burden of proof.

9. The required degree of specificity in identifying the essential security interests is linked to the standard of review applicable in respect of each of the elements of Article XXI(b). The invoking Member is required to identify the invoked interest with the degree of specificity that is necessary for the Panel to ascertain whether it is plausible that the invoked interest is one of security as opposed to purely economic and whether it is important enough to qualify as essential.

10. Several third parties have expressed views that the Panel should review whether a Member invoking Article XXI(b) honestly considers, or believes in good faith, that the action taken was necessary for the protection of its essential security interests. It remained unclear in the respective third party submissions how the Panel should assess such an elusive requirement. Subjective intent is not only difficult to establish, the object of Article XXI is not the punishment of a WTO Member lack of honesty. Rather, Panels must review whether the invoking Member can plausibly consider that the measure is necessary in order to prevent abuses. To this end, it is necessary to examine objective factors. According to the Appellate Body in *EC − Seal Products* a panel must take account of all evidence put before it in this regard, including the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue. While made in the context of Article XX, the underlying idea of this statement can be transposed to Article XXI. At any rate, the characterisation of a Member's measure under municipal law is not dispositive as the Appellate Body confirmed in *US — Large Civil Aircraft (2nd complaint)* and *Canada — Renewable Energy / Canada — Feed-in Tariff Program*.

11. The Panel cannot determine whether Russia's assertion that the action it took was necessary for the protection of its essential security interests was reasonable or plausible without Russia having indicated what its "essential security interests" are.

12. Contrary to what Russia maintains, the EU fails to understand how Article XXI(a) can exempt Russia from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Discretion accorded under it is not unlimited.

13. The EU acknowledges that information relating to essential security interests is of a highly sensitive nature, but the complainant is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if Russia was justified in not providing certain information pursuant to Article XXI(a), that would not discharge Russia from its burden of proof in relation to Article XXI(b).

Legal standard for the interpretation and application of Article XXI(b)(iii) of GATT 1994

14. The analytical framework developed by the Appellate Body for applying Article XX provides useful guidance for interpreting and applying Article XXI. Article XX of GATT requires a "two-tiered analysis". Since Article XXI does not contain a *chapeau*, the analysis is limited to the first tier. Under Article XX, this analysis requires, first, that the measures "addresses the particular interest specified in [the sub]paragraph" and, second, that "there [is] a sufficient nexus between the measure and the interest protected." The analysis under Article XXI should address these very elements keeping in mind the general principle of good faith enshrined in Article 26 of VCLT.

The first element of the analysis under Article XXI(b)(iii)

15. Under the first element, the defending party has the burden of demonstrating that the measure is taken "in time of war or other emergency in international relations", that it has "essential security interests" with respect to the war or other emergency in international relations, and that the measure is designed "for" the protection of the relevant essential security interest. The panel has to ascertain whether a situation of "war" or of "other emergency in international relations" exists in a given case. Article XXI is different in this respect from, for example, Article 3 of OECD Code of Liberalisation of Capital Movements,

which refers to "the protection of [a Member's] essential security interests", without any further specification.

16. The terms "which it considers" in Article XXI do not qualify the terms "war or other emergency in international relations" but only the term "necessary". Subparagraphs (i) to (iii) refer to "action" and not to "it considers". A different reading would lead to the absurd result that a Member could unilaterally define pigs as fissionable materials in paragraph (i).

17. Hence, the existence of a "war or other emergency in international relations" refers to objective factual situations that can be fully reviewed by panels. Both terms should be interpreted taking into account relevant international law. "War" describes a situation when one or more States have used armed force against each other. The notion of "emergency in international relations" is broader than that of "war". War is one particular example of emergency. The latter thus has to be of significant intensity also in the absence of a war.

18. The terms "taken in time" require a sufficient nexus between the action taken by the invoking Member and an ongoing situation of war or emergency in international relations. A mere temporal coincidence between both does not suffice, as it would allow for the adoption of measures entirely unrelated to the war or emergency. This would also be inconsistent with the term "protection" included in the *chapeau* of Article XXI (b), which implies the existence of a threat to which the action of the invoking Member responds.

19. The terms "its essential security interests" should be interpreted in such a way as to allow Members to identify their own security interests and the desired level of protection without having the Panel second-guess the value judgment as to the legitimacy of the interest. At the same time, not any interest will qualify under this exception. The interest must relate genuinely to "security" and be "essential". Purely economic interests or security interests of minor importance would not qualify. Based on the reasons provided by the invoking Member, a panel should review whether the interests at stake can reasonably/plausibly be considered to be "essential security" interests, from that Member's perspective, so as to be able to detect abuses of this exception. Security interests may vary in time and space. Article XXI cannot be used to circumvent the requirements of Article XX.

20. Finally, the invoking Member must show that the action is "designed" to protect the relevant essential security interest from the threat posed by the situation of war or other emergency in international relations.

The second element of the analysis under Article XXI(b)(iii)

21. The second element in the analysis under Article XXI is whether the measure is "necessary". In the context of Article XX, the Appellate Body has explained that determining the "necessity" of a measure involves "a process of weighing and balancing [...] a series of factors" in particular the relative importance of the objective pursued by the measure, the contribution of the measure to that objective, and the restrictive effect of the measure on international trade. In general, a challenged measure should be compared with reasonably available alternative measures that are less trade restrictive, while making an equivalent contribution to achieving the desired level of protection of the relevant objective.

22. The term "necessary" in Article XXI(b) must be given the same meaning as in Article XX. However, the terms "which it considers" imply that, in principle, it is for each Member to assess by itself whether a measure is "necessary". Again, this does not give the Member unfettered discretion. However, a panel's review should give deference to the invoking Member. The review should be limited to assessing whether the invoking Member can plausibly consider the measure necessary and whether the measure is applied in good faith. Since the invoking Member bears the burden of proof, it must provide the panel with an explanation of why it has considered the measure necessary in light of the factors mentioned above.

23. This "plausibility test" finds support in the decisions reached by the adjudicators in other contexts. For example, when the arbitrators had to interpret Articles 22.3(b) and 22.3(c) of DSU, which both start with the phrase "if that party considers"; or when the International Court of Justice interpreted the terms "if it considers" in Article 2 (c) of the Convention on Mutual Assistance in Criminal Matters between the Djiboutian Government and the French Government of 27 September 1986 they did not consider those provisions as giving absolute discretion to the party invoking them, because the exercise of discretion remained subject to the principle of good faith.

24. Notably, the Panel should ascertain whether the interests of third parties who may be affected were properly taken into consideration, as required by the preamble of the Decision of 30 November 1982.

C. Certain aspects relating to transit

25. Article V:2, first sentence, is not confined to a single route that is deemed "the most convenient" for international transit. This understanding can be derived from the use of the plural (routes) as opposed to the singular (route) and several other considerations.

26. *First*, for Members with large territories and long common borders departure points A and B on the territory of the Member of origin may be thousands of kilometers apart, as well as the points of arrival on the territory of the Member of destination. In between there may be a transited Member sharing hundreds (if not thousands) of kilometers of borders with both the Member of origin and the Member of destination. For instance, were Kazakhstan to require Russian carriers to take only one route that is deemed *the* most convenient for international transit through Kazakh territory towards Tajikistan, carriers from both Volgograd and Novosibirsk would be restricted to taking this route. The ensuing necessity for detours on Russian territory would clearly amount to a barrier to trade. Moreover, the restriction of individual market actors to one single transit route hardly aligns with the concept of "freedom" embodied in Article V:2.

27. *Second*, other factors may also play a role in determining "the most convenient routes": the mode of transport (by road, by rail, by water, by air, pipelines) and the specificity of different types of goods that are in transit.

28. The "routes most convenient for international transit" should be determined on a case by case basis, taking into account objective factors. Otherwise, a WTO Member could undermine the freedom of transit through the designation of what it itself deems the most convenient routes. In objective terms, the determination may depend upon the total number of transit routes, their varying convenience for international transit from the perspective of a reasonable trader, taking into account criteria such as distance, time, safety, road and infrastructure quality.

29. Regarding the extent of freedom of transit, the Panel in *Colombia – Ports of Entry* noted that in "light of the ordinary meaning of freedom and the text of Article V:2 … the provision of 'freedom of transit' pursuant to Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit". Accordingly, Article V:2, first sentence not only requires the availability of the most convenient routes but also the absence of restrictions for using these routes.

30. Finally, with regard to the Panel's question concerning indirect transit routes the EU notes that in practice the absence of a direct transit route that figures among the "routes most convenient for international transit" is hardly conceivable. It requires a very unique geographical condition. The present case does not involve Members in such a condition. The EU does not see how the detour through Belarus of Ukrainian carriers having as countries of destination Kazakhstan, the Kyrgyz Republic and other third countries in the region may qualify as a route "most convenient for international transit."

31. While there may be some overlap between Article V:2, first sentence, and the remaining provisions of Article V, this does not allow the generic conclusion that a finding of violation of Article V:2, first sentence, will necessarily follow from a finding of violation of any of the other paragraphs of Article V. Article V:2, first sentence, requires extending unrestricted access via the most convenient routes for the passage of goods in international transit. The panel in *Colombia – Ports of Entry* found that Article V:2, second sentence complements and expands upon the obligation to extent freedom of transit in Article V:2, first sentence. Article V:6 has a different scope of application. Unlike Article V:2, first sentence, it also applies to imports to the country of final destination. In any event, the Panel need not, and should not decide in the abstract this question.

32. Article V:2, second sentence, outlaws distinctions based on criteria such as the flag of vessels or the place of origin. It adds to the discipline of Article V:2, first sentence.

33. The requirement in Article V:3 that traffic in transit "shall not be subject to any unnecessary delays or restrictions" applies specifically with regard to delays or restrictions resulting from customs laws or regulations. It is introduced by the conjunction "but" and thus appears to qualify the opening sentence of Article V:3, which provides that a Member may require that

traffic in transit "be entered at the proper customs house". Moreover, it is subject to just one exception relating to the "cases of failure to comply with applicable customs laws and regulations".

34. The regulations addressed in Article V are subject to Article X under the same conditions as other types of trade regulations. It would be surprising indeed, if transit regulations (alone among all trade regulations) could be adopted without being published promptly in such a manner as to enable governments and traders to become acquainted with them, or if they could be administered in a selective, partial and unreasonable manner without any domestic legal recourse. The lacking express reference to transit in Article X is not conclusive. The terms "Trade Regulations" in the title of Article X cover transit measures. The extensive enumeration of measures in the first sentence of Article X:1 reflects the drafters' intention to include a wide range of measures that potentially affect trade. Article X:1 refers to "requirements … affecting their transportation" with "their" relating to "products" as the French text makes clear: "le transport de ces produits". Moreover, in the specific context of Article X the terms "imports" can be reasonably interpreted as covering any goods that enter physically into the territory of the Member concerned, whether or not they are released for free circulation after being cleared through customs. Article X is in the nature of a horizontal provision laying down certain general requirements which apply always in addition to those stipulated elsewhere in the GATT with regard to the various types of trade measures mentioned in Article X(1). The cumulative application of Article V and X to regulations governing traffic in transit does not create any conflicts.

III. CONCLUSIONS

35. The EU hopes that these contributions will be helpful to the Panel.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ARTICLE V OF THE GATT 1994

1. Article V:2, First Sentence: "Freedom of Transit"

1. Article V:2, first sentence establishes freedom of transit for WTO Members. Japan understands Ukraine's ultimate claim to be that a measure that completely prohibits traffic in transit through the territory of a WTO Member will be *prima facie* inconsistent with the Article V:2 obligation to ensure freedom of transit via the routes most convenient for international transit.[1] Japan understands that a measure that blocks all access into the territory of a WTO Member would likely be inconsistent with Article V:2 unless the measure is justified on a basis other than Article V of the *General Agreement on Tariffs and Trade* ("GATT 1994").

2. Japan cautions, however, against an overly expansive view of the freedoms provided in Article V:2. Ukraine argues that the "passage [of goods and means of transport across a WTO Member's territory] must…be *free of any restriction or constraint.*"[2] Ukraine also argues that Article V:2 "precludes WTO Members from banning traffic in transit via the most convenient routes *or from otherwise restricting such traffic.*"[3] In this regard, Japan would like to clarify that Article V:2 of GATT 1994 does not imply unqualified, unrestricted access, but only ensures freedom of transit in traffic via the routes *most convenient* for international transit.[4] So long as a WTO Member ensures access through the "most convenient" routes through its territory, Article V:2 does not prohibit a WTO Member from otherwise restricting access with respect to traffic in transit.

2. Article V:2, First Sentence : "Routes Most Convenient"

3. Japan provides several observations on the interpretation of Article V:2, first sentence. First, as Ukraine recognizes, "[t]he requirement to ensure freedom of transit as regards traffic in transit … is qualified by the phrase 'via the routes most convenient for international transit'."[5] Japan agrees that the term "for" in the phrase "the routes most convenient for international transit" indicates that the routes must be most convenient in order for international transit to occur.[6]

4. Second, Japan notes that the text of Article V:2 providing for "*routes* most convenient," implies that there may be more than one route that must be made available for traffic in transit. However, even when there are more than one routes that are considered "most convenient," Japan does not agree with Ukraine that the first sentence of Article V:2 guarantees the transiting WTO Member a *choice* between such routes.[7]

5. Third, as regards the burden of proof, the general rule in WTO dispute settlement procedures is that the complainant is required to first make a *prima facie* case of its claim.[8] In this situation, the complainant is required to first make a *prima facie* case that the freedom of transit ensured under Article V:2, first sentence is violated by another Member's measure that fails to provide access to transit "via the routes most convenient for international transit." As part of making this *prima facie* case, it is Japan's view that the complainant must show that there is a more convenient route to which the complainant does not have access. A mere assertion that there is a "more convenient" route will not suffice to make this *prima facie* case. Once the complainant has identified other routes that it believes to be more convenient that the one(s) available to it, it is the WTO Members through

[1] Ukraine's First Written Submission, paras. 239-240.
[2] Ukraine's First Written Submission, paras. 207-210. (emphasis added.)
[3] Ukraine's First Written Submission, para. 222. (emphasis added.)
[4] *See, for example*, Panel Report, *Colombia – Ports of Entry,* para 7.401 and 7.414; Ukraine's First Written Submission, para. 211.
[5] Ukraine's First Written Submission, para. 211.
[6] Ukraine's First Written Submission, para. 213.
[7] *See* Ukraine's First Written Submission, para. 213.
[8] *See for example,* Appellate Body Reports, *US – Wool Shirts and Blouses,* pp. 13-14, and *EC – Hormones*, para 98.

whose territories transit occurs that are in the best position to provide an explanation as to why the routes proposed by the complainant are not "the routes most convenient for international transit."

6. Fourth, Japan notes that Article V:2 envisions *some* access through the territory of each WTO Member. Therefore, if a WTO Member does not allow freedom of transit through any routes in its territory, it is Japan's view that by establishing that the measure at issue does, in fact, block all access to the territory of a WTO Member including access "via the routes most convenient for international transit," the complaining Member would have met its *prima facie* burden. It is then up to the WTO Member whose territory the complaining Member seeks access to explain why its measure complies with its obligation under Article V:2.

7. Finally, the determination of whether a specific route is "most convenient" should take account of such objective factors as the means of transit, available routes, distances or costs. To that extent, Japan agrees that the WTO Member through whose territories transit occurs cannot decide the most convenient routes for international transit "unilaterally and subjectively."[9] In this regard, Japan agrees that a "[WTO] Member does not enjoy absolute discretion to decide what is the most convenient route for certain international transit."[10] Similarly, the question as to whether a Member across whose territory goods are transiting may require that transit from a neighbouring Member not proceed directly across their mutual border, but through another country, without violating Article V:2, first sentence, should be addressed on a case-by-case basis, taking into account these objective factors.

3. Article V:2, Second Sentence

8. In Japan's view, Ukraine errs to the extent it considers that the first sentence of Article V:2 articulates an overarching principle that is supported by the second sentence of Article V:2, such that a measure inconsistent with the second sentence entails a violation of the first sentence.[11] In Japan's view, the second sentence of Article V:2 of GATT 1994 has its own function and meaning independent from the first sentence of Article V:2.

9. As the panel in *Colombia—Ports of Entry* noted, "the second sentence [of Article V:2] complements and expands upon the obligation to extend freedom of transit[.]"[12] Article V:2, second sentence sets out WTO Members' obligation to accord freedom of transit "via the routes most convenient for international transit", regardless of the flag of vessels; the place of origin, departure, entry, exit or destination; or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

10. Japan agrees that what should be compared under Article V:2, second sentence is not limited to distinctions made in the treatment of traffic in transit based on the origins of the goods transiting, but also distinctions based on (i) the flag of vessels, (ii) the place of origin, departure, entry, exit or destination, or (iii) any circumstances relating to the ownership of goods, vessels or other means of transport.[13] In addition, it is the objective structure, design and operation of the measure, and not the subjective judgment of the Member imposing the measure at issue, which shall be examined to conclude whether there is any distinction made. Japan respectfully requests that the Panel carefully examine whether any comparison made under Article V:2, second sentence, accurately compares the treatment of traffic in transit based on the same criterion (*e.g.*, place of origin, departure, entry, exit or destination, etc.).

4. Relationship between Article V:2 and Other Paragraphs of Article V

11. Japan does not agree with Ukraine that paragraphs 3, 4, 5 and 6 of Article V of the GATT 1994 are a specific application of the basic obligation to guarantee freedom of transit in the first sentence of Article V:2 of the GATT 1994.[14] Specifically, Ukraine errs in arguing that "if a measure is found to be inconsistent with [paragraphs 3, 4, 5, 6 or 7 of Article V], by implication, that conclusion entails

[9] Ukraine's First Written Submission, para. 215.
[10] Ukraine's First Written Submission, para. 215.
[11] *See* Ukraine's First Written Submission, para. 262.
[12] Panel Report, *Colombia – Ports of Entry*, para. 7.397.
[13] Ukraine's First Written Submission, para. 269.
[14] *See* Ukraine's First Written Submission, para. 196.

that the measure is also inconsistent with the obligation to guarantee freedom of transit laid down in the first sentence of Article V:2."[15] In Japan's view, there is no basis to conclude that a violation of paragraphs 3-7 of Article V is sufficient "to conclude that there is also a violation of the first sentence of Article V:2."[16]

12. As the panel in *Colombia – Ports of Entry* stated, "Article V of the GATT 1994 … generally addresses matters related to 'freedom of transit' of goods. This includes protection from unnecessary restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4), and the extension of Most-Favoured-Nation (MFN) treatment to Members' goods which are 'traffic in transit' (via paragraphs 2 and 5) or 'have been in transit' (via paragraph 6)."[17] Thus, each paragraph includes separate transit requirements and obligations that must be met by each WTO Member, and a finding of non-conformity with any other paragraph of Article V does not necessarily result in non-conformity with Article V:2, first sentence.

II. ARTICLE XXI OF THE GATT 1994

13. Article XXI, paragraph (b) of the GATT 1994 allows WTO Members to derogate from their obligations under other provisions of the GATT 1994 when they consider it necessary to adopt measures to protect their essential security interests. Along with similar security exceptions clauses in the GATS and TRIPS Agreement,[18] GATT Article XXI is an extraordinary provision in that it recognizes the vital importance of WTO Members' essential security interests, and the fundamental nature of a Member's sovereign right to pursue such vital interests. This is reflected in the deferential language of Article XXI.

14. As an initial matter, Japan believes that consideration of Russia's Article XXI defense is within the Panel's terms of reference in this dispute. This is in contrast to the case involving the United States' trade embargo against Nicaragua in 1985, where the GATT panel was precluded from examining the validity of the United States' invocation of Article XXI of the General Agreement by its terms of reference.[19] The terms of reference adopted in that dispute placed strict limits on the panel's activities, stipulating that the panel could not examine or judge the validity of, or the motivation for, the invocation of Article XXI(b)(iii) by the United States.[20] The standard terms of reference, which were adopted by the Panel in the present dispute, contain no such restrictions.[21]

15. A proper interpretation of Article XXI of the GATT 1994 must begin with the ordinary meaning given to the terms of the treaty, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"). In this respect, Japan notes that Article XXI of the GATT 1994 does not contain qualifiers that expressly limit a Member's consideration in determining what actions are necessary to defend its essential security interests in the circumstances set out in the Article. This is clear from the use of the phrase "which it considers necessary" in the text of the Article, as well as the absence of any qualifying language limiting a Member's consideration, such as that found in the chapeau of Article XX.

16. That said, Japan also notes that Article 31 of the Vienna Convention requires treaties to be interpreted "in their context and in the light of its object and purpose." Therefore, the rights afforded to Members under Article XXI of the GATT 1994 must be viewed in light of the object and purpose of the GATT 1994, which is "the substantial reduction of tariffs and other barriers to trade" and "the elimination of discriminatory treatment in international commerce" as enshrined in its preamble. Japan's view is that the object and purpose of the GATT 1994, logically prohibits the invocation of Article XXI in a manner that frustrates the objective of the GATT 1994, including trade liberalization, without a justifiable reason. To interpret otherwise would defeat the object and purpose of the GATT 1994.

17. This view is bolstered by the preparatory work of the original Draft Charter in accordance with

[15] *See* Ukraine's First Written Submission, para. 198.
[16] *See* Ukraine's First Written Submission, para. 224.
[17] Panel Report, *Colombia – Ports of Entry*, para. 7.387.
[18] GATS Article XIV *bis*; TRIPS Agreement Article 73.
[19] L/6053 (unadopted), paras. 5.1-5.3.
[20] *Ibid.*
[21] WT/DS512/4 and WT/DS512/3.

Article 32 of the Vienna Convention, which provides for recourse to preparatory work of a treaty as a supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. Drafters noted the need to permit "measure which are needed purely for security reasons," but recognized the risk that, "under the guise of security, countries will put on measures which really have a commercial purpose."[22]

18. Indeed, the risk of abuse of Article XXI of the GATT 1994 has been widely acknowledged throughout the years of the GATT and WTO. This acknowledgement has been embodied by the Ministerial Declaration of November 1982, in which Members undertook "individually and jointly:… to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."[23] In addition, the Decision Concerning Article XXI of the General Agreement of 30 November 1982 established the procedural guidelines for the application of Article XXI of the GATT 1994 pending a decision on a formal interpretation of Article XXI.[24]

19. In Japan's view, in light of the object and purpose of the GATT 1994 and preparatory work of the Draft Charter as discussed above, the discretion accorded to the WTO Members in deciding the actions that they consider necessary to protect its essential security interests is not unbounded.

20. Despite these guiding principles, Japan is mindful of the disagreement among WTO Members on the interpretation of Article XXI of the GATT 1994 due to its far-reaching implications to the balance between the rights and obligations of WTO Members. As such, each instance in which Article XXI is invoked would impose undue burdens on the WTO dispute settlement system. Moreover, an invocation of Article XXI of the GATT 1994 would import non-economic matters into the WTO, for which the WTO was not designed.

21. Therefore, Japan considers that WTO Members should exercise considerable prudence in resorting to Article XXI of the GATT 1994. Before bringing a case or making a claim under Article XXI, Members should consider whether its action under the WTO dispute settlement procedures would be "fruitful" and contribute to "a positive solution to a dispute" pursuant to Article 7 of the DSU. It is also Japan's hope that the parties will exert every effort to seek a solution mutually acceptable to the parties in order to maintain the effective functioning of the WTO.

22. In the following, Japan presents its views on several principles which may guide the Panel in interpreting and applying Article XXI. First, in reviewing Russia's defense, the Panel should pay due regard to the crucial importance of national security interests to WTO Members' sovereignty, and grant appropriate deference to the Members' judgement as to the necessity of taking actions to protect their essential security interests. Japan considers that a Member invoking Article XXI(b) bears the burden of showing why its measures are justified by the provision, but will be given a degree of deference with respect to its judgement that its action falls under Article XXI(b).

23. Second, it should also be noted that Article XXI of the GATT 1994, including its subparagraph (b)(iii), carefully circumscribes the situations that would allow WTO Members to invoke a defense based on each Member's "essential security interests." Taking also into consideration the object and purpose of the GATT 1994 and the preparatory work of the Draft Charter, the discretion accorded to WTO Members in deciding the actions that are necessary to protect their essential security interests is not unbounded.

24. Third, in order to justify a measure pursuant to Article XXI(b)(iii), it is not sufficient to merely invoke the article. In Japan's view, the invoking Member is required to identify its essential security interests and explain why it considers the action "necessary for the protection of its essential security interests" under the introductory paragraph of Article XXI(b), as well as how the requirements under Article XXI(b) as a whole are met. The identification of the essential security interests needs to be specific enough to allow the Panel to assess whether there is a reasonable link or connection between the invoking Member's decision to take the action and the essential security interests identified by that Member.

25. Fourth, Japan notes that what is to be protected by the challenged measure is "*its* essential security interests" and not unqualified "essential security interests." Thus, whether the security

[22] EPCT/A/PV/33, p.20-21 and Corr.3.
[23] L/5424.
[24] L/5426.

interests are "essential" should be examined from the viewpoint of the Member taking the measure at issue, rather than that of any other Member.

26. Finally, Japan notes that Article XXI(a) instructs that a Member is not obligated to furnish any information the disclosure of which it considers contrary to its essential security interests. Whereas the disclosure of *some* information related to a Member's motivation of taking the action under Article XXI(b) may be understandably contrary to its essential security interests, it is probable that the invoking Member could discharge its burden of proof to make its Article XXI(b) claim without compromising such information.

27. In this regard, the Decision Concerning Article XXI of the General Agreement of 30 November 1982 (the "Decision") affirms the will of the WTO Members to ensure that they are informed "*to the fullest extent possible* of trade measures taken under Article XXI," even though Members are not required to disclose information contrary to their essential security interests pursuant to Article XXI(a).

28. Were Article XXI(a) to be construed to effectively exempt Members from their burden of making its *prima facie* case under Article XXI(b), it would run counter to the interpretation of Article XXI in light of the object and purpose of the GATT 1994 and preparatory work of the Draft Charter in accordance with Articles 31 and 32 of the Vienna Convention.

III. ARTICLE X OF THE GATT 1994

29. Japan understands that "a measure covered by Article V," which is adopted by a Member and includes certain elements that would regulate traffic and prohibit, restrict, or otherwise affect goods originating in or destined to that Member, can be subject to Article X as "a requirement, prohibition or restriction on imports or exports."

30. The text of Article V indicates that a measure on "traffic in transit" covered by that article may involve, among others, "warehousing" (paragraph 1), "change in the mode of transport" (paragraph 1), "charges for transportation" (paragraph 3), or charges "commensurate with administrative expenses entailed by transit or with the cost of services rendered" (paragraph 3). Similarly, Article X covers "[l]aws, regulations, judicial decisions and administrative rulings of general application" which affect imports or exports with respect to, e.g. their "transportation" or "warehousing inspection."

31. Therefore, Japan considers that measures of general application relating to "traffic in transit" that are covered under Article V can constitute "requirements, restrictions or prohibitions on imports or exports," or measures affecting the "distribution" or "transportation" of such imports or exports. These measures would therefore be subject to the obligations contained in Article X.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF MOLDOVA

I. INTRODUCTION

1. The dispute *Russia – Measures Concerning Traffic in Transit (DS512)* raises significant issues regarding the invocation and interpretation of Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (the GATT 1994)

2. The package of agreements accepted at the end of the Uruguay Round provides a carefully calibrated balance of rights and obligations. The WTO Agreements fully recognize the right of all WTO Members to avail themselves of exceptions to the WTO rules but requires them to do so within certain limits and based on the principle of good faith.

3. In addition, in the Republic of Moldova's view, the measures at issue in this dispute are inconsistent with several WTO obligations of the Russian Federation. By finding that the respondent's measures at issue are both in breach of the GATT Article V, Articles X:1, X:2, X:3 and paragraphs 1426, 1427 and 1428 of the Working Party Report of the Russian Federation and that these measures cannot be justified under the GATT Article XXI, this Panel can help to ensure that the necessary balance for the invocation of the national security exception is preserved. The Panel is to conduct an "objective assessment of the matter" as prescribed by the Dispute Settlement Understanding (DSU) Article 11.

4. Solid evidence is presented by Ukraine in this dispute showing that at least the following two trade-restrictive measures are being applied by the Russian Federation on transit of goods through its territory: (i) the 2016 general transit ban and other transit restrictions; and (ii) the 2016 product-specific transit ban and other transit restrictions. With the evidence submitted by Ukraine in its First Written Submission and additional evidence which the Panel may obtain in the course of these proceedings, we look forward to the Panel to establish the precise legal acts concerned in the case and their continued application. This is part of the Panel's duty to conduct an "objective assessment of the matter" as prescribed by the Dispute Settlement Understanding (DSU) Article 11.

5. The Republic of Moldova has traditionally used the most economic and efficient transit routes in this region in order to allow Moldovan products to compete in the final markets to which the Russian Federation restricts transit. The Republic of Moldova has received signals from its exporters regarding such measures restricting the free transit of their goods through the Russian territory including towards Kazakhstan and Kyrgyzstan. Both export destinations are very important to the Republic of Moldova. To exemplify, the exports of Moldovan wines alone to Kazakhstan represent 8,34% of its total exports.

6. The Republic of Moldova fails to understand how the exports of the Moldovan products which traditionally have been transported through the disputed Russian transit routes pose a threat to that country. It is therefore very important for the Panel in these proceedings to offer clarifications as to whether such negative economic impact can be justified by the respondent by mere reference to the Security Exception of GATT Article XXI.

II. LEGAL ARGUMENTS, PANEL JURISDICTION IN RESPECT OF ARTICLE XXI AND INTERPRETATION OF ARTICLE XXI

A. The jurisdiction of the WTO Panels over GATT Article XXI measures

7. The Republic of Moldova is concerned with some points made by the Russian Federation in its First Written Submission in this dispute. In particular, the Russian Federation alleges that "neither this Panel nor the WTO as an institution has a jurisdiction over" the matter at issue in this case.[1]

8. The Republic of Moldova is of the view that this Panel has jurisdiction over the case and that it should take the opportunity to clarify the limits of the GATT Article XXI Security Exceptions in these proceedings.

[1] First Written Submission by the Russian Federation, 18 October 2017, para 7.

9. In this case the Panel also possesses the necessary legal methods (what we consider justiciability) to consider and interpret Art. XXI of GATT in this particular situation and the transit restrictions imposed by the Russian Federation.

10. Therefore, the Republic of Moldova considers that the Panel has the legal power to examine this dispute and is the legally competent authority (has the jurisdiction) to use the legal methods (justiciability) in accordance with the provisions of the DSU, as well as the legal framework GATT 1994 to legally interpret the provisions of Article XXI of the GATT 1994, as well as Art. V, X of GATT 1994 invoked by Ukraine.

11. The Russian Federation seems to believe that the mere invocation of the GATT Article XXI (b)(iii)[2] prevents WTO panels from reviewing trade issues which would otherwise be WTO-inconsistent. The Republic of Moldova disagrees with this approach.

12. It is undisputed that WTO panels have jurisdiction to decide on claims under WTO covered agreements. Under Article 1.1, the DSU applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU]", i.e., the so-called WTO covered agreements.[3] The GATT Article XXI is a provision found in one of the WTO covered agreements. There is nothing in the GATT 1994 or the DSU excluding that provision from the jurisdiction of panels and the Appellate Body.

13. This jurisdiction was recognised at the Dispute Settlement Body (DSB) meeting of 21 March 2017, in which the DSB established a panel with the following terms of reference: *To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.*[4]

14. While WTO Members have the right to self-define what their essential security interests are and declare the necessity of appropriate protection, the WTO panels reserve the right to review whether WTO Members apply such WTO-inconsistent measures in good faith and in accordance with the terms laid down in GATT Article XXI. This reading also finds support in the WTO Agreement Article XIII:1 which states that the DSU, the multilateral agreements on trade in goods, GATS, and TRIPS (the covered agreements) "shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application. "At the time of its accession, the Russian Federation did not avail itself of this possibility.

B. The limits of the GATT Article XXI Security Exception

15. While clearly of the view that this Panel does not have jurisdiction over the matter in the case, the Russian Federation nonetheless invokes GATT Article XXI (b) (iii) in order to justify the alleged inconsistency of all of the measures at issue with the different WTO rules under which Ukraine has made claims in these proceedings.[5]

16. All WTO Members, including the Russian Federation, have the right to take measures to protect national security issues. Thus, while the Republic of Moldova does not contest that the protection of national security falling within the scope of the GATT Article XXI is a valid exception from the WTO rules, the mere invocation of this provision does not provide absolute rights to those invoking the provision. The examination of GATT Article XXI(b)(iii) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) confirms that the security exception is not totally self-judging.

17. In our view, the task of this Panel is to examine the limits of this provision. According to the Republic of Moldova, the limits of the sovereign discretion arising from the GATT Article XXI is set by: i) the general principle of good faith and ii) the fact that the burden of proof to justify a violation of a WTO provision lies with the defendant − that is the Russian Federation.

[2] Ibid, para 5.

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement (DSU).

[4] Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.

[5] First Written Submission by the Russian Federation, 18 October 2017, para 7 and para 33.

C. The principle of good faith

18. DSU Article 3.2 explicitly confirms that WTO covered agreements must be clarified "in accordance with customary rules of interpretation of public international law". There is wide agreement and WTO jurisprudence supporting the fact that this interpretative exercise should be done with reference to the VCLT. Article 31(3) of the VCLT, part of the rules of interpretation thus referred to, directs the WTO adjudicating bodies to seek guidance not only from the WTO treaty itself, but also of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", as well as "any relevant rules of international law applicable in the relations between the parties".

19. The WTO treaty thereby explicitly frames itself in the wider context of public international law, including other non-WTO treaties, customary international law and general principles of law. In this sense, the principle of good faith is perhaps the most important general principle of law, as it underpins many international legal rules. [6]

20. What the principle of good faith does is to require a party to a treaty to refrain from acting in a manner that would defeat the object and purpose of the treaty as a whole or that would put the treaty provision into question.[7]

21. In the context of the GATT Article XX General Exception the WTO panels and the Appellate Body (AB) have stressed that the good faith principle controls the exercise of rights by States, prohibits the abusive exercise of a State's rights, and enjoins the assertion of a right.[8] An abuse of right is said to occur when a State exercises its rights in such a way as to encroach on the rights of another State, and that the exercise "... is unreasonable, and pursued in an arbitrary manner, without due consideration of the legitimate expectations of the other State."[9] The WTO Panel in *Peru-Agricultural Products* further indicated that treaty right 'must be exercised bona fide, that is to say, reasonably'.[10]

22. An abusive exercise by a WTO Member of its own treaty right results in a breach of the treaty rights of another WTO Member. An interpretation according to good faith seeks to determine whether the intentions of the WTO Members are genuine and in accordance with the principle of good faith, the task of this Panel is to determine if, by applying restrictions on free transit, the Russian Federation has refrained from unfair conduct through which it is taking undue advantage of other WTO Members.

23. According to the Republic of Moldova, the principle of good faith should guide the Panel's process of finding an "objective assessment of the matter" in this dispute. In order to understand if the Russian Federation has acted in good faith in imposing the measures at issue, the Republic of Moldova submits that the Panel should seek to clarify the phrase" necessary for the protection of its essential security interests "in GATT Article XXI(b) as follows:

"necessary"

24. This Panel needs to assess whether the invoking member 'genuinely believes' that the measure taken is 'necessary' in order to protect its national security interests. In this context, this Panel may refer to the jurisprudence from the 'necessity test' of Article XX(a), (b) and (d), and consider the relevant factors, particularly the importance of the essential security interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. This should be complemented with an analysis of whether the measures at issue in this case are 'apt to make a material contribution to the achievement of its objective'.[11]

[6] Hersch Lauterpacht, International Law Vol. 1, (ed Elihu Lauterpacht, CUP 1970) 68; Malcolm N. Shaw, International Law, (6th edn, CUP 2008) 98; James Crawford, Brownlie's Principles of Public International Law, (8th edn, OUP 2012) 134.

[7] Panel Report, *United States–Continued Dumping and Subsidy Offset Act of 2000 (US–Byrd Amendment)*, WT/DS217/R, adopted 27 January 2003, para 7.64.

[8] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp Products)*, WT/DS58/AB/R, adopted 6 November 1998, para 158.

[9] Hersch Lauterpacht, *Oppenheim's International Law*, (8th ed, Longmans 1955) 263.

[10] Panel Report, *Peru–Additional Duty on Imports of Certain Agricultural Products (Peru–Agricultural Products)*, WT/DS457/R, adopted 27 November 2014, para 7.94.

[11] Panel Report, *China–Rare Earths*, para 7.146; *China–Raw Materials*, paras 7.480-92.

"essential security interests"

25. This Panel should seek to clarify if the measures at issue in this dispute protect 'essential security interests' under the GATT Article XXI(b)(iii). The word 'essential' indicates that general security may not suffice. The Republic of Moldova believes that 'essential security interests' within the range of 'security interests' must meet a higher standard that can be distinguished from other 'non-essential security interests'.

26. In our view this Panel should ask the Russian Federation, in addition to establishing the objective prerequisites in Article XXI(b) (iii) regarding the existence of an essential security interest, to demonstrate that any measure it has taken pursuant to this provision does not intentionally serve protectionist purposes.

27. The weighing and balancing exercise under the necessity analysis contemplates a determination as to whether a WTO-consistent alternative measure is reasonably available to the WTO Member imposing the measure.[12] In this process the Panel should determine what the right approach is to compare a regime which severely restricts the free transit of goods with a less trade-restrictive alternative measure. The Russian Federation needs to show that it 'genuinely believes' that the taking of the measures at issue and the resulting restrictions are proportionate responses to the protection of its "essential security interests". This would entail a minimum degree of proportionality between the security interests as taken and the impact of the transit restrictions applicable to several WTO Members using the transit routes at issue in this dispute.

28. Under the WTO framework, the Member invoking the national security exception under GATT Article XXI(b)(iii) is entitled to a high level of deference, but this deference is not absolute. According to the Republic of Moldova, the Panel is to review the necessity of the measures at issue.

D. The burden of proof

29. It is well-established that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[13] In light of the foregoing, this Panel should establish an appropriate mechanism by which it can effectively allocate the duty to present the facts and arguments in this case. The Republic of Moldova believes that it is the Russian Federation that bears the burden of proof in this dispute of showing that it has a valid GATT Article XXI justification for violations of the GATT Article V and the other provisions of the WTO covered agreements under which Ukraine has made claims in these proceedings.

30. In a case where the security exception is invoked by one of the parties to the dispute, it may be impossible for the complaining party to provide evidence to demonstrate that the 'motive' of the responding party who invokes the GATT Article XXI is actually purely commercial. The Russian Federation therefore must prove their case to the Panel's satisfaction in particular as regards the question of whether it has acted in good faith in applying the GATT Article XXI exception.

31. DSU Article 13 accords to WTO Panels ample and extensive authority to undertake and to control the process by which it informs itself of the relevant facts of a dispute. Thus, the Republic of Moldova would like to urge this Panel to play an active role in fact-finding as has been explicitly mandated in Article 13.1 of the DSU, under which a panel is given an independent investigative function. Consideration should also be given to the finding of the Appellate Body that 'a refusal to provide information requested by the panel lead to inferences being drawn about the inculpatory character of the information withheld'.[14] We find it necessary in this dispute for the Panel to actively intervene by seeking information evaluating and weighing the evidence, and carefully balancing the rights and obligations constructed by the WTO Agreement.

[12] See Panel Report, *European Communities − Measures Prohibiting the Importation and Marketing of Seal Products (EC−Seal)*, WT/DS400/R, adopted 18 June 2014, paras 7.636-39. Appellate Body Reports, EC−Seal, WT/DS400, paras 5.260-64.

[13] Ibid.

[14] Appellate Body Report, *Canada−Measures Affecting the Export of Civilian Aircraft (Canada−Aircraft)*, WT/DS70/AB/R, adopted 20 August 1999, para 204.

III. CONCLUSION

32. The Republic of Moldova is of the view that this Panel has jurisdiction over the case. The Panel is empowered to examine the invocation of the Russian Federation of Art. XXI(b)(iii) of the GATT 1994, and is the legally competent authority (has the jurisdiction) to use the legal methods (justiciability) in accordance with the provisions of the DSU, as well as the legal framework GATT 1994 to legally interpret the provisions of Article XXI of the GATT 1994, as well as Art. V, X of GATT 1994 invoked by Ukraine.

33. The Republic of Moldova does not contest that the protection of national security falling within the scope of the GATT Article XXI is a valid exception from the WTO rules, but the mere invocation of this provision does not provide absolute rights to those invoking the provision. The examination of GATT Article XXI(b)(iii) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) confirms that the security exception is not totally self-judging.

34. The limits of the sovereign discretion arising from the GATT Article XXI is set by: i) the general principle of good faith and ii) the fact that the burden of proof to justify a violation of a WTO provision lies with the defendant − that is the Russian Federation.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

A. Introduction

1. This dispute raises novel issues regarding the interpretation of Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The decision on the interpretation of Article XXI of the GATT 1994 would have a direct impact on the interpretation of Article XIV*bis* of the General Agreement on Trade in Services as well as potentially broader implications for the multilateral trading system. As a WTO Member who attaches great importance to upholding an open and predictable trading environment, and as the world 's largest transhipment hub and second busiest port, Singapore has great interest in the interpretation and application of Article XXI.

2. From the outset, it is emphasized that Singapore is not commenting on the merits of the claims and the defences raised by the parties to this dispute. This issue fundamentally concerns the legal interpretation of GATT treaty language. Singapore 's third party intervention is thus strictly limited to the underlying approach and principles in the interpretation of Article XXI.

3. Singapore is concerned with maintaining a rules-based multilateral trading system and a disciplined application of the covered agreements. This entails the need to guard against any spurious reliance on Article XXI. At the same time, Singapore recognizes the fundamental and critical right of every WTO Member to protect itself in the face of threats to its essential security interests.

4. As such, the Panel must strike an appropriate balance between maintaining the integrity of a rules-based multilateral trading system on the one hand, and preserving the ability of Members to protect their essential security interests on the other. The appropriate balance that should be struck will be the subject of Singapore 's third party intervention.

5. Singapore will first address the issue of whether the Panel has *jurisdiction* in respect of Article XXI before turning next, to the *interpretation* of Article XXI(b), in particular Article XXI(b)(iii).

6. As this issue fundamentally involves an exercise in treaty interpretation, we are guided by the principles of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties[1]. This reflects a customary rule of treaty interpretation[2] that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

B. Whether the Panel has jurisdiction in respect of Article XXI

7. On the question of whether the Panel has jurisdiction to consider a WTO Member 's invocation of Article XXI, Singapore joins several other third parties to this dispute in responding in the affirmative[3].

8. The Panel 's terms of reference are set out in Article 7(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which provides for the Panel to "examine, in the light of the relevant provisions [of the agreement cited by the parties to the dispute] the matter referred to the DSB." [4] Further, Article 7(2) of the DSU provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The plain and ordinary meaning of the DSU 's provisions do not speak of any exceptions to the

[1] Article 31(1) The Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[2] Appellate Body Report, *EC – Chicken Cuts*, para. 192; International Court of Justice, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8.

[3] Australia 's third party submission, para. 10; the European Union 's third party submission, para. 21; Japan 's third party submission, para. 30; and Moldova 's third party submission, para. 16.

[4] Constitution of the Panel Established at the Request of Ukraine, WT/DS512/4.

application of Articles 7(1) and 7(2). If the intention of the negotiators was for the Panel to have no jurisdiction to examine a dispute once a Member invokes Article XXI, one would have expected such an important and significant matter to be expressly provided for.

9. This interpretation is supported by the jurisprudence of the Appellate Body. The Appellate Body has interpreted the phrase "shall address" in Article 7(2) of the DSU as indicating that panels are "required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[5] This means that the Panel must address the relevant provisions to the dispute at hand, including Article XXI(b).

10. It is therefore clear that the Panel does have jurisdiction over any Member 's invocation of Article XXI in WTO dispute proceedings, subject to certain parameters which are set out next.

C. The interpretation of Article XXI(b), in particular Article XXI(b)(iii) – the applicable test

11. As regards the test that the Panel should apply in the interpretation of Article XXI(b), in particular, Article XXI(b)(iii), Singapore wishes to highlight three points. Article XXI(b) provides as follows:

> 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;
> ...

12. First, the word "it" in the phrase "it considers necessary" in Article XXI(b) clearly and unambiguously refers to a "contracting party". On a plain and ordinary reading, the focus of any scrutiny therefore has to be whether the Member invoking the exception considers the action to be necessary. This key phrase has been deliberately drafted in this manner and must be given effect to.

13. This points to the self-judging nature of the assessment in Article XXI(b) and indicates that a WTO Member is allowed to determine with a significant degree of subjectivity what action "it considers necessary" to protect "its essential security interests". This would mean that a WTO Member has wide latitude to determine: (a) the action taken for the protection of its essential security interests, including the nature, scope and duration of the measure; and (b) the necessity of the measure.

14. This is to be contrasted with the text in Article XX of the GATT 1994, which does not contain the phrase "*it considers* necessary" (emphasis added). Unlike Article XXI(b), the necessity of the measure taken under Article XX is capable of objective determination. In light of the ordinary meaning of Article XXI(b), Singapore does not agree with an interpretation which seeks to apply the necessity test developed under Article XX to Article XXI(b). We also have doubts as to the applicability of the two-tiered analytical approach in the evaluation of an Article XX general exception to the Article XXI security exceptions.

15. Second, the nature of the matters addressed by Article XXI(b) and consequently the context of this exception cannot be overlooked. Every Member has the sovereign right to determine its own security interests and threats. Essential security interests are likely to vary depending on each Member 's unique circumstances. Following from this, we would caution against attempts to frame a prescriptive scope and content to the phrase "essential security interests". As for the assessment of threats to the essential security interests of a WTO Member and the necessary measures in response, this assessment involves judgement on the part of that Member and is dependent on the particular context and circumstances of the Member concerned. Further, the particular measure that a Member has to take to deal with the threat and to protect its essential security interests, may not be similar to the measure that needs to be taken by another Member in response to the same type of threat.

[5] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

16. Moreover, in arriving at this judgement, every Member, as the guardian and protector of its own essential security, has to a larger or lesser extent in every case, make determinations of the security threats, sometimes under the most urgent circumstances, relying on information the disclosure of which may itself prejudice the security interest of the Member or other Members and undermine the very purpose of Article XXI(b). Therefore, there is necessarily a degree of subjectivity in this exercise, and an accompanying diversity of assessments that has to be respected.

17. Third, there are many areas in the WTO regime where some margin of appreciation is incorporated. We observe that in applying the standard of review in Article 11 of the DSU, panels and the Appellate Body have granted considerable deference to the decisions of Members, particularly in a Member 's assessment of the appropriate level of protection and the chosen level of protection. For example, in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Appellate Body has recognized that "[t]he determination of the appropriate level of protection… is a *prerogative* of the Member concerned and not a panel or of the Appellate Body" (emphasis original)[6]. Additionally, in relation to the necessity of a measure taken for the protection of health, the Appellate Body has stated that "… it is undisputed that WTO Members have the right to determine the level of health that they consider appropriate in a given situation."[7]

18. None of these provisions come anywhere close to being as express and definitive with respect to self-judgment as Article XXI(b). It then follows that, *a fortiori*, a higher level of deference should be accorded to the WTO Member 's chosen level of protection, assessment of risk and of the necessity of a measure taken for the protection of its essential security interests. Accordingly, a significant margin of appreciation should be accorded to WTO Members in their assessment of the same.

19. Having laid out these three points, Singapore recognizes that Article XXI(b) should not be read as giving a WTO Member entirely unfettered discretion in invoking this exception. For Article XXI(b) to be meaningful, a Member is expected to act in accordance with the standard of good faith (*pacta sunt servanda*) as set out in Article 26 of the Vienna Convention on the Law of Treaties and with the general international law notion of abuse of rights (*abus de droit*). The principle of good faith and the doctrine of abuse of rights have been recognized by the Appellate Body, which has held that Members must abide by their treaty obligations in good faith[8] and that the doctrine of abuse of rights is an application of the general principle of good faith[9].

20. Singapore submits that in the context of Article XXI(b), this standard is met when a Member in good faith, albeit subjectively, considers based on the information available to that Member, that: (a) there is a threat to its essential security interest; and (b) its chosen action is necessary for the protection of that essential security interest (i.e. that there is a nexus between the measure taken and the essential security interests). Such an approach appropriately balances the subjective self-judging nature of Article XXI(b) with the need to ensure that Article XXI is not used spuriously to justify measures which are in reality motivated solely for economic or trade restrictive purposes or other purposes which are unrelated to the protection of its essential security interests. Such a lack of good faith may in turn, be inferred from the facts.

21. Even if the Panel is inclined to conduct a more intrusive examination of a Member 's invocation of Article XXI(b), we would urge the Panel to confine this to an examination of whether the disputed measure was implemented in a non-capricious manner, rather than conducting an examination that in reality approximates a substantive review.

22. In respect of Article XXI(b)(iii) in particular, the determination of whether an "emergency in international relations" exists is inherently subjective, and takes into account, among others, the invoking Member 's particular state of relations with other Member(s) and the wider international community, the pressing needs of the moment and the context in which such needs arise. Furthermore, the highly subjective nature of the sensitivities involved in the Members ' determinations of security threats which has been set out above, are equally applicable to a determination of whether an "emergency in international relations" exists.

[6] Appellate Body Report, *Australia − Salmon*, para. 199.
[7] Appellate Body Report, *EC − Asbestos*, para. 168.
[8] Appellate Body Report, *EC − Sardines*, para. 278; Appellate Body Report, *US − FSC*, para. 166.
[9] Appellate Body Report, *US − Shrimp*, para. 158.

D. Conclusion

23. In conclusion, Singapore accepts that the Panel has jurisdiction to consider a WTO Member 's invocation of Article XXI. We have sought to set out the policy, logic and textual basis underpinning the legal interpretation of Article XXI(b) as a provision that permits a WTO Member to take measures that it subjectively considers to be necessary to protect its essential security interests. In this process, a significant margin of appreciation should be accorded to WTO Members in their assessment of the same.

24. However, this does not mean that WTO Members have unfettered discretion to invoke this exception spuriously. A WTO Member is expected to act in accordance with the standard of good faith should it wish to invoke this exception. In Singapore 's view, this approach is what is required by the language of Article XXI(b) which reflects the balance that has been struck between maintaining the integrity of a rules-based multilateral trading system and preserving the ability of Members to protect their essential security interests.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY*

I. INTRODUCTION

Mr. Chairman, distinguished Members of the Panel,

1. Turkey appreciates the opportunity to present this Oral Statement as a Third Party in the current proceedings. Turkey would like to note that it will not present any opinion on the specific factual context of this dispute and takes no position whatsoever as to the allegations and defense presented by the parties on whether the specific measure at issue is consistent or inconsistent to the subject provisions of the WTO Agreements.

2. Turkey is aware of the Russian Federation's objection regarding the Panel's and the WTO's jurisdiction over the matter at issue in this dispute. Thus, in the followings, Turkey will briefly share its views with regard to Article XXI of the General Agreement on Tariffs and Trade (GATT 1994). It will then express its opinion on some systemic issues regarding the interpretation of the relevant paragraphs of Article V of the GATT 1994, to be taken into consideration in the event the Panel decides that it has jurisdiction over the matter before it.

II. ARTICLE XXI OF THE GATT

3. First and foremost, Turkey recognizes that "national security concerns" of the WTO Members are protected under Article XXI of the GATT, allowing them to take measures that would otherwise be in breach of their GATT obligations. Moreover, it is a fact that nearly almost all of the bilateral, regional or multilateral agreements provide provisions, generally structured based on Article XXI of the GATT, that allow governments to protect their national security interests that are in conflict with free trade rules. In fact, Article XIV bis of the GATS and Article 73 of the TRIPS Agreement contain similar provisions.

4. Nevertheless, as of yet, application and interpretation of the security exception stipulated in Article XXI of the GATT has not been addressed by a Panel and Appellate Body. Although Article GATT XXI of the GATT 1947 has been invoked several times by the Contracting Parties to justify some of their measures, and Panels were established for some of them, no clear answers have been given to the following two questions: "Does a Panel have jurisdiction to examine a case involving an Article XXI invocation?" and "Is the interpretation of Article XXI reserved entirely to the Member invoking it?" In this context, answers of the Panel of this dispute are vital and will have many systemic effects on WTO legal system.

5. Within the context of this dispute, Article XXI of the GATT, in relevant parts, states that "[n]othing 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" (emphasis added)

6. The wording of Article XXI (b), especially the use of "which it considers necessary", gives the impression that the subjective assessment of the country taking action for the protection of its essential security interests is in the foreground. Furthermore, Article XXI does not contain an expression that is similar to the *chapeau* of Article XX of the GATT 1994.

7. Therefore, in Turkey's view, to a very large extent, Article XXI leaves the determination of which measure is "necessary for the protection of its essential security interests" to the judgement of the country concerned. Nonetheless, Turkey also considers that judgement of the Member, taking action for the protection of its essential security interests, is not unqualified. Turkey would like to underline that the term "security interests" is qualified with the term "essential", which at

* Turkey requested that its oral statement serve as its executive summary.

least, in Turkey's view, intends to draw some boundary and prevent abuse of the power to take commercial measure by sheltering it behind the security exception.

8. With regard to the legal standard that should be applied to the examination of Article XXI invocation, Turkey is of the view that the Panel should take guidance in the steps that have been applied to other exception rules, such as the general exception rules contained in Article XX of the GATT. In this sense, in case of a dispute between two Members, the complainant Member should first prove that the measure is *prima facie* inconsistent with the relevant provisions of the GATT, then the defendant Member should put forward its arguments, including the argument that the measure it took can be justified under the security exception stipulated in Article XXI of the GATT. The Panel, however, in reviewing GATT Article XXI, should consider the large margin of discretion of the Member, invoking it.

III. ARTICLE V OF THE GATT 1994

Mr. Chairman, distinguished Members of the Panel,

9. From now on, Turkey would like to express its view with regard to the interpretation of relevant paragraphs of Article V.

10. Article V:1 defines the term of "traffic in transit" covering not only the goods but also vessels and other means of transport, whose journey begin and terminate beyond the frontier of the contracting party across whose territory the traffic passes. Turkey agrees with the Panel in *Colombia − Ports of Entry* that "the definition of "traffic in transit" provided in Article V:1 seems sufficiently clear on its face" .

11. Given the clear wording of the first paragraph and in light of Panel's understanding in *Colombia − Ports of Entry*, Turkey would like to emphasize four points with regard to the definition of the term "traffic in transit". First, Article V:1 defines journeys which begin outside the frontier of a WTO Member and terminate after crossing the country as "transit traffic". Accordingly, beginning or ending of a journey from or at the territory of a country that is a member or a non-member of the WTO, has no significance in the definition of "traffic in transit". Second, definition of "traffic in transit" covers not only the transported goods but also the vessels and other means of transport. Third, the conduct of procedures such as warehousing, change in the mode of transport and trans-shipment do not change the "transit" status of the good or the vehicle. Fourth, definition in the first paragraph of Article V informs the scope of obligations under the following paragraphs of Article V. Therefore, in interpreting the other paragraphs of the Article V, definition in the first paragraph should always to be taken into account.

12. Concerning freedom of transit, Article V:2 provides two substantive obligations in the first and second sentences, which are in support of each other. While first sentence requires transit traffic to be conducted freely via the routes most convenient for international transit, second sentence prohibits from making distinction based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

13. With regard to first sentence of Article V:2, Turkey notes that there is no definition of the key term "freedom of transit" in the text itself. Nevertheless, Turkey considers that qualification of the word "transit" with "freedom" necessitates a purposeful interpretation, subject only to the specific qualifications set out in Article V itself. Indeed the Panel in *Colombia − Ports of Entry* interpreted the first sentence of the Article V:2 requiring "unrestricted access" to the most convenient routes for the passage of goods in international transit.

14. It is worth noting that first sentence of Article V:2 also provides that transit passages should be achieved through the most appropriate routes. The text uses the term "routes" in plural form, which suggests that there can be more routes appropriate for international transit. Nevertheless, forcing the transporters to use of long and costly routes or use of a different mode of transport will constitute contradiction with Article V.

15. Regarding the second sentence of Article V:2; Turkey is of the view that, this sentence provides equal treatment obligation, which has a wider scope of application compared to MFN obligation.

Thus, in Turkey's understanding, the transit WTO Member should provide equal access to transit traffic for the internationally transported goods as well as the vessels of the other WTO Members. In other words, any kind of distinction not only among the WTO Members, but also between a WTO Member and the transit WTO Member would be inconsistent with this sentence. For greater clarity, Turkey would like to emphasize that obligation in this sentence applies only to the goods and vessels in transit, i.e. journeys beginning and terminating beyond the transit country. However, whereas vessels carrying domestic and imported goods within the country are out of the scope of this sentence, vessels registered in the transit country, but taking its load from a different country and transiting the country, are in the scope of this sentence.

16. With regard to Article V:3, Turkey notes that this provision brings an important limitation on freedom of transit. Indeed, Article V:3 gives permission to the transit WTO Member to require the transit vehicles to enter from the proper customs house. However, this right is not unfettered and should be read together with second paragraph of Article V. In fact, Article V:3 limits the right to require the transit vehicles to enter from the proper custom house in the event where it causes unnecessary delays. In other words, if the right to request transit vehicles to enter from the proper customs house is used in way to prolong or restrict the free transit passages of the goods and the vessels, this measure would be inconsistent with Article V.

17. Another limitation stated in Article V:3 relates to fees. Naturally, transit country incurs some expenses because of the transit traffic, such as maintenance and repair costs of roads, highways, railways and ports etc. Thus, in Turkey's view, Article V:3 allows transit country to require the users of those facilities to meet some costs associated with those expenses. However right to collect fees and charges from the transit traffic is not unlimited.

18. First, as Article V:3 clearly states, transit vehicles and their load cannot be subject to any kind of financial obligation which can be regarded as a customs duty or a transit duty. Second, as the Trade Facilitation Agreement, which constitutes a relevant context, explains in detail, traffic in transit shall also not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered. In other words, any administrative expense and service fee regarding the services rendered for transit vehicles and their loads should commensurate with the expenses and the services rendered. Thus, fees and charges that are not related or proportional with the expenses and the services rendered would be inconsistent with Article V:3.

19. In addition Article V:4 requires that charges and regulations must be reasonable. According to Article V:4, all charges and other restrictive regulations that are allowed to be implemented within the scope of Article V:3 shall be reasonable, taking the conditions of traffic into consideration. Turkey believes that provided that they are applied in an objective and impartial manner, regulations restricting passages in residential areas or in weekends, which are applied to local and foreign carriers similarly would be reasonable. However, Turkey believes that rate discrimination or passage restrictions that are not applied in an objective and impartial manner fall aside from these reasonable charges and regulations.

20. Lastly, Article V:5 provides an MFN obligation, with respect to all charges, regulations and formalities in connection with transit. Ad Note to paragraph 5 further states that "with regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions". Turkey considers that Article V:5 provides equal conditions of competition between like products being transported on the same route under like conditions. Thus, Turkey believes that in interpreting this paragraph, the Panel should consider the interpretation of Article I of the GATT, as it provides a useful shed lights.

IV. CONCLUSION

Mr. Chairman, distinguished Members of the Panel,

21. This concludes Turkey's oral statement. Turkey thanks once again the Panel for the time and attention and stands ready to answer any questions that you might have.

ANNEX D-10

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY ORAL STATEMENT

I. INVOCATION OF ARTICLE XXI IS SELF-JUDGING AND NOT SUBJECT TO REVIEW

1. Article XXI of the GATT 1994, in relevant part, states that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations[.]" On its face, the text establishes two crucial points: first, nothing in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest; and second, the action necessary for the protection of its essential security interests is that "which it considers necessary for" such protection. That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens.

2. The self-judging nature of Article XXI is established through use of the crucial phrase: "which it considers necessary for the protection of its essential security interests." The ordinary meaning of "considers" is "regard (someone or something) as having a specified quality" or "believe; think". The "specified quality" for the action is that it is "necessary for" the protection of a Member's essential security. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("considers") an action as having the quality of being necessary.

3. The context of Article XXI(b)(iii) supports this understanding. First, the phrase "which it considers" is present in Article XXI(a) but not in Article XXI(c). Its use in Articles XXI(a) and XXI(b) highlights that, under these two provisions, it is the judgment of the Member that controls. The use of "which it considers" in Article XXI(b) should be given meaning and should not be reduced to inutility.

4. Second, the context provided by Article XX supports this understanding. This Article sets out "general exceptions", and a number of subparagraphs relate to whether an action is "necessary" for some listed objective. In none of these subparagraphs is the phrase "which it considers" used to introduce "necessary". It is also notable that the chapeau of Article XX subjects application of a measure qualifying as "necessary" under a subparagraph to a further requirement of, essentially, non-discrimination. No such qualification, which requires review of a Member's action, is present in Article XXI.

5. Third, the use of the phrase "it considers" in the GATT 1994 and other provisions of the WTO Agreement is used when the judgment resides in the named actor. Such provisions envision that a Member, a panel, the Appellate Body, or another entity takes an action where it "considers" that a situation arises. In each of these provisions, the judgment of whether a situation arises is left to the discretion of the named actor.

6. By way of contrast, and further context, we note at least two WTO provisions in which the judgment of the named actor is expressly subject to review through dispute settlement. Article 26.1 of the DSU permits non-violation complaints to be brought under the DSU, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party: "Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following …". Thus, in this provision, Members explicitly agreed that "where … [a] party considers … that" is not enough, and they subjected the non-violation complaint to the additional check that "a panel or the Appellate Body determines that" the case is in fact a non-violation situation described in GATT 1994 Article XXIII:1(b). A similar limitation – that a "party considers and a panel determines that" – was agreed in DSU Article 26.2 for situation complaints described in GATT 1994 Article XXIII:1(c).

7. This context is highly instructive. No such review of a Member's judgment is set out in Article XXI, which only states "which it [a Member] considers necessary for the protection of its essential security interests". In agreeing to GATT 1994, Members could have subjected a Member's essential security judgment to an additional check through a similar phrase as in DSU Articles 26.1 and 26.2 – "and a panel [or the Appellate Body] determines that". But Members did not agree to this language in Article XXI. Accordingly, they did not agree to subject a Member's essential security judgment to review.

8. Russia's invocation of Article XXI did not occur in the DSB or prior to establishment of this Panel. The DSB established this Panel with standard terms of reference to examine the matter raised by Ukraine. However, the dispute is non-justiciable in the sense that the Panel cannot make findings on Russia's invocation, other than to conclude that Article XXI has been invoked.

9. This outcome is fully consistent with the Panel's terms of reference and the DSU. To recall, under Article 7.1, the Panel is charged with examining the matter raised by Ukraine "and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Similarly, DSU Article 11 calls for the Panel to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." But, were the Panel to make findings on Ukraine's claims in this dispute, that would be contrary to its terms of reference and Article 11. This is because such findings "will [not] assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements." No recommendation under DSU Article 19.1 is possible in this dispute because no antecedent finding that a measure is inconsistent with a covered agreement is possible, given the invocation of Article XXI.

10. In this way, the Panel will have "address[ed] the relevant provisions in any covered agreements cited by the parties to the disputes," consistently with DSU Article 7.2. It is erroneous to consider that to "address" a provision means that it is necessary for a Panel or the Appellate Body to make "findings" under that provision. Were this not so, each exercise of judicial economy by a panel or the Appellate Body would breach either DSU Article 7.2 or DSU Article 17.12.

II. THIS INTERPRETATION IS CONSISTENT WITH MEMBERS' HISTORICAL UNDERSTANDING OF ESSENTIAL SECURITY

11. Shortly after the GATT 1947 was concluded, a dispute arose between Czechoslovakia and the United States concerning export licenses that Czechoslovakia claimed the United States was withholding with respect to certain goods in a discriminatory manner. Czechoslovakia requested a decision under Article XXIII whether the United States had failed to carry out its obligations under Article I of the GATT 1947. The United States responded by invoking Article XXI.

12. In addressing the request from Czechoslovakia, it was commented that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security" and that "the Chairman … was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Article[] XXI which embodied exceptions to the general rule contained in Article I."

13. Based on this shared view, and upon a vote with only Czechoslovakia dissenting, the CONTRACTING PARTIES held that the United States had not failed to carry out its obligations under the Agreement. This early GATT action confirms the understanding of Article XXI as a self-judging exception to the general applicability of the other articles in the GATT.

14. In 1982, the European Communities and its member states, Canada, and Australia, spoke in the GATT Council to justify their application of trade restrictions for non-economic reasons against certain imports. The representative of the European Communities stated that it and its member states took these measures "on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights."

15. In the same Council discussion, the representative of Canada stated that "Canada's sovereign action was to be seen as a political response to a political issue" and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.

16. Expressing the same view, the representative of Australia stated that "the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification."

17. In that same Council discussion, the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment." Thus, the U.S. understanding of the security exemption in Article XXI has been consistent.

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

18. General U.S. Answer to Questions from the Panel: As the Panel is aware, the United States considers that the text and negotiating history of GATT 1994 Article XXI, as well as its place within the broader WTO framework, indicate that this provision is non-justiciable. That is, the text leaves its invocation to the judgment of a Member through the phrase "that it considers essential". A Member's judgment as to any element of this invocation is therefore not capable of findings by a panel. This being the case, the Panel would carry out its mandate, consistent with the terms of reference and the DSU, by acknowledging that Russia has invoked Article XXI and, on this basis, concluding that it cannot make findings as to whether Russia's measures are consistent with its WTO obligations.

19. In December 1945, the United States proposed the establishment of an International Trade Organization of the United Nations for the purpose of administering commercial relations between trading partners in accordance with rules set forth in a Charter for the Organization. The Draft Charter proposed by the United States the following year included two articles containing exceptions to certain provisions of the Charter. The articles, respectively and in relevant part, read as follows:

> Article 32 (General Exceptions to Chapter IV):
>
> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures …
>
> (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.
>
> Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):
>
> None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

20. Notably, these provisions as originally drafted do not appear to be self-judging. First, they lacked the key phrase that appears in the current text of Article XXI regarding action by a Member that "it considers necessary for" the protection of its essential security interests. Second, the essential security exception set out in Article 32 was one of twelve exceptions, several of which later formed the basis for GATT 1994 Article XX.

21. In March 1947, a general exception to Chapter V of the Draft Charter was put forward in Article XX (cf. Article 37 of the Charter). The proposed text read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

> international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …
>
> (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.

22. The chapeau of this provision on general exceptions and a number of the subparagraphs are identical to what would become Article XX in the GATT 1994. With its proviso, the chapeau contemplated review by a panel so that the exceptions would not be applied to discriminate unfairly. As the subparagraphs corresponding to essential security were included here together with other exceptions, and therefore were also subject to the proviso in the chapeau, this too suggests that the drafters did not, at this time, view the essential security exception in subparagraph (e) as self-judging.

23. On July 4, 1947, the United States proposed suggestions regarding the arrangement of the Charter as a whole, including the addition of a new Chapter VIII, entitled "Miscellaneous," and the placement in this new chapter of the proposed General Exceptions to the Charter as a whole. In this proposal, the United States also proposed additional text to make the self-judging nature of these exceptions apparent. Draft Article 94 stated:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of *which it considers contrary to* its essential security interests, or to prevent any Member from taking any action *which it may consider to be necessary to* such interests: …
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;

24. For the first time in the drafting of the general exceptions, the text now referenced what a Member considered to be necessary − but this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interest. The drafting history thus shows a deliberate textual distinction drawn between the self-judging nature of general exceptions pertaining to essential security and those related to other interests that, unlike the removal of the security-based exceptions referenced above, were retained in Article 37.

25. Regarding the scope of application of the exception, at a meeting of the negotiating committee in 1947, the delegate from the Netherlands requested clarification on the meaning of the "essential security interests" of a Member, which the delegate suggested could represent "a very big loophole in the whole Charter." Responding to these concerns, the delegate from the United States explained that the exception would not "permit anything under the sun" and that the limitation on actions not consistent with the Charter related to the time in which such actions would be taken − *i.e.*, "in time of war or other emergency in international relations." The delegate suggested that there must be some latitude for security measures, and that it was a question of balance. In situations such as times of war, however, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

26. Moreover, "in defence of the text," the Chairman recalled the context of the exception as part of the Charter of the ITO, and that in that context "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by the Netherlands delegate. Therefore, the delegates and the Chairman recognized that the security exceptions would be self-judging and that no formal review of a Member's invocation of the exceptions could be requested.

27. During the same meeting, the Chairman noted that the question arose whether "we are in agreement that these clauses [on national security] should not provide for any means of redress". In response, the U.S. delegate noted that "[i]t is true that *an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter*; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article

35 to this or any other article." The U.S. delegate noted that Article 35(2) permitted recourse to its procedure "whether or not [a measure] conflicts with the terms of this Charter." Therefore, the negotiating history again demonstrates the negotiators understood that the essential security exception was "so wide in its coverage" that it was not justiciable; and that while the delegates considered that a claim for nullification or impairment "whether or not a measure conflicts" with the agreement might be available, they were clear that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.

28. The drafting history outlined above shows that the self-judging nature of the security exception in what was to become Article XXI was an intentional choice of the CONTRACTING PARTIES. In the course of the negotiation, the drafters continued to revise the general exception applicable to essential security, and agreed to separate it from the other exceptions so as to apply more broadly to the Charter as a whole. In so doing, they also agreed to the current formulation of the chapeau of Article XXI, which states that the exception would apply when a Member is taking "any action which it considers necessary for" the protection of its essential security interests. Therefore, both the text, in context, and the drafting history of Article XXI of the GATT 1994, confirm that a Member's invocation of its essential security interests in defence of an action "taken in time of war or other emergency in international relations" is self-judging and not justiciable by a dispute settlement panel.

29. Response to Question 1: We have used the term "jurisdiction" to refer to the ability of a Panel or the Appellate Body, under the terms of reference set by the DSB pursuant to the DSU, to organize and hear a dispute from a Member, including receiving submissions from the parties and third-parties. We have used the term "justiciability" to refer to the ability of the Panel or Appellate Body to make findings and provide a recommendation to the DSB.

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ANNEX E

INTERIM REVIEW SECTION

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the arguments made at the interim review stage. The Panel has modified certain aspects of the Report in the light of the parties' comments where the Panel considered it appropriate, as explained below. In addition, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report, or to correct typographical and other non-substantive errors, including but not limited to those identified by the parties.

1.2. As a result of the changes, the numbering of the footnotes in the final Report has changed from the Interim Report. References to Section headings, paragraphs numbers and footnotes in this Annex relate to the Final Report, unless otherwise specified.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 General exchange between the parties regarding the characterization of the events of 2014 and subsequently

2.1. Russia requests the Panel to refrain from taking any position regarding certain events that occurred in 2014 by "qualifying" them using terms such as "annexation" or "temporary occupation". Russia strongly opposes the use of these terms by the Panel, as the Panel's qualification of the relevant events, and considers that such terms are used by Ukraine. Russia sets forth, in four paragraphs of its comments on interim review, Russia's own characterization of those events.[1] Russia then requests specific changes to paragraphs 7.122, 7.137 and 7.144 of the Report.[2]

2.2. Ukraine strongly objects to what it alleges is Russia's use of the interim review stage of these proceedings to challenge the territorial integrity of Ukraine within its internationally recognized borders and to promote Russia's territorial claims over the Autonomous Republic of Crimea and the City of Sevastopol. In particular, Ukraine considers that paragraphs 5-10 of Russia's request for review of the interim report in essence ask the Panel to modify its interim report because certain actions invoked by Russia in its request were alleged by Russia to have been "carried out in full compliance with international law" and because "the situation in question cannot be qualified as 'internationally recognized armed conflict'".[3] Ukraine requests that, in light of these observations, and in particular UN General Assembly Resolution No. 68/262 of 27 March 2014 (Exhibit UKR-89), the Panel not give any effect to paragraphs 5-10 of Russia's request for review of the interim report.

2.3. The Panel notes that Russia has not pointed to any places in the interim report where the Panel has in fact characterized the events of 2014 using terms such as "annexation" or "temporary occupation". Such terms appear in the Report in quotation marks to clearly signify attribution to a specific speaker (e.g. the UN General Assembly, or the Government of Ukraine) rather than to the Panel. The Panel recalls, moreover, that the third sentence of paragraph 7.5 of the Report clearly states that it is not the Panel's function to pass upon the parties' respective legal characterizations of the events of 2014, or to assign responsibility for them. The Panel therefore considers it unnecessary to further comment in general terms on the above exchange between the parties. The Panel has, however, made certain modifications to paragraphs 7.122, 7.137 and 7.144 of the Report, which are discussed further in paragraphs 2.64-2.66, 2.71-2.74 and 2.80-2.81 below.

2.2 Section 7.1 of the Report - Overview of Ukraine's complaints

2.4. Ukraine requests a number of revisions to the Panel's general summary of Ukraine's main complaints in paragraph 7.1. More specifically, Ukraine requests that paragraph 7.1(a) be revised to reflect Ukraine's arguments that: (i) the 2016 Belarus Transit Requirements affect "all goods";

[1] See Russia's request for review of the interim report, dated 14 February 2019, paras. 5-8.

[2] Russia's requests regarding these changes are discussed below in paragraphs 2.64-2.66, 2.71-2.74 and 2.80-2.81 of this Annex.

[3] Ukraine's comments on Russia's request for review of the interim report, dated 28 February 2019, para. 11 (quoting from Russia's request for review, paras. 8 and 10).

(ii) transit from Ukraine of goods destined for the Kyrgyz Republic, unlike transit from Ukraine of goods destined for Kazakhstan, was only affected by the 2016 Belarus Transit Requirements as of 1 July 2016; and (iii) the 2016 Belarus Transit Requirements also require goods to exit the territory of Russia at specified control points on the border between Russia and Kazakhstan. Ukraine considers that these changes are necessary for the sake of completeness and clarity. Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" is an adequate reflection of Ukraine's complaints.

2.5. The Panel has decided to modify paragraph 7.1(a) to reflect these additional details of the 2016 Belarus Transit Requirements, as requested by Ukraine. However, the Panel has modified the language proposed by Ukraine in order to maintain consistency with other paragraphs of the Report.

2.6. Ukraine also requests the Panel to revise paragraph 7.1(c) to reflect that Ukraine referred, throughout its submissions, to the 2016 Belarus Transit Requirements as the 2016 general "transit bans". Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" is an adequate reflection of Ukraine's complaints. Moreover, Russia argues that Ukraine's choice of the term "ban" to describe the 2016 Belarus Transit Requirements is factually inaccurate because a "ban" should be understood as a total prohibition, while a restriction is a limiting condition.

2.7. Throughout its submissions in these proceedings, Ukraine has referred to Russia's prohibition on all traffic in transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia directly from the Ukraine-Russia border (requiring instead that it detour via Belarus) as a "general transit *ban*" or a "ban on direct and indirect transit" applying to all goods in transit by road or rail transport. Ukraine has also stated that there are no exceptions to the "direct" ban and that there exists one "derogation" for "indirect" transit, namely, the so-called "Belarus route requirement".[4] The Panel considers that the term "ban" in such a context, and in the light of the nature of the transit bans that are part of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, is potentially confusing. Unlike the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, the prohibition on all road and rail transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia directly from the Ukraine-Russia border does not ban transit across Russia outright. Rather, it restricts transit from Ukraine by requiring that such transit enter Russia from Belarus rather than crossing the Ukraine-Russia border. In order to avoid the potential for confusion with the outright transit bans that are an inherent feature of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and to accurately reflect the essence of Ukraine's complaints, the Panel refers to the Belarus route requirement that is an inherent aspect of the 2016 Belarus Transit Requirements (which Ukraine refers to as the 2016 "general transit ban" or as a derogation from a "general transit ban" on direct and indirect traffic in transit[5]) as a "requirement". Subparagraph (c) of paragraph 7.1 makes clear that the scope of Ukraine's complaint regarding the *de facto* application of certain written measures is that both the actual bans referred to in subparagraph (b) and the requirements that all other traffic in transit from Ukraine destined for Kazakhstan or the Kyrgyz Republic transit Russia via Belarus, referred to in subparagraph (a), are also being *de facto* applied to traffic in transit destined for other destinations. The Panel therefore considers that its description of the measures at issue for purposes of the overview of Ukraine's complaints in Section 7.1 of the Report is clear and accurate as is. The Panel has decided, however, to add a footnote reference to the end of paragraph 7.1 of the Report, cross-referencing to paragraphs 7.264-7.275 of the Report, where the Panel sets forth the measures described by Ukraine in its panel request, Ukraine's subsequent explanation of how the measures described in its first written submission relate to those described in its panel request, and the Panel's terminology referring to the same measures.

2.8. Ukraine further requests the Panel to revise paragraph 7.1(d) to reflect the difference between the specific legal instruments implementing the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as they apply to veterinary goods (Instruction No. FS-NV-7/22886), and to plant goods (Instruction No. FS-AS-3/22903). Ukraine considers that this change is necessary

[4] See Ukraine's first written submission, paras. 32-34. Ukraine concedes at paragraph 64 of its first written submission that the Belarus route requirement means that "indirect" traffic in transit "through that specific route is not banned", while at the same time referring to the Belarus route requirement as the "sole derogation to the ban" and referring in the next paragraph of its first written submission once again to the "general ban on direct and indirect traffic in transit." (Ibid. paras. 64-65.)

[5] See ibid.

to highlight that veterinary goods and plant goods are subject to "distinct measures". Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" of Ukraine's complaints is an adequate reflection of Ukraine's complaints.

2.9. The Panel notes that its description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods in paragraph 7.1(d) is nearly identical to Ukraine's own description of these measures in section III.A. of its panel request. In particular, Ukraine's panel request does not distinguish between the measures as they affect veterinary goods listed in Resolution No. 778 as opposed to plant goods listed in Resolution No. 778. Moreover, Ukraine's panel request refers to the above-referenced legal instruments as among the "documents" through which the measures in question are imposed, rather than as the measures themselves. That said, the Panel considers that it will improve the accuracy and clarity of the Report to note the different ways in which the two Instructions affect the transit of the covered veterinary goods, and of the covered plant goods. The Panel has therefore decided to modify paragraph 7.1(d) to reflect these additional details of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as requested by Ukraine. This issue also arises in relation to Ukraine's request for review of paragraph 7.106(c) of the Report, discussed at paragraphs 2.51-2.52 of this Annex.

2.3 Section 7.2 of the Report - Russia's response

2.10. Russia requests the Panel to delete from paragraph 7.3 the statement that "Russia does not respond specifically to Ukraine's claims of WTO-inconsistency in relation to any of the challenged measures", because it has repeatedly claimed throughout these proceedings that all measures challenged by Ukraine are in full conformity with the WTO Agreement, including the GATT 1994 and Russia's Accession Protocol.

2.11. Ukraine opposes Russia's request, noting that the first sentence of paragraph 7.3 refers to the fact that Russia did not respond to Ukraine's claims, while paragraph 7.4 describes Russia's invocation of Article XXI(b)(iii), which is the reason why Russia considers that all of the measures are fully in conformity with the WTO Agreement, the GATT 1994 and Russia's Accession Protocol. Ukraine suggests that, should the Panel decide to modify the first sentence of paragraph 7.3, it be reformulated to state that "Russia has not contested the arguments and evidence adduced by Ukraine in support of its claims under the GATT 1994 and Russia's Accession Protocol in relation to any of the challenged measures." Ukraine considers that it must clearly be stated in the Report that Russia did not contest the arguments and evidence adduced by Ukraine in support of its claims, and instead, Russia alleged that certain claims and measures fell outside of the Panel's terms of reference and that the measures were justified under Article XXI(b)(iii) of the GATT 1994.

2.12. In its submissions in these proceedings, Russia did not contest the factual evidence or legal arguments adduced by Ukraine in support of its substantive claims that certain measures imposed by Russia were inconsistent with various provisions of the GATT 1994 and Russia's Working Party Report, as incorporated into its Accession Protocol by reference. The Panel agrees with Ukraine that it is important that this be conveyed clearly in the Report. Therefore, rather than delete the first sentence, as requested by Russia, the Panel has decided to modify the first sentence of paragraph 7.3 to clarify this in a manner similar to that suggested by Ukraine.

2.13. Ukraine requests the Panel to revise its description of Russia's argument in paragraph 7.4 to more accurately reflect Russia's statement at paragraph 16 of its first written submission. Ukraine observes that the footnote to paragraph 7.4 of the Report only refers to paragraph 16 of the Russian Federation's first written submission. Ukraine notes that in paragraph 17, Russia referred to "the measures challenged by Ukraine those introduced by Decrees No. 1, No. 319, No. 560 and Resolutions No. 1, No. 147, No. 276." Ukraine considers that the first sentence of paragraph 7.4 therefore incorrectly implies that the statement in paragraph 16 of Russia's first written submission was made with respect to "the measures" included in paragraph 7.1 without any further qualification. Russia opposes Ukraine's request, arguing that Ukraine substantially modifies and misrepresents the position that Russia has repeatedly expressed throughout these proceedings, namely, that *all* of the measures that Ukraine challenges in this dispute are among those that Russia took in response to the emergency in international relations that occurred in 2014.

2.14. The Panel considers that Russia has clearly stated that its invocation of Article XXI(b)(iii) applies to all of the challenged measures in this dispute. The Panel has modified footnote 18 to paragraph 7.4 to refer to the places throughout Russia's submissions where it has asserted that all of the measures at issue in these proceedings, including the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, are justified under Article XXI(b)(iii) of the GATT 1994.

2.4 Section 7.3 of the Report - Factual background

2.15. Ukraine requests the Panel to remove the reference in paragraph 7.7 to the "*Euromaidan* events" and to the fact that, "following on" the Euromaidan events, Ukraine decided not to join the EaEU Treaty. Ukraine argues that neither party referred to these specific facts and that there is no basis for such facts in the arguments and evidence before the Panel. Russia opposes Ukraine's request on the basis that the "*Euromaidan* events" are a fact of common (public) knowledge and "objective historic and factual background" which were publicly available and confirmed by information provided by Ukraine in its first written submission.

2.16. The Panel uses the term "*Euromaidan* events", in quotation marks, as a legally neutral and widely used term to refer to significant and well-known events in recent world history, for which Ukraine and Russia have radically different legal characterizations.[6] The Panel considers that the chronology of events outlined in paragraph 7.7 is factually accurate and therefore declines Ukraine's request.

2.17. Russia requests the Panel to reflect in the text of paragraph 7.8 that: (i) Russia was among the countries that voted against UN General Assembly Resolution No. 68/262 of 27 March 2014 and UN General Assembly Resolution No. 71/205 of 19 December 2016, and (ii) the information concerning the voting record for each resolution, contained in footnotes 28 and 30 to paragraph 7.8. Ukraine considers that the Panel should reject Russia's request, as Russia has offered no explanation as to why such information should be moved from footnotes to the main text of paragraph 7.8. Ukraine notes that Russia asks for the Panel "to provide proper balance of factual background set out in the Interim Panel Report", but Ukraine considers that this request relates to a part of the factual background that does not concern facts invoked by Russia.

2.18. The Panel sees no reason why the information on the voting records for the two UN General Assembly Resolutions, which is reflected in footnotes 28 and 30 to paragraph 7.8, or the fact that Russia was among the countries that voted against both resolutions, should be moved to the main text of that paragraph. The Panel therefore declines to make the requested modifications.

2.19. Ukraine requests the Panel to modify footnote 28 to paragraph 7.8 in a different respect, i.e. to clarify that Russia has not referred to or relied on either of the UN General Assembly Resolutions. Russia opposes Ukraine's request on the ground that this Section of the Report merely provides the factual background. In that context, Russia considers that the existence and content of the UN General Assembly Resolutions, as well as the parties' respective positions on those resolutions, are relevant to the discussion at hand, but the parties' specific reliance on those resolutions *in these proceedings* is not.

2.20. Section 7.3 of the Report is entitled "Factual background". Its purpose is to provide the relevant factual context for the serious deterioration of relations between Ukraine and Russia that occurred following a change of government in Ukraine in 2014. The existence of the two UN General Assembly Resolutions, their content, and whether Ukraine and Russia voted in support of them is part of this factual context. However, the fact that Russia did not seek to rely on the UN General Assembly Resolutions referred to in paragraph 7.8 *in these proceedings* is not part of, or relevant to, this factual context. The Panel therefore declines Ukraine's request.

2.21. Ukraine requests the Panel to delete the statement in paragraph 7.9 that "[t]he events in Ukraine in 2014 led to the imposition of economic sanctions against Russian entities and persons by certain countries" on the basis that no support is given for this statement. Russia opposes Ukraine's request on the grounds that the statement in question is based on common knowledge, objective facts and publicly available information, in addition to being supported by

[6] See e.g. Russia's request for review of the interim report, dated 14 February 2019, para. 5.

paragraphs 20-30 of Russia's second written submission. Alternatively, Russia suggests that the Panel consider replacing the words "led to" with "were followed by" in paragraph 7.9.

2.22. Russia, for its part, requests a modification of paragraph 7.9 to delete the phrase "by certain countries".

2.23. The Panel agrees that it is factually correct to state that the events in Ukraine of 2014 were "followed by" the imposition of economic sanctions against Russian entities and persons, as suggested by Russia, because this chronology is evident from the respective dates of the events in Ukraine and the date of Resolution No. 778. The Panel has therefore decided to make this modification to paragraph 7.9. The Panel sees nothing inaccurate in stating that such economic sanctions against Russia were imposed by "certain countries" and thus declines to make this requested modification.

2.24. Ukraine requests the Panel to remove the phrase "Russia responded" at the beginning of paragraph 7.10. Ukraine considers that this phrase implies that the 2014 transit restrictions were measures taken by Russia in response to the imposition of economic sanctions against Russian entities and persons. However, Ukraine argues that Russia has never made this allegation in these proceedings, nor is the link between the 2014 transit restrictions and the imposition of economic sanctions supported by the text of the measures introducing the 2014 transit restrictions or evidence before the Panel of statements regarding those measures.

2.25. Russia confirms that the 2014 transit restrictions referred to in paragraph 7.10 *were* indeed a response by Russia to the sanctions adopted by certain countries against Russia, or the decision by certain countries to adhere to such sanctions. Russia also considers that the text of paragraph 7.10 is supported by evidence on the record, referring to the text of Decree No. 560 and Resolution No. 778, and paragraphs 20-21 of Russia's second written submission. Finally, Russia considers that there is an explicit link between the 2014 transit restrictions and the imposition of economic sanctions because the *Rosselkhoznadzor* Instructions refer to Resolution No. 778, which itself refers to Decree No. 560, which in turn refers to Federal Law No. 281-FZ and Federal Law No. 390-FZ.

2.26. Since Section 7.3 of the Report is confined to stating the factual events, the Panel has decided to modify the introductory part of the first sentence of paragraph 7.10 to read "[o]n 7 August 2014, Russia imposed import bans …".

2.27. Ukraine and Russia each additionally advise that, since the filing of the parties' final submissions in these proceedings, Decree No. 560 has been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

2.28. Although Decree No. 420 of 12 July 2018 has not been submitted as an exhibit in these proceedings, the Panel has revised the references to Decree No. 560 (in footnotes 32, 205 and 383) to reflect the fact that both parties indicate that Decree No. 560 has been further extended until 31 December 2019 by Decree No. 420.

2.29. Ukraine requests the Panel to modify the text of paragraph 7.12 to reflect that Resolution No. 842, dated 13 August 2015, stated that the import ban under Resolution No. 778 would apply "with respect to Ukraine … from the effective date of paragraph 1 of Resolution … No. 959 …". Furthermore, Ukraine asks that the language of paragraph 7.12 reflect that Resolution No. 959 refers to "the economic part of the EU-Ukraine Association Agreement" and not to the "DCFTA". Ukraine also proposes that the same change be made to paragraph 7.13 given the wording used in Exhibit UKR-84. Russia objects to the modification on the grounds that it misleadingly suggests that this dispute is "merely an ordinary trade dispute", when Russia has noted on numerous occasions that "this is beyond simple trade relations." Russia also asserts that Resolution No. 842 "set out a fork on the road which, *inter alia*, includes Resolution No. 959 but is not limited thereto."

2.30. Resolution No. 959 is dated 19 September 2014. On 13 August 2015, the Russian Government adopted Resolution No. 842, which refers specifically to Resolution No. 778 and Decree No. 560. Among other things, Resolution No. 842 amended Resolution No. 778 to add further countries to the

list of countries whose exports are subject to the import bans under Resolution No. 778, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provided that the Resolution No. 778 import bans would be applied from the effective date of paragraph 1 of Resolution No. 959, but no later than 1 January 2016. The effective date referred to in Resolution No. 959 is 10 days from the Russian Government being notified that Ukraine has taken action to implement the economic part of the EU-Ukraine Association Agreement. The Panel has revised paragraphs 7.11-7.13 of the Report to more clearly reflect the chronology of these facts and events. The Panel also clarifies in paragraph 7.11 that the text of Resolution No. 959 refers to the "economic part of the EU-Ukraine Association Agreement", rather than the "DCFTA". The Panel notes, however, that Ukraine itself has explained, at paragraph 60 of its opening statement at the second meeting of the Panel, that the "economic part" of the EU-Ukraine Association Agreement contains a "free trade agreement establishing the Deep and Comprehensive Free Trade Area (DCFTA)". The Panel has therefore decided to clarify, in footnote 27 to paragraph 7.7, that the "economic part" of the EU-Ukraine Association Agreement contains a free trade agreement establishing the DCFTA.

2.31. Ukraine also requests the Panel to delete the statement in the third sentence of paragraph 7.12 that negotiations were "aimed at achieving practical solutions to Russia's concerns about the DCFTA". Ukraine considers that the evidence cited in support (Exhibit UKR-80) offers no support for this statement. Russia does not respond specifically to this request.

2.32. Exhibit UKR-80 is an RBK news article which reports, among other things, Russia's concerns with the possibility that Ukraine would be in simultaneous free trade zones with the European Union and with Russia. In particular, the RBK news article refers to Russia's concerns that the EU-Ukraine Association Agreement would involve the threat of re-export of European goods under the guise of Ukrainian goods. Exhibit UKR-80 reports that the Ukrainian Minister of Foreign Affairs announced (on 1 December 2015) the "failure of negotiations on the risks of the association of Kiev with the European Union. The head of the foreign affairs agency called the terms suggested by Moscow 'unacceptable'." The Russian Minister of Economic Development is also reported to have stated that he expected the parties would be able to reach an agreement on the Russian proposals later in December 2015, with the news article noting that the next round of negotiations was scheduled for 21 December 2015. A subsequent UNIAN news agency article of 30 December 2015 (Exhibit UKR-78) reported that on 22 December 2015, the Russian State *Duma* had unanimously passed a law to suspend the FTA with Ukraine, effective 1 January 2016, citing alleged conflicts between Ukraine's obligations under the EU-Ukraine Association Agreement and the provisions of its FTA with Russia regarding duty-free trade. The Panel considers that it is logical to infer that the negotiations that were scheduled for 21 December 2015 ultimately did not succeed in finding solutions to Russia's concerns regarding the EU-Ukraine Association Agreement in a manner that was acceptable to all parties, and that accordingly, the Russian State *Duma* took action purporting to suspend Russia's obligations under the CIS-FTA as regards Ukraine. The Panel therefore considers that there is a sufficient basis in the evidence to support the factual statement in the third sentence of paragraph 7.12 of the Report. The Panel has, however, modified the sentence by deleting the word "practical" and changing footnote 37 to reflect that this sentence, as modified, is supported by Exhibit UKR-80 read in conjunction with Exhibit UKR-78. The Panel has also moved what was previously paragraph 7.14 to paragraph 7.13 because of the relationship between this paragraph and the discussion in paragraphs 7.9-7.12 of the Report.

2.33. Ukraine requests the Panel to delete the references to the consultations requests in WT/DS532/1 and WT/DS525/1 in paragraphs 7.14, 7.15 and 7.18(a). Ukraine considers that, notwithstanding the clarifications provided in footnotes 42 and 49, the inclusion of the references to these disputes "in essence implies a connection" between the measures at issue in those disputes and the facts in paragraphs 7.5 through 7.19 of the factual background for this dispute. Ukraine argues that there is no basis in any of the submissions before the Panel for such a connection, nor does the Panel have any jurisdiction to refer to those measures given that its terms of reference do not include the matters in DS532 or DS525. Ukraine also suggests that the statement "since 2014" in the first sentence of paragraph 7.14 is incorrect, as made clear in subparagraph (c) of that paragraph, which states that certain measures are alleged to have been in place since 2013. Russia objects to the requested modifications, noting that the references to WT/DS532/1 and WT/DS525/1 are made as part of the factual background and that the Panel does not provide any evaluation of the measures at issue in those disputes. Russia also requests that, should the Panel make the requested modifications, it nevertheless reflect in the factual background section the evidence on the record regarding the measures adopted by Ukraine as set forth in paragraphs 24-30 of

Russia's second written submission, containing information that Russia states is "highly important for establishing the factual background for the developments after 2014."

2.34. The Panel has stated explicitly in footnotes 42 and 49 of its Report that the references to the alleged measures that are the subject of the consultations requests in WT/DS532/1 and WT/DS525/1 are made solely as factual background and that the Panel does not link the consultations requests in those disputes to the present proceedings. The Panel does not engage in any evaluation or further discussion of the measures described in those consultations requests. The Panel therefore rejects Ukraine's request. The Panel has, however, modified the introductory sentence to paragraph 7.14 to clarify that Russia is alleged by Ukraine to have banned imports of various Ukrainian goods since 2013, rather than 2014.

2.35. Ukraine additionally requests that, should the Panel decide to retain the references to the measures at issue in WT/DS525/1, it add a new paragraph reflecting Ukraine's argument that the measures challenged by Ukraine in the present dispute were taken "before Ukraine allegedly adopted any of the measures to which the Russian Federation referred in these proceedings". Ukraine also requests that the Panel add a footnote to paragraph 7.18, referring to paragraph 55 of Ukraine's opening statement at the second meeting of the panel.

2.36. Paragraph 7.18 already sets forth, in the description of the alleged measures challenged by Russia in its consultations request in WT/DS525/1, the dates on which Russia alleges such measures were adopted by Ukraine. There is no basis for the Panel to make any other statement regarding such measures, which as Ukraine has previously noted, are not before this Panel. The Panel therefore declines to add the new paragraph requested by Ukraine.

2.37. Ukraine requests the Panel to change the reference in paragraph 7.13 to Federal Law No. 410-FZ "purporting to suspend" the CIS-FTA with respect to Ukraine and instead use the term "suspending". Ukraine considers that the use of the verb "purport" implies that the law merely intended to suspend the CIS-FTA, whereas the law expressly states that the State *Duma* decided to "suspend" the CIS-FTA. Ukraine also requests that the Panel add to the same paragraph that the Russian State Legal Department "stated" (rather than "indicated") that "such an act constitutes a fundamental change of circumstances, which were essential for Russia at the conclusion of the [CIS-FTA]". Ukraine considers this is necessary to reflect the "entire explanation" given by the Russian State Legal Department as to the suspension of the CIS-FTA. Russia does not respond specifically to these requests.

2.38. The Panel does not take a position on whether Federal Law No. 410-FZ did effectively suspend the CIS-FTA with respect to Ukraine. For this reason, the Panel considers it accurate to state that Federal Law No. 410-FZ *purports* to suspend the CIS-FTA with respect to Ukraine. Accordingly, the Panel declines this aspect of Ukraine's request. The Panel has decided to grant the second aspect of Ukraine's request, and accordingly has modified the second sentence of paragraph 7.13 to include the entire statement of the Russian State Legal Department in Exhibit UKR-84.

2.39. Ukraine requests the Panel to: (i) modify paragraph 7.16(a) to add a footnote reference to Resolution No. 959 in order to provide authority for this statement, (ii) modify the description of the measures in paragraph 7.16(c) to clarify that the 2016 Belarus Transit Requirements also specify that the traffic in transit in question may only leave the territory of Russia from specific points on the Russia-Kazakhstan border, and (iii) remove the term "temporary" from the description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods (as well as from the descriptions in paragraphs 7.346 and 7.347 and footnotes 461 and 487). Russia refers only to the last of these requests, opposing the request on the ground that the text of the instrument adopting the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods refers to the bans in question as "temporary" and has an expiry date.

2.40. The Panel has decided to add the requested footnote reference to paragraph 7.16(a) and to modify paragraph 7.16(c) to reflect the additional details of the 2016 Belarus Transit Requirements, as requested by Ukraine, because these modifications enhance the clarity and accuracy of the Report. As regards Ukraine's third requested modification, the Panel notes that the text of Decree No. 319 describes the bans in question as "temporary". The Panel therefore has decided to place the term "temporary" in quotation marks where Decree No. 319 is referred to for the first time.

2.41. Finally, with respect to Section 7.3 of the Report more generally, Ukraine requests that the Panel remove from this section any reference to facts for which there is no basis in the parties' submissions or the evidence before it.

2.42. Aside from the specific comments that have been addressed by the Panel above (in paragraphs 2.15-2.40 of this Annex), Ukraine does not identify any other "facts" for which it alleges there is no basis in the parties' submissions or the evidence before the Panel. The Panel considers that Section 7.3 of the Report sets forth facts that are common knowledge, in the sense that they cannot reasonably be disputed, and moreover, are supported directly or indirectly (or both) by evidence submitted in these proceedings. The Panel therefore declines to make any additional modifications to the Report in response to this general request of Ukraine.

2.5 Section 7.5 of the Report - Russia's invocation of Article XXI(b)(iii) of the GATT 1994

Ukraine's main arguments

2.43. Ukraine requests numerous changes to the summary of Ukraine's arguments in paragraphs 7.31-7.34. Russia objects to certain of Ukraine's proposed modifications on the basis that the proposed wording was nowhere reflected in Ukraine's submissions in these proceedings and requests that Ukraine's assertions regarding established facts be qualified to signify that these are assertions made by Ukraine and not factual statements by the Panel.

2.44. The Panel has made a number of modifications to the summary of Ukraine's arguments in paragraphs 7.31-7.34 of the Report, in response to Ukraine's requests. The summary has been modified to commence with Ukraine's jurisdictional arguments, before describing Ukraine's main arguments concerning the burden of proof, and then the standard of review under the chapeau of Article XXI(b). The Panel has based its revisions of the summary of Ukraine's main arguments on Ukraine's drafting suggestions, but in certain places uses the language from Ukraine's submissions, rather than the language that Ukraine proposes in its comments on interim review. Moreover, the Panel notes that the summary of arguments in Section 7.5.1 is expressly confined to the "main" arguments of the parties. Where relevant to the analysis, the Panel refers to the more specific arguments advanced by the parties as part of the Panel's analysis.

The measures at issue and their existence

2.45. Ukraine requests a number of modifications to the description of the measures at issue in paragraph 7.106.

2.46. First, as concerns paragraph 7.106(a), Ukraine argues that the Panel has failed to refer to what Ukraine calls the "2016 general transit ban prohibiting traffic in transit of all goods from the territory of Ukraine, destined for the territory of Kazakhstan and the Kyrgyz Republic, from entering and passing through the territory of the Russian Federation at the border between Ukraine and the Russian Federation". Ukraine argues that the Panel's description of the "2016 general transit ban" fails to reflect that such a "ban" has a wider product scope than the "2016 product specific transit bans". Ukraine also argues that the Panel's description of the so-called "Belarus route requirement" aspect of the 2016 Belarus Transit Requirements does not mention that entry to Russia via Belarus is permitted only via two entry control points at the Belarus-Russia border, and that exit from Russia to Kazakhstan is permitted only at three exit control points on the Russia-Kazakhstan border, or provide specific details regarding the conditions attached to the identification and registration card components of the measures. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications.

2.47. The Panel has previously observed (in paragraph 2.7 of this Annex) that throughout its submissions, Ukraine has referred to Russia's prohibition on all traffic in transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia *directly from the Ukraine-Russia border* (requiring instead that it detour via Belarus and be subject to a number of other additional requirements) as a "general transit ban", or a "ban on direct and indirect transit" applying to all goods in transit by road or rail transport, for which there are no exceptions to the "direct" ban and for which there exists one "derogation" for "indirect" transit, namely, the so-called "Belarus route

requirement".[7] The Panel considers that use of the term "ban" on direct and indirect transit with a derogation for indirect transit through the Belarus route is an unclear way to describe the basic import of the 2016 Belarus Transit Requirements. The measures themselves do not prohibit outright all traffic in transit from Ukraine, but require (among other things) that such traffic may transit across the territory of Russia only from specific control points on the Belarus-Russia border. Accordingly, the Panel has decided to refer to these measures as "requirements" rather than "bans". The Panel's description of the operation of the Belarus route requirement component of the 2016 Belarus Transit Requirements is clearly stated in subparagraphs 7.106(a) and 7.357(a) of the Report.[8] The Panel also considers that the use of the term "requirements" to refer to the 2016 Belarus Transit Requirements, and "ban" to refer to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods also makes clear that the "requirements" apply generally to *all* traffic in transit, while the "bans" apply to *specific* goods in transit. The Panel therefore considers that there is no basis for Ukraine's assertion that the Panel has neglected to refer to the so-called "ban" aspect of the 2016 Belarus Transit Requirements.

2.48. On the other hand, the Panel considers that the requested modifications to the description of the 2016 Belarus Transit Requirements, to provide certain additional details will improve the overall clarity and accuracy of the Report. These additional details concern: (i) the scope of the 2016 Belarus Transit Requirements, as applying to *all* international cargo transit by road and rail, (ii) the content of the conditions related to identification seals and registration cards, and (iii) the permissible control points for procuring these identification seals and registration cards, at specific entry points on the Belarus-Russia border and exit points on the Russia-Kazakhstan border, all of which are part of the 2016 Belarus Transit Requirements. The Panel has therefore decided to modify the relevant paragraphs of the Report to reflect these additional details of the 2016 Belarus Transit Requirements, both in paragraph 7.106(a) and elsewhere.

2.49. Second, as concerns paragraph 7.106(b), Ukraine argues that the Panel's description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods fails to refer to the request and authorization requirements that apply for traffic in transit of non-zero duty and Resolution No. 778 goods to cross the Belarus-Russia border, and the transit restrictions that would apply, should a derogation be granted, to traffic in transit passing via the Belarus route. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications. However, Russia requests that, should the Panel modify paragraph 7.106(b), it note that traffic in transit subject to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods may only occur pursuant to a derogation from the bans, which must be authorized by Russia on the request of Kazakhstan and/or the Kyrgyz Republic.

2.50. The Panel notes that one of Ukraine's complaints (at paragraph 7.1(c) of the Report) is that, although there is a procedure which exceptionally permits transit of goods subject to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, it is unclear how this derogation procedure operates, and to date, no such derogations have been granted. Nonetheless, the Panel has decided to amend the description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods to reflect the procedure for requesting a derogation, as well as the additional conditions that would apply, should such a derogation be granted, both in paragraph 7.106(b) and elsewhere.

2.51. Third, as concerns paragraph 7.106(c), Ukraine argues that the Panel's description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods fails to refer to (i) the distinct product scope of the measures introduced by *Rosselkhoznadzor* Instruction No. FS-NV-7/22886 of 21 November 2014 (concerning veterinary goods included in the list annexed to Resolution No. 778) and *Rosselkhoznadzor* Instruction No. FS-AS-3/22903 of 21 November 2014 (concerning plant goods included in the list annexed to Resolution No. 778); (ii) the distinct requirements that *Rosselkhoznadzor* Instruction No. FS-AS-3/22903 imposes on traffic in transit of

[7] See Ukraine's first written submission, paras. 32-34. Ukraine concedes at paragraph 64 of its first written submission that the Belarus route requirement means that "indirect" traffic in transit "through that specific route is not banned", while at the same time referring to the Belarus route requirement as the "sole derogation to the ban" and referring in the next paragraph of its first written submission once again to the "general ban on direct and indirect traffic in transit."

[8] The Panel also examines these measures based on a close analysis of the text of Ukraine's panel request (and the differences between the presentation of the measures in Ukraine's panel request and first written submissions) in paras. 7.265-7.266 and 7.272-7.273 of the Report.

plant goods included in the list annexed to Resolution No. 778; and (iii) the fact that the requirements applicable to plant goods included in the list annexed to Resolution No. 778 apply, by virtue of *Rosselkhoznadzor* Instruction No. FS-AS-3/22903, as of 24 November 2014. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications.

2.52. The Panel has already referred (in paragraph 2.9 of this Annex) to Ukraine's conflation, in its submissions and in its request for review of the interim report, of the measures at issue with the legal instruments implementing those measures. However, the Panel has no objection to providing greater detail concerning the different ways in which the two *Rosselkhoznadzor* Instructions affect the transit of veterinary goods, and of plant goods. The Panel has therefore decided to modify the description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods to this effect, both in paragraph 7.106(c) of the Report and elsewhere.

Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

2.53. Ukraine requests two modifications to the description of Russia's position on whether the measures were "taken in time of war or other emergency in international relations" in paragraph 7.112. First, Ukraine requests that the phrase "imposing measures at issue" in the sentence "Russia … refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue" be replaced with "the measures introduced by Decrees No. 1, No. 319, No. 560, and Resolutions No. 1, No. 147, and No. 276". Ukraine considers that the statement made by Russia had no bearing on the "2014 transit ban and other transit restrictions" or the "de facto application of the 2016 general and product-specific bans in Decree No. 1, as amended".

2.54. Second, Ukraine requests that the Panel modify, in the second sentence of paragraph 7.112, its reference to Russia's statement at paragraph 6 of its closing statement at the first meeting of the Panel. Ukraine requests that the Panel remove the phrase "the dispute raises" and replace it with "the WTO has no competence over [the issues concerning politics, national security and international peace and security]".

2.55. Russia objects to Ukraine's proposed modifications to Russia's arguments, stating that paragraph 7.112 correctly summarizes Russia's position, in particular as reflected in paragraph 6 of Russia's closing statement at the first meeting of the Panel.

2.56. The Panel considers that the first sentence of paragraph 7.112 accurately states Russia's position in these proceedings. By way of support, the Panel notes that in paragraph 16 of Russia's first written submission, Russia states that it "took a number of actions which the Russian Federation considered necessary for the protection of essential security interests, including those that Ukraine challenges in the present dispute". This is a general reference to the challenged measures, including the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as well as the so-called "de facto measure". In paragraph 17 of Russia's first written submission, Russia does refer specifically to "the measures introduced by Decrees No. 1, No. 319, No. 560, and Resolutions No. 1, No. 147, and No. 276", but only to state that these measures were "adopted in accordance with the Federal Law of 30 December 2006 No. 281-FZ 'On the Special Economic Measures'". Subsequently, in paragraph 19, Russia states that "*the measures adopted*, in particular Decrees No. 1, No. 319, No. 560 and Resolutions No. 1, No. 147, No. 276 … *were introduced by the Russian Federation at the time of emergency in international relations as actions that are necessary for the protection of essential security interests of the Russian Federation, as provided for in the GATT Article XXI*." Finally, in paragraphs 33 and 74 of Russia's first written submission, Russia states that the "2014 transit ban and other transit restrictions" and the "de facto application of the 2016 general and product-specific bans in Decree No. 1, as amended", respectively, should they be found to exist, are covered by Article XXI(b)(iii) of the GATT 1994.

2.57. As for the requested modification to the second sentence of paragraph 7.112, the Panel considers that the sentence accurately reflects Russia's position. The Panel has added a footnote reference to the third paragraph of Russia's closing statement at the second meeting of the Panel to clarify this.

2.58. Ukraine requests the Panel to modify the description of Ukraine's position regarding whether the measures were "taken in time of war or other emergency in international relations" in paragraph 7.113 to reflect Ukraine's argument that Russia has "not satisfied its burden of proof by failing to … adequately identify and establish[] what specific emergency in international relations, [] causing … the adoption of each measure at issue, occurred in 2014 and continued to exist during these panel proceedings." Russia responds that it does not agree with Ukraine's reasoning in requesting these modifications but does not oppose such modifications.

2.59. The Panel does not consider that Ukraine's proposed modification to paragraph 7.113 changes the meaning of that sentence in a way that improves the accuracy of the Report or improves the clarity of the sentence. The Panel has therefore decided to decline Ukraine's request.

2.60. Additionally, Ukraine requests the Panel to adjust footnote 192 to paragraph 7.113 to remove the text stating that Ukraine "professes not to know what Russia means when it refers to an emergency in international relations that arose in 2014". According to Ukraine, when the text of paragraph 142 of Ukraine's second written submission and paragraph 64 of Ukraine's opening statement at the second meeting of the Panel are considered, Ukraine's position was "in essence" that there was no evidence or argumentation before the Panel to show the existence of the particular emergency in international relations.

2.61. The Panel notes that the text of the provisions of Ukraine's submissions referred to above clearly distinguish between: (i) the question of the identity of the emergency in international relations, and (ii) the evidence and argumentation to establish the existence of any such emergency. This was also Russia's understanding of Ukraine's position, for example, in paragraph 4 of Russia's closing statement at the second meeting of the Panel. The Panel therefore considers that the text of footnote 192 accurately describes Ukraine's position and declines to make the requested modification.

2.62. As regards the references to Ukraine's 2016 Trade Policy Review Report in paragraphs 7.115 and 7.118 and footnote 198, Ukraine requests the Panel to confirm that, during the second substantive meeting, Russia referred specifically to paragraph 1.13 of that document, and if it did not, to modify references to remove the citation specifically to paragraph 1.13. Russia does not respond specifically to this request.

2.63. The Panel confirms that, in response to a question from the Chair posed to Russia during the second substantive meeting, Russia referred specifically to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report.

2.64. Both parties request modifications to paragraph 7.122. Russia requests that the Panel state that, by December 2016, the situation between Ukraine and Russia was recognized by "certain countries" as involving armed conflict, rather than being "recognized internationally as involving armed conflict." Russia argues that the Panel should take into account the number of countries (including Russia) that voted against UN General Assembly Resolution No. 71/205 of 19 December 2016 and that, in the light of this factor, the situation cannot be considered to be "internationally recognized armed conflict". Russia also asserts that it is not a party to any armed conflict that Ukraine is involved in, "including the military conflict in the east of Ukraine, that among other factors pose a threat, in particular, to the security of the Russian State border."

2.65. Ukraine does not comment specifically on Russia's request; rather, Ukraine requests the Panel to remove from footnote 204 to paragraph 7.122 the statement that UN General Assembly Resolution No. 71/2015 "makes explicit reference" to the Geneva Conventions of 1949, "which apply in cases of *declared war or other armed conflict* between High Contracting Parties".

2.66. As previously explained in paragraph 7.8 of the Report, in UN General Assembly Resolution No. 71/205 of 19 December 2016, the UN General Assembly condemned what is referred to in the Resolution as the "temporary occupation of part of the territory of Ukraine" by Russia. This Resolution refers to Russia as an "occupying Power", and to the prohibition under the Geneva Conventions of 12 August 1949 for the occupying Power to compel a protected person to serve in its armed or auxiliary forces. Moreover, as noted previously in footnote 30 of the Report, UN General Assembly Resolution No. 71/205 of 19 December 2016 received 70 votes in favour, 26 against (including Russia) and 77 abstentions. The Panel considers that, as the resolution was adopted by the UN

General Assembly with the constitutionally required majority, it constitutes the position of the UN General Assembly. Moreover, the fact that the Resolution makes express reference to the Geneva Conventions of 12 August 1949 (which by their terms apply in cases of declared war or other armed conflict between High Contracting Parties), means that it is accurate to state that by December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. The Panel therefore declines both parties' requested modifications to paragraph 7.122. However, in order to improve the precision of this aspect of the Panel's analysis, the Panel has decided to replace the term "internationally" with the phrase "by the UN General Assembly".

Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

2.67. Ukraine expresses concern that, in paragraph 7.128, the description of Ukraine's position regarding the scope of a Member's discretion to determine its own level of protection of its essential security interests, juxtaposed with its argument that this does not mean that a Member may unilaterally define what its essential security interests are, "incorrectly suggests that Ukraine argued that there is no discretion in Member States' definition of its essential security interests". Ukraine requests the Panel to modify the third sentence of paragraph 7.128 to incorporate Ukraine's observation in paragraph 142 of its opening statement at the first meeting of the Panel that, because the phrase "essential security interests" forms part of the covered agreements, it is to be interpreted in accordance with customary rules of interpretation of public international law. Russia does not respond specifically to this request.

2.68. The Panel agrees that the requested modification accurately reflects Ukraine's arguments and thus has decided to make the modification to paragraph 7.128 of the Report.

2.69. With respect to the last sentence of paragraph 7.128, which refers to Ukraine's argument that Russia cannot invoke Article XXI(a) of the GATT 1994 to evade its burden of proof, Russia notes that the Panel has not referred to Russia's arguments regarding Article XXI(a) or examined those arguments. Russia requests the Panel to rectify this omission. Ukraine requests only that, should the Panel include a sentence explaining Russia's reliance on Article XXI(a) of the GATT 1994, it note that Russia did not invoke this provision in relation to Ukraine's claims under Articles X:1 and X:2 of the GATT 1994, or paragraphs 1426, 1427 or 1428 of Russia's Working Party Report.

2.70. The Panel agrees to modify paragraph 7.128 by adding to the last sentence of that paragraph, a reference to Russia's arguments regarding Article XXI(a). The Panel disagrees with Ukraine that Russia did not invoke Article XXI(a) in relation to Ukraine's claims under Articles X:1 and X:2 of the GATT 1994 or its claims under Russia's Accession Protocol, based on its reading of the references to Russia's submissions in footnote 210 of the Report with Russia's arguments at paragraph 37 of its first written submission. The Panel does not consider that it is necessary for the resolution of this dispute for it to further address the parties' arguments concerning Article XXI(a) and therefore declines Russia's request that the Panel examine the arguments pertaining to Article XXI(a) of the GATT 1994.

2.71. Russia asserts that it is not a party to any armed conflict that Ukraine is involved in, including military conflict in the east of Ukraine. Russia therefore requests the Panel to modify the first sentence of paragraph 7.137 to remove the description of the 2014 emergency as "one involving armed conflict with a neighbouring country and exhibiting the other features identified by Russia". Ukraine does not respond specifically to this request.

2.72. The Panel does not take a position on Russia's involvement in any armed conflict with Ukraine. It is not necessary for the Panel to make any such assessment for purposes of the point that the Panel makes in paragraph 7.137 of the Report. The Panel has therefore decided to modify the first sentence of paragraph 7.137 so that it conforms to the Panel's description of the nature of the 2014 emergency in paragraph 7.143.

2.73. Russia also requests the Panel to elaborate upon the last sentence of paragraph 7.137 by providing guidance as to what might be an indication of invocation of Article XXI of the GATT 1994 that is used "simply as a means to circumvent" one's obligations under the GATT 1994. Ukraine

considers that the Panel need not respond to Russia's request, as Russia has not explained why such guidance is required for the positive resolution of this dispute.

2.74. The Panel does not consider that any elaboration of the last sentence of paragraph 7.136 would improve the clarity or coherence of the Panel's reasoning, and therefore declines this request.

2.75. Ukraine objects to the inclusion of the second sentence of paragraph 7.141 (which states that Ukraine does not indicate whether it considers Ukraine's decision to pursue economic integration with the European Union rather than with Russia, and consequently the 2016 measures, to be related also to the emergency in international relations that had arisen between Ukraine and Russia in early 2014). Ukraine requests that the Panel refer instead to paragraphs 60 through 63 of Ukraine's opening statement at the second meeting of the Panel, in which Ukraine considers that it "argued and showed" that its decision to pursue economic integration with the European Union was taken well before 2014 or 2016. Russia does not respond specifically to this request.

2.76. The Panel disagrees that Ukraine has argued or demonstrated that its decision to pursue economic integration with the European Union was taken "well before" 2014 or 2016. While negotiations on the EU-Ukraine Association Agreement may have begun in 2008, as Ukraine states in paragraph 60 of its opening statement at the second meeting of the Panel, the political part of the EU-Ukraine Association Agreement was signed on 21 March 2014, while the economic part, including the DCFTA, was signed on 27 June 2014. The news reports of Russia's reaction to Ukraine's decision to enter into a free trade area with the European Union, discussed in Exhibits UKR-78, UKR-79 and UKR-80, also support the inference that the operative decision was made by Ukraine in 2014, through its signing of the EU-Ukraine Association Agreement, and not in 2008, when Ukraine began discussions with the European Union. The Panel notes that Ukraine states (at paragraph 24 of its first written submission) that "[i]nstead of becoming a party to the EaEU Treaty, Ukraine concluded, *in 2014*, an Association Agreement with the European Union", indicating that, from the perspective of Ukraine-Russia relations, the definitive decision on the political and economic direction of Ukraine was taken in 2014.[9] In sum, the Panel sees nothing in paragraphs 60 through 63 of Ukraine's opening statement at the second meeting of the Panel that renders inaccurate or misleading the second sentence of paragraph 7.141. The Panel therefore declines to make the requested modifications.

2.77. Russia requests that the Panel refrain from stating, in paragraph 7.143 and elsewhere in the Report (i.e. paragraphs 7.9, 7.119, 7.122 and 7.142) that sanctions applied by other countries against Russia from 2014 were responses to the 2014 emergency in international relations. Rather, Russia requests the Panel to confine itself to stating that sanctions were imposed against Russia, and to abstain from any further evaluation of such sanctions. Ukraine responds by noting that it has requested that paragraph 7.9 be deleted. Ukraine also notes that Russia does not propose that the phrase "that other countries had imposed" in the final sentence of paragraph 7.143 be deleted, and in the light of the above, the Panel need not give effect to Russia's request with respect to paragraphs 7.119, 7.122 and 7.142.

2.78. The Panel notes that, despite Russia's request above, in its comments on Ukraine's requests for interim review, Russia opposed Ukraine's request that the Panel delete paragraph 7.9 (see paragraph 2.21 of this Annex), arguing that the statement in paragraph 7.9 that the events in Ukraine in 2014 led to the imposition of economic sanctions against Russian entities and persons "comes from common knowledge, objective facts and publicly available information as well as paragraphs 20 to 30 of the Second Written Submission of the Russian Federation."[10] Moreover, in its second written submission, Russia refers to the decision of certain states or unions of states that have decided to apply economic sanctions in respect of Russian legal and natural persons, before referring specifically to the European Union, which Russia accuses of attempting to "shift focus from such unilateral actions that are applied in respect of Russia, in particular by the EU and Ukraine in violation of the UN Charter and that are impairing the authority of the UN Security Council."[11] Russia refers specifically in a footnote to two paragraphs from the European Union's response to Panel Question No. 2 to the third parties, where the European Union discusses the unspecified events of

[9] Emphasis added.

[10] Russia's comments on Ukraine's request for review of the interim report, dated 28 February 2019, para. 12.

[11] Russia's second written submission, paras. 20-21.

2014, before referring to the "events in 2014 in the Crimean peninsula and in Eastern Ukraine".[12] Russia then states, with respect to this portion of the European Union's submission, that Russia considers the measures at issue to be a reaction to an internationally wrongful act and/or to an unfriendly act of a foreign state or its bodies and officials which poses a threat to the interests and security of Russia and/or violates the rights and freedoms of its citizens.[13] Finally, in its opening statement at the second meeting of the Panel, Russia again refers to "[u]nilateral measures, sanctions, imposed by [a neighbouring country that had lost control of its side of the border] or by other countries … especially when such measures are taken without an authorization from the United Nations", referring back to the discussion in paragraphs 20 and 25-29 of Russia's second written submission.

2.79. Although Russia's references to the events of 2014 were somewhat cryptic, it is reasonable to infer, based on the evidence before the Panel and facts that are common knowledge and which cannot reasonably be disputed, that the sanctions applied by certain other countries against Russia from 2014 were responses to the emergency in international relations, and that this is also the view of Russia, as reflected in paragraphs 20-30 of its second written submission and in its response to Ukraine's request that the Panel delete paragraph 7.9 of the interim report. The Panel therefore declines to make the requested modifications to paragraph 7.143 and paragraphs 7.9, 7.119, 7.122 and 7.142. The Panel emphasizes, however, that in stating that the sanctions applied by certain other countries against Russia from 2014 were responses to the emergency in international relations, the Panel does not make any evaluation of the legality of those sanctions.

2.80. In paragraph 7.144, Russia requests the Panel to replace the reference to "the international community" with the reference to "certain countries".

2.81. The Panel has already explained, in response to Russia's request for modifications to paragraph 7.122 (see paragraph 2.66 of this Annex), that the fact that UN General Assembly Resolution No. 71/205 was adopted by the constitutionally required majority of UN Member States, constitutes the position of the UN General Assembly on the matter, and the fact that the Resolution makes express reference to the Geneva Conventions of 12 August 1949 (which by their terms apply in cases of declared war or other armed conflict between High Contracting Parties), means that it is accurate to state that by December 2016, the situation referred to in the UN General Assembly resolution was recognized by the UN General Assembly as involving armed conflict. However, for the same reasons discussed above (at paragraph 2.66 of this Annex, in relation to requested modifications to paragraph 7.122), the Panel has decided to replace the phrase by "the international community" with the phrase "by the UN General Assembly" in paragraph 7.144.

2.6 Section 7.6 of the Report - Ukraine's claims of WTO-inconsistency of the measures at issue

The Panel's conditional conclusions, factual findings and exercises of judicial economy

2.82. Russia considers that the Panel's analysis in Section 7.6 contradicts the Panel's previous reference, in paragraph 7.152, to the Appellate Body's statements in *US – Wool Shirts and Blouses*, concerning the incompatibility with Article 3.7 of the DSU of panels considering or deciding issues that are not "absolutely necessary to dispose of the particular dispute" between the parties. Russia argues that the Panel has fulfilled the requirements of Article 19.1 of the DSU by concluding that Russia has not acted inconsistently with its obligations under the GATT 1994 or with Russia's commitments in its Accession Protocol, and that any further analysis does not serve the purpose of prompt settlement. Russia therefore considers that Section 7.6 should be confined to a description of the relevant facts, without engaging in any legal analysis or further conclusions.

2.83. Ukraine strongly objects to Russia's request, which it interprets as a request for the Panel to exercise judicial economy by foregoing altogether a consideration of Ukraine's claims. Ukraine argues that giving effect to such a request would mean that, should the Appellate Body reverse the Panel's findings regarding Article XXI(b)(iii) of the GATT 1994 with regard to some or all of the measures at issue, there would be "a severe risk of no resolution whatsoever of the dispute". This follows, in Ukraine's view, from the fact that Article XXI of the GATT 1994 is an affirmative defence

[12] European Union's response to Panel question No. 3, paras. 4-5.
[13] Russia's second written submission, para. 22.

in justification of measures that are otherwise inconsistent with the GATT 1994. According to Ukraine, without a prior finding of violation, there is no cause to apply an affirmative defence such as Article XXI of the GATT 1994. Ukraine therefore requests the Panel to reject Russia's request.

2.84. For the reasons already explained in paragraphs 7.152-7.154 of the Report, the Panel disagrees with Russia that the Panel's discussion of Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and commitments in Russia's Working Party Report, contained in Section 7.6, is at odds with the Appellate Body's very clear statement of the proper role of panels at page 339 of the Appellate Body Report in *US − Wool Shirts and Blouses*. The Panel therefore declines Russia's request.

2.85. Ukraine requests the Panel to modify the first sentence of paragraph 7.157 by changing the reference from "three measures" to "the measures at issue", in order to avoid giving the impression that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are three measures, when in fact these terms collectively describe the measures at issue. Ukraine also requests the Panel to refer, in the last sentence of paragraph 7.156, to the "cost of using a transit route" in the summary of the factors relevant to the determination of what routes are most convenient for international transit, as this factor was listed in paragraph 78 of Ukraine's opening statement at the first meeting of the Panel. Russia does not make any specific comments on these requests.

2.86. The Panel considers that the requested modifications would improve the clarity of the Report and has therefore decided to make the modifications.

2.87. Ukraine requests the Panel to modify the text of paragraph 7.160 to reflect that Ukraine's interpretative argument that a finding of inconsistency with any other paragraph of Article V will be sufficient to establish an inconsistency with the first sentence of Article V:2 was qualified to apply to cases where "a measure is applied to goods transiting via the most convenient routes of passage". Russia does not comment specifically in this request.

2.88. The Panel has reviewed paragraph 72 of Ukraine's opening statement at the first meeting of the Panel and disagrees with Ukraine that, in that paragraph, Ukraine qualified its interpretive argument to apply only to the situation where a measure is applied to goods transiting via the most convenient routes of passage. Rather, the Panel reads the last sentence of paragraph 72 as providing an example of where the general interpretive position applies, i.e. "[t]hat is the case where …". However, the Panel notes that at paragraph 32 of Ukraine's second written submission, Ukraine recasts its interpretive argument so as to qualify it as applying only in the situation where a measure is applied to goods transiting via the most convenient routes of passage. This being so, the Panel has decided to modify paragraph 7.160 as requested by Ukraine, in order to reflect the evolution of Ukraine's interpretive argument throughout the proceedings.

2.89. Ukraine also requests that, in relation to paragraph 7.160, the Panel include a specific reference to the second sentence of Article V:2 as one of the paragraphs of that provision to which Ukraine's interpretive argument applies, and that the reference to "establish an inconsistency of the first sentence of Article V:2" be changed to "establish that such a measure is also inconsistent with the obligation of a WTO Member to guarantee freedom of transit via the most convenient routes pursuant to the first sentence of Article V:2." Russia does not comment specifically on these requests.

2.90. The Panel considers that these proposals accurately reflect Ukraine's arguments and that the requested modifications would improve the accuracy and clarity of the Report. It has therefore decided to make these modifications.

2.91. Ukraine requests, with respect to Sections 7.6.2.1.3 and 7.6.2.1.4, that the Panel make factual findings under the first sentence of Article V:2 of the GATT 1994 in relation to "all of the measures" with respect to which Ukraine has brought claims. Ukraine argues that it is not contested that it has brought claims in relation to the following measures found to fall within the Panel's terms of reference:

a. the 2014 transit ban in Instruction No. FS-NV-7/22886, as amended by Instruction No. FS-EN-7/19132;

b. the 2014 transit restriction, as set out in the same instruments, restricting traffic in transit of veterinary Resolution No. 778 goods, through the territory of the Russian Federation, destined for third countries by requiring that such goods enter that territory "only through the checkpoints located at the Russian part of the external border of the Customs Union" listed in Instruction No. FS-NV-7/22886;

c. the 2016 general and product-specific transit bans in Decree No. 1, as amended by Decree No. 319 and Decree No. 643; and

d. the 2016 general and product-specific transit restrictions, as set out in the same instruments as well as in Resolutions Nos. 1, 147 and 276 (as amended) and PJSC Russian Railways Order No. 529r, requiring that traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territory of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfy the identification and registration card requirements, as well as such requirements as applying to traffic in transit of Resolution No. 778 goods.

2.92. However, Ukraine considers that the Panel's analysis in Sections 7.6.2.1.3 and 7.6.2.1.4 is limited to "measures that prohibit traffic in transit". Ukraine considers that this is not consistent with the Panel's conclusion that "had the measures had been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994" in paragraph 7.199.

2.93. The Panel disagrees with Ukraine's characterization of its factual findings in Sections 7.6.2.1.3 and 7.6.2.1.4 as omitting to cover some of the measures at issue, namely, the aspects of the measures that Ukraine refers to as the "transit restrictions" (as opposed to "transit bans").

2.94. With respect to the measures that comprise the 2016 Belarus Transit Requirements, the Panel has clearly stated throughout the Report that these measures comprise *both*: (i) requirements that international cargo transit by road and rail from Ukraine destined for Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus (which Ukraine refers to as the "2016 general transit ban") *and* (ii) additional conditions relating to identification seals and registration cards, which must be obtained and removed at particular permanent and mobile checkpoints on the Belarus-Russia border and the Russia-Kazakhstan border respectively (which Ukraine refers to as the "2016 general transit restrictions").

2.95. The Panel uses the term 2016 Belarus Transit Requirements to describe these measures collectively and notes that: (i) both the Belarus route requirement and additional conditions are set forth in the same legal instrument, namely Decree No. 1 (and amendments and implementing instruments); (ii) the additional conditions relating to identification seals and registration cards, which must be obtained and removed at particular permanent and mobile checkpoints on the Belarus-Russia border and the Russia-Kazakhstan border, respectively, apply only to road and rail transit which is subject to the Belarus route requirement; and (iii) the clear function of these additional conditions is to verify and ensure that covered goods comply with the Belarus route requirement. Finally, these additional conditions are also directly addressed in paragraph 7.190 of the Report.

2.96. The same logic applies to the 2016 Transit Bans on Non-Zero Duty Goods and Resolution No.778 Goods, which Ukraine also refers to as two separate measures (the "2016 product-specific transit ban" and the "2016 product-specific transit restrictions"). The Report clearly states that these measures comprise: (i) bans on all road and rail transit from Ukraine or goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, as well as goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic (which Ukraine refers to as the "2016 product-specific transit ban") and (ii) a derogation procedure under which goods exceptionally authorized by Russian authorities upon request by Kazakhstan or the Kyrgyz Republic would be subject to the 2016 Belarus Transit Requirements (which Ukraine refers to as the "2016 product-specific transit restrictions").

The Panel uses the term 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods to describe these measures collectively and notes that both the transit bans and the derogation procedure are set forth in the same legal instrument, namely Decree No. 1, as amended by Decree No. 319.

2.97. With respect to the measures that comprise the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, the Report also clearly states (e.g. at paragraphs 7.1(d), 7.106(c), and 7.357(c)) that these measures comprise *both*: (i) prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of plant and veterinary goods which are subject to the import bans implemented by Resolution No. 778 (which Ukraine refers to as "the 2014 transit ban") *and* (ii) related requirements that such goods enter Russia through designated Russian checkpoints and be subject to clearance by the appropriate Kazakh or Russian veterinary and phytosanitary surveillance authorities (which Ukraine refers to as "the 2014 transit restrictions").

2.98. The Panel uses the term 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods to describe these measures collectively because: (i) both the transit bans and related requirements are set forth in the same legal instruments, namely Instruction No. FS-NV-7/22886 (and amendments) and Instruction No. FS-AS-3/22903; (ii) the related requirements to enter through designated checkpoints and to receive clearance from the appropriate Kazakh or Russian authorities apply only to goods subject to the prohibitions on transit through Belarus; and (iii) the clear function of these related requirements is to verify and ensure that the covered goods are complying with the prohibition on transit through Belarus. Finally, these related requirements are also directly addressed in paragraph 7.194 of the Report.

2.99. Accordingly, the Panel considers that its conclusions in Sections 7.6.2.1.3 and 7.6.2.1.4 cover all of the measures at issue, and therefore declines Ukraine's request. Moreover, the Panel considers that the discussion of the measures in Sections 7.6.2.1.3 and 7.6.2.1.4 is sufficient to explain the relevant factual aspects of the measures at issue, should the Appellate Body be required to assess Ukraine's respective claims under the first and second sentences of Article V:2.

2.100. Ukraine also requests that, with respect to Section 7.6.2.2.3, the Panel set out its "interpretive analysis of the second sentence of Article V:2 of the GATT 1994". Russia responds generally by reference to its request in paragraph 2.82 of this Annex.

2.101. In paragraph 7.153 of the Report, the Panel explains the rationale for, and scope of, its conditional conclusions on Ukraine's claims of WTO-inconsistency of the measures at issue. Ukraine does not explain why, consistent with the explanation in paragraph 7.153, the Panel should set out an "interpretive analysis" of the second sentence of Article V:2 of the GATT 1994. The Panel therefore declines Ukraine's request.

2.102. Ukraine further requests that, as concerns the Panel's exercise of judicial economy in relation to Ukraine's claims under Articles V:3, V:4 and V:5 (Section 7.6.3), the Panel address Ukraine's claims, or alternatively, at least make factual findings regarding those claims. Ukraine considers that the Panel's exercise of judicial economy over these claims and the lack of any factual findings in the context of such claims means that, in essence, the dispute regarding whether the "transit bans" and, in particular, the other "transit requirements" at issue comply with Article V:3, V:4 and V:5 will remain unresolved.

2.103. The Panel notes that the conclusions in Sections 7.6.2.1.4 and 7.6.2.2.4 are conditional in nature and include an explanation of the operation of the measures at issue (which is apparent on the face of the instruments implementing the measures). Should the Appellate Body reverse the Panel's findings regarding the applicability of Article XXI(b)(iii) of the GATT 1994 to any of the measures at issue, the conditional conclusions in Sections 7.6.2.1.4 and 7.6.2.2.4, which cover all of the measures at issue, provide a sufficient basis for findings that every aspect of the measures at issue would, in different circumstances, be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. In those circumstances, the Panel considers that conditional conclusions on Ukraine's claims under Articles V:3, V:4 and V:5 would not be "absolutely necessary to dispose of the particular dispute" between the parties.[14]

[14] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1996:I, 323, p. 339.

2.104. As regards Ukraine's alternative request, the Panel notes that Ukraine has not pointed to any specific disputed factual issues which the Panel would need to resolve in order to permit the Appellate Body to complete the analysis of Ukraine's claims under Articles V:3, V:4 and V:5 of the GATT 1994. The Panel regards its explanation of the operation of the measures at issue in Sections 7.6.2.1.3 and 7.6.2.2.3, as well as in Section 7.7, of the Report to be sufficient.

2.105. Accordingly, the Panel declines both of Ukraine's requests.

2.106. Ukraine also requests that the Panel make the relevant factual findings regarding Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994 and under paragraphs 1426, 1427 and 1428 of the Working Party Report. Ukraine considers that such factual findings would ensure the ability of the Appellate Body to complete the analysis and would guarantee a positive resolution of the dispute.

2.107. The Panel notes that Ukraine has not pointed to any specific disputed factual issues which the Panel would need to resolve in order to permit the Appellate Body to complete the analysis of Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994, or under paragraphs 1426, 1427 or 1428 of Russia's Working Party Report. The Panel recalls that it has extensively explained the operation of the measures at issue in Sections 7.6.2.1.3 and 7.6.2.2.3, as well as in Section 7.7, of the Report. Accordingly, the Panel declines Ukraine's request.

2.108. Ukraine also argues that the Panel omitted to make making any reference, in Sections 7.6.2.1.3, 7.6.2.2.3, 7.6.2.1.4, and 7.6.2.2.4 to paragraph 1161 of Russia's Working Party Report, despite the fact that Ukraine also brought claims pursuant to that provision.

2.109. The Panel's analysis of paragraph 1161 of Russia's Working Party Report is contained in Section 7.6.4.2.2 and is also reflected in the Panel's findings in Section 8. The Panel therefore declines to make any changes on the basis of this comment.

2.110. Ukraine argues that Russia never sought to rely, as part of its affirmative defence under Article XXI(b)(iii) of the GATT 1994, on any aspects of paragraphs 1161, 1426, 1427 or 1428 of its Working Party Report. Ukraine therefore requests the Panel to remove Section 7.6.4, and instead to draw the necessary inferences from the fact that Russia has not relied on the provisions of its Working Party Report as part of its defence under Article XXI(b)(iii) of the GATT 1994. Russia refers the Panel to paragraph 76 of its first written submission, arguing that throughout the proceedings, Russia has coherently claimed that the measures at issue were adopted consistently with Article XXI of the GATT 1994, and therefore, that such measures are consistent with the provisions of the WTO Agreement, including the GATT 1994 and Russia's Accession Protocol.

2.111. The Panel understands Ukraine's comment to take issue with the fact that Russia did not explicitly advance any arguments regarding the text of the paragraphs 1161, 1426, 1427 and 1428 of its Working Party Report. Ukraine's appears to consider that, in the absence of such arguments, Russia is precluded from relying upon the specific phrases in each of paragraphs 1161, 1426, 1427 and 1428 as part of its "affirmative defence" under Article XXI(b)(iii). The Panel is mindful of its duty under Article 11 of the DSU to make an "objective assessment of the matter before it". While the Panel must not make a case for a party where that party has failed to do so[15], it remains within the competence of a panel to develop its own legal reasoning to support its own findings on the matter under consideration.[16] Moreover, a panel's interpretation of the text of the relevant WTO Agreement cannot be limited by the particular interpretations advanced by the parties, where such an interpretation is necessary to resolve the dispute.[17]

2.112. The Panel recalls that, in its first written submissions, Russia explicitly relied on Article XXI in relation to Ukraine's claims under both the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference. For instance, in paragraph 37 of its first written submission, Russia noted that the measures contested

[15] See e.g. Appellate Body Report, *Japan − Agricultural Products II*, paras. 127-130

[16] See e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.116; and *US − Tuna II (Mexico) (Article 21.5 − Mexico)*, paras. 7.176-7.177.

[17] See e.g. Appellate Body Reports, *EC − Tariff Preferences,* para. 105; and *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 5.215.

by Ukraine were taken pursuant to Article XXI and were therefore "in full consistency with the WTO Agreement, including the GATT and the Accession Protocol".[18] Accordingly, Ukraine was afforded full opportunity to comment on this argument by Russia at any stage following receipt of Russia's first written submission. However, Ukraine at no point in the proceedings raised any arguments contesting the applicability of Article XXI(b)(iii) to any paragraphs of Russia's Working Party Report.

2.113. Given Russia's argument that Article XXI was applicable to commitments in its Working Party Report, the Panel proceeded to conduct a textual and purposive analysis of the relevant paragraphs in order to determine whether Russia could rely on Article XXI in relation these commitments. This analysis was conducted in accordance with customary principles of international law, as well as based on previous guidance by the Appellate Body on the relationship between Article XX of the GATT 1994 and obligations in a Member's Accession Protocol. The Panel concluded that a number of elements, including but not limited to the specific text of each of the provisions in Russia's Working Party Report, supported the conclusion that Russia could rely upon Article XXI(b)(iii) in relation to paragraphs 1161, 1426, 1427 and 1428 of its Working Party Report.

2.114. The Panel notes, moreover, that Russia's failure to advance any specific interpretive or textual arguments in relation to Ukraine's claims under Articles V or X of the GATT 1994, as well as paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report, was consistent with its overarching position that the Panel lacked jurisdiction to examine any of Ukraine's claims due to Russia's invocation of Article XXI. In the light of these circumstances, as well as the importance of Article XXI as a safeguard for the right of Members to take actions in pursuance of their essential security interests, the Panel considers that it was not precluded from analysing the applicability of Article XXI to provisions in Russia's Working Party Report, even in the absence of specific interpretive arguments by Russia or Ukraine on the relevant text of paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report. Accordingly, the Panel denies Ukraine's request.

2.7 Section 7.7 of the Report – Panel's terms of reference and the existence of the measures

Whether the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are within the Panel's terms of reference

2.115. Ukraine requests that, with respect to paragraph 7.330, the Panel reflect Ukraine's argument in its second written submissions that if neither of the instructions ever applied with respect to Ukraine, arguably, there would have been no need to adopt Instruction No. FS-EN-7/19132. Russia does not respond specifically to this request.

2.116. The Panel considers that the requested modification would improve the accuracy and clarity of the Report and therefore has decided to make the modification.

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[18] Russia's first written submission, para. 37. See also ibid. paras. 9 and 76; and Russia's closing statement at the first meeting of the Panel, para. 5

WORLD TRADE ORGANIZATION

WT/DS512/R/Add.1

5 April 2019

(19-2126)

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Original: English

RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS512/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 12 July 2017
Revised on 11 January 2018

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Information designated as confidential shall be used only for the purposes of the proceedings under the DSU, during which such information was submitted. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. The Panel shall meet in closed session. The parties and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties") shall be present at the meetings only when invited by the Panel to appear before it.

1.4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Ukraine requests such a ruling, the Russian Federation shall submit its response to the request in its first written submission. If the Russian Federation requests such a ruling, Ukraine shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.8. Where the original language of an exhibit is not a WTO working language, the party or third party submitting such an exhibit shall submit, at the same time, a translation of the exhibit into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should

be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the filing of the exhibit comprising the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Thereafter, the Panel will rule as promptly as possible on any objection to the accuracy of a translation.

1.9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

1.10. To facilitate the maintenance of the record of the dispute and to maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Ukraine could be numbered UKR-1, UKR-2, etc. If the last exhibit in connection with the first submission was numbered UKR-5, the first exhibit of the next submission thus would be numbered UKR-6. Exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc.

Questions

1.11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting of the Panel.

Substantive meetings

1.12. Each party and third party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and by no later than 5.00 p.m. on the Friday prior to each substantive meeting.[1]

1.13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Ukraine to make an opening statement to present its case first. Subsequently, the Panel shall invite the Russian Federation to present its point of view. Before a party takes the floor, it shall provide the Panel, the other party, and the third parties at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each such party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel, the other party and the third parties the final version of its opening statement, as well as the final version of its closing statement, if any, as soon as practicable following the end of the session at which that statement is delivered. In any event, each party shall make available the final version of its opening statement by no later than 9.00 a.m. on Wednesday, 24 January 2018. Each party shall then make available the final version of its closing statement by no later than 5.00 p.m. on Friday, 26 January 2018.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to answer these questions orally. Each party shall send in writing, on 30 January 2018, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions by 13 February 2018.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, on 30 January 2018, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions by 13 February 2018.

[1] For the first substantive meeting, this date would be Friday, 19 January 2018. For the second substantive meeting, this date would be Friday, 11 May 2018.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Ukraine presenting its statement first.

1.14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the Russian Federation if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the Russian Federation to present its opening statement, followed by Ukraine. If the Russian Federation chooses not to avail itself of that right, the Panel shall invite Ukraine to present its opening statement first. Before a party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each such party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.16. Each third party may be present at the sessions of the first substantive meeting with the Panel at which the parties deliver their opening oral statements, and their closing oral statements, respectively.

1.17. Each third party shall also be invited to present its views orally during a session of the first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. on Friday, 19 January 2018.

1.18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each such third party shall provide additional copies to the interpreters, through the Panel Secretary. Third parties shall make available to the Panel,

the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. on Friday, 26 January 2018.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, on 30 January 2018, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions by 13 February 2018.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, on 30 January 2018, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions by 13 February 2018.

Descriptive part

1.19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

1.20. Each party shall submit, in accordance with the timetable adopted by the Panel: (i) the first integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and, optionally, responses to questions following the first substantive meeting; and (ii) the second integrated executive summary of its rebuttal, second opening and closing oral statements and, optionally, responses to questions and comments thereon following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' and third parties' responses to questions or the parties' comments on responses to questions.

1.21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed six (6) pages. If a third-party submission and/or statement do(-es) not exceed six (6) pages, it can be deemed, upon such third party's request, an integrated executive summary of its arguments.

Interim review

1.22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

1.24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

1.25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (Office No. 2047). Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

b. Each party and third party shall file two (2) paper copies of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the two (2) paper copies. The electronic version shall be filed in a format compatible with that used by the Secretariat; either on 4 CD-ROMs, 4 DVDs or 4 USB keys; or as an e-mail attachment containing the document(s). If the electronic version is provided on a CD-ROM, DVD or USB key, the 4 copies shall be delivered to the DS Registry (Office No. 2047). If the electronic version is provided by e-mail attachment, the e-mail shall be sent to the DS Registry (*****@wto.org), with copies to Ms Michelle Healy (*****@wto.org), Ms Parika Ganeriwal (*****@wto.org) and Mr Matthew D'Orsi (*****@wto.org).

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel. A party or third party may serve its documents on the other party or third party in electronic format only, unless a paper copy is requested specifically in writing no later than one day prior to the filing and provided that the Panel Secretary is notified. Service of the electronic (or paper) copy of any document shall constitute service of that document for purposes of these Working Procedures.

e. In parallel with the submission of a document to the DS Registry and the service of a document upon a party or a third party, each party and third party may upload the same document to the Digital Dispute Settlement Registry (DDSR). Such a document must be uploaded to the DDSR no later than one day after the due date established by the Panel for that document. If a party or third party experiences technical difficulties in uploading a document promptly to the DDSR, such difficulties will not affect the official submission of the document to the Panel or the service of the document to a party or third party. As stated above, the paper version of a document shall constitute the official version for the purposes of the record of the dispute, and service of an electronic (or a paper) copy of a document on a party or third party shall constitute service of that document for purposes of these Working Procedures. For assistance with any technical difficulties concerning the DDSR, please contact the DS Registry (*****@wto.org).

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

1.26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 25 August 2017

1 These procedures apply to any business confidential information ("BCI") that a party or third party wishes to submit to the Panel.

2 For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party or third party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the Member submitting the information or of the person or entity that supplied the information to that Member.

3 No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise, or association of enterprises, engaged in the production or sale of products affected by the measures at issue in this dispute, or in import, export or transit operations regarding such products.

4 A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5 The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between bolded brackets, as follows: [xx,xxx.xx]. The first page or cover of the document shall state in bold "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" in bold at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI), Exhibit RUS-1(BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between bolded brackets, as follows: [xx,xxx.xx]". Should the party submit an exhibit of which the entire content constitutes BCI, the cover page of the exhibit and the top of each page of the exhibit shall state in bold "All of the information included in this exhibit is business confidential information" without it being necessary to place all of the specific information in that exhibit between bold brackets.

6 Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

7 If a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions, written versions of oral statements and documents submitted in binary-encoded form, shall mark the document and any storage medium, and use bolded brackets, as set out in paragraphs 5 and 6.

8 In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

9 If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party marked as containing BCI in any of the ways set forth in paragraphs 5 and 6 above should not be designated as BCI. Each party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

10 The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

11 The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

12 If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 13 below.

13 If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures.

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ANNEX B

PRELIMINARY RULINGS

ANNEX B-1

ENHANCED THIRD-PARTY RIGHTS RULING

Issued by the Panel on 9 January 2018

1.1. The Panel refers to the joint request of Australia, Canada and the European Union (the requesting third parties) of 10 November 2017, in which the requesting third parties request the Panel to grant to all of the third parties certain additional third-party rights in these proceedings, namely to: (a) receive all submissions by the parties to the Panel; (b) be present during the entirety of the first and second substantive meetings of the Panel; (c) make a statement to the Panel at the second substantive meeting; and (d) have the opportunity to respond to questions from the Panel to the parties and other third parties.[1]

1.2. The requesting third parties advance two main grounds in support of their request for these enhanced third-party rights.

1.3. First, they note the novelty of the Russian Federation's defence based on Article XXI of the GATT 1994, and the significance of this dispute as the first in which a WTO dispute settlement panel will address the scope of the WTO security exceptions.[2] Further, they assert that the Russian Federation has presented limited argumentation in support of its defence, and with Ukraine not having anticipated this defence in its first written submission, the parties will have to make their case in respect of the security exception in Article XXI(b)(iii) in their second written submissions. The requesting third parties argue that, in these circumstances, confining the third parties' involvement in the case to the first written submissions and the first substantive meeting would mean that the third parties are not able to fully participate in legal exchanges of "utmost systemic importance" which would frustrate the purpose of third-party rights.[3]

1.4. Second, they assert the European Union's significant economic interests in this dispute as a major exporter to Kazakhstan and the Kyrgyz Republic and as a major user of the transit routes implicated in this dispute.[4]

1.5. The requesting third parties submit that the grant of enhanced third-party rights does not place any additional burden on the parties (given that the service of documents by parties and third parties is being effected electronically) and suggest that the Panel has the means available to ensure the appropriate balance between the interests of the parties and third parties, including with respect to the efficiency and promptness of the proceedings, even in a situation in which there is a comparatively large number of third parties.[5]

1.6. Following the Panel's invitation to the parties and the other third parties to comment on the joint request, Ukraine, the Russian Federation and certain of the other third parties (Brazil, China, Japan, Singapore and the United States) provided comments on the joint request on 1 December 2017. Ukraine generally supports the joint request, but does not consider it necessary that the third parties participate in the entirety of the sessions of the first and second substantive meetings that are reserved for the parties.[6] The Russian Federation opposes the joint request on the grounds that the request is not justified in this case, is unsupported in the case law, and involves an undue burden on the parties, the Secretariat and the Panel.[7] Brazil and Singapore support the grant of "passive" enhanced third-party rights (i.e. to receive all submissions by the parties to the

[1] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 8.
[2] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 4.
[3] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 5.
[4] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 7.
[5] Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 6.
[6] Letter from Ukraine dated 1 December 2017, paras. 2 and 10.
[7] Letter from the Russian Federation dated 1 December 2017, pp. 2-3, 3-5, and 5-6.

Panel and to be present during the first and second substantive meetings of the Panel).[8] China and Japan both express the view that the decision to grant enhanced third-party rights should be made on a case-by-case basis.[9] China and Japan each request that, if the Panel grants any such rights to any of the third parties, those same rights be granted to them.[10] The United States considers that the Panel should deny the joint request, based on its view that the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994 means that there is no basis for the Panel to make findings in this proceeding. Accordingly, the Panel should not require further written submissions from the parties, or hold substantive meetings with the parties and third parties.[11]

1.7. Articles 10.2 and 10.3 of the DSU and paragraph 6 of Appendix 3 of the DSU define the rights of third parties in panel proceedings. Pursuant to these provisions, third parties have the rights to (a) receive the submissions of the parties up to the first meeting of the panel, (b) make submissions to the panel, (c) present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session.

1.8. A panel may exercise the discretion afforded to it under Article 12.1 of the DSU[12] to grant enhanced third-party rights in a dispute, provided the additional rights are consistent with the provisions of the DSU and the principles of due process.[13] All third parties in a panel proceeding may be presumed to have a "substantial interest" in the matter before the panel.[14] Additional third-party rights have been granted in panel proceedings for specific reasons only, namely, where there were special circumstances that justified the grant of enhanced third-party rights. Previous panels have granted enhanced third-party rights on the basis of, *inter alia*, certain third parties enjoying economic benefits that were directly implicated by the measure at issue[15], the importance of trade in the product at issue to certain third parties[16], at least one of the parties agreeing that enhanced third-party rights should be granted[17], claims that the measures at issue derived from an international treaty to which certain third parties were parties[18], third parties having previously been granted enhanced rights in related panel proceedings[19], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[20] Decisions on whether to grant enhanced third-party rights are made on a case-by-case basis, and are informed by the factors considered in previous disputes.[21] These determinations are made in light of the need to maintain the distinction drawn in the DSU between the rights afforded to parties and those afforded to third parties.[22]

1.9. We recall that the panels in *EC − Bananas III*, *EC − Tariff Preferences,* and *EU − Poultry Meat (China)* granted enhanced third-party rights where third parties enjoyed certain economic benefits that were directly implicated by the measure at issue.[23] In these disputes, the third parties were direct beneficiaries of the challenged measures (respectively, tariff rate quotas, tariff preferences and tariff rates). By contrast, in the present case, the European Union does not enjoy particular legal rights or economic benefits in Russia's transit regime as such. While the European Union may be a significant user of the transit routes affected by Russia's transit measures, we note that in cases where third parties have asserted an economic interest in the outcome of a case, for example,

[8] Letter from Brazil dated 1 December 2017, p. 2; and Letter from Singapore dated 1 December 2017, paras. 2-3.
[9] Letter from China dated 1 December 2017, p. 1; and Letter from Japan dated 1 December 2017, p. 1.
[10] Letter from China dated 1 December 2017, p. 2; and Letter from Japan dated 1 December 2017, p. 2.
[11] Letter from the United States dated 1 December 2017, para. 2.
[12] Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."
[13] Appellate Body Reports, *US − 1916 Act*, para. 150; *EC − Hormones*, para. 154; and *US − FSC (Article 21.5 − EC*), para. 243.
[14] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.16.
[15] Panel Reports, *EC − Bananas III*, para. 7.8; *EC − Tariff Preferences*, Annex A, para. 7; and *EU − Poultry Meat (China)*, para. 7.44.
[16] Panel Report, *EC − Export Subsidies on Sugar (Australia)*, para. 2.5.
[17] Panel Reports, *EC − Bananas III*, para. 7.8.
[18] Panel Reports, *EC − Bananas III*, para. 7.8.
[19] Panel Reports, *EC − Bananas III*, para. 7.8.
[20] Panel Report, *EC − Hormones (Canada*), para. 8.17.
[21] See Panel Report, *China − Rare Earths*, para. 7.7.
[22] Panel Reports, *US − 1916 Act*, para. 6.33; and *EC − Export Subsidies on Sugar (Australia*), para. 2.5.
[23] Panel Reports, *EC − Bananas III*, paras. 4.9, 4.10; *EC − Tariff Preferences*, Annex A, para. 7; *EU − Poultry Meat (China*), para. 7.44.

because their exports are potentially affected by the same measures, panels have declined to grant enhanced third-party rights if one or both parties opposed the grant.[24]

1.10. The other basis on which the requesting third parties request enhanced third-party rights concerns the "novelty" of Russia's defence based on Article XXI of the GATT 1994, and the "utmost systemic importance" of the legal issues that arise in relation to the interpretation of this provision, along with the assertion that the third parties will not have been able to fully engage with the parties' arguments regarding Article XXI until the parties' second written submissions.[25] Ukraine also supports the grant of enhanced third-party rights on similar grounds, noting that the third parties will not have access to Ukraine's opening oral statement at the first substantive meeting or to Ukraine's second written submission.[26] The important systemic implications of the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994 are also referred to by Brazil, China and Japan.[27]

1.11. The Russian Federation, on the other hand, argues that panels have consistently rejected requests for enhanced third-party rights where the requesting third party only has legal and systemic interests that do not differentiate it from other third parties or Members.[28] The Russian Federation refers specifically to the decisions of three panels denying requests for enhanced third-party rights that were made on the basis of the alleged systemic interests of the requesting third parties: *US – Countervailing Measures (China)*, *Indonesia – Import Licensing Regimes*, and *India – Solar Cells*.[29] It argues that Ukraine was fully aware of the substance of the measures at issue and the circumstances leading to their imposition and notes that five of the third parties have already made extensive arguments concerning Article XXI of the GATT 1994 in their third-party submissions.[30]

1.12. We agree with the Russian Federation that prior panels have not supported requests for enhanced third-party rights when the requesting third party has simply alleged a "systemic interest" in the interpretation of various provisions of WTO Agreements. This is because all WTO Members are presumed to have a systemic interest in the interpretation of the covered agreements. Requesting third parties have therefore typically been required to identify a specific interest, over and above the systemic interests common to all WTO Members.

1.13. The Panel considers, however, that this proceeding presents something of an exceptional situation. In its first written submission, the Russian Federation invokes Article XXI(b)(iii) of the GATT 1994 as a defence to Ukraine's claims. This proceeding will, therefore, be the first occasion on which a WTO dispute settlement panel will interpret Article XXI(b)(iii) of the GATT 1994. Moreover, the Russian Federation advances an interpretation of Article XXI(b)(iii) which posits that the determination of an action that is necessary for the protection of a Member's essential security interests, and the determination of such Member's essential security interests, is within the sole discretion of that Member. It is clear that the Panel's conclusions regarding the interpretive issues raised by the Russian Federation could have far-reaching effects on the determination of the ambit of the covered agreements and on the WTO as a whole. In our view, these effects are radically different from those of the interpretation of one or another of the substantive provisions of the covered agreements. In the circumstances of this case, the Panel has concluded that it is in the interests of the WTO system as a whole that all of the third parties be granted such enhanced third-party rights as would enable them to engage fully on interpretive issues of such vital systemic importance.

1.14. The Panel is also, however, mindful of the sensitivities of the parties to discussion, during the course of this proceeding, of factual issues that potentially relate to their foreign policy and security interests. The Panel has therefore decided to grant the third parties enhanced third-party rights less

[24] See e.g. Panel Reports, *US – Coated Paper (Indonesia)*, Annex D-1, p. D-3; and *Indonesia – Import Licensing Regimes*, para. 7.1. We therefore agree with the Russian Federation that the European Union has failed to demonstrate that "third party benefits economically differentiated from the challenged measure, and its economic interest cannot be addressed by bringing a separate case." Letter from the Russian Federation dated 1 December 2017, p. 3.

[25] Letter from Australia, Canada, and the European Union dated 10 November 2017, paras. 4 and 5.

[26] See Letter from Ukraine dated 1 December 2017, paras. 3 and 8.

[27] Letter from Brazil dated 1 December 2017, pp. 1-2; Letter from China dated 1 December 2017, pp. 1-2; and Letter from Japan dated 1 December 2017, pp. 1-2.

[28] Letter from the Russian Federation dated 1 December 2017, pp. 2-3.

[29] Letter from the Russian Federation dated 1 December 2017, fn 4, p. 3.

[30] Letter from the Russian Federation dated 1 December 2017, pp. 4-5.

extensive than requested in the joint request. More specifically, the Panel has decided to grant enhanced third-party rights that it considers will enable the third parties to participate in the legal exchanges between the parties at the first substantive meeting regarding the interpretation of Article XXI(b)(iii) of the GATT 1994.

1.15. Accordingly, the Panel grants the following enhanced third-party rights to all of the third parties:

a. The right to attend the portions of the party session of the first substantive meeting at which the parties deliver their opening oral statements, and closing oral statements, respectively; and

b. The right to receive the provisional written versions of the parties' opening oral statements and closing oral statements, respectively, at the portions of the party session of the first substantive meeting at which those statements are delivered, as well as the final versions of such oral statements at the end of the day on which they are delivered.

1.16. In order to provide the third parties with an opportunity to comment on the parties' arguments presented in the opening oral statements in their third-party statements at the third-party session of the first substantive meeting, the Panel proposes to change the date of the third-party session of the first substantive meeting from 24 January 2018 to 25 January 2018.

1.17. The Panel advises that, when issuing questions to the third parties to which it wishes to receive responses in writing, following the first substantive meeting, it will endeavour to ensure that the third parties are given a full opportunity to address the interpretive issues raised by the parties during the party session of the first substantive meeting.

1.18. The Panel advises the third parties that, consistent with paragraph 11 of the Working Procedures, it reserves the right to pose questions to the third parties anytime during the proceedings of the dispute, including after the second substantive meeting, should the Panel consider that this can be of assistance to it in discharging its obligations under Article 11 of the DSU.[31]

1.19. The Panel will shortly distribute a revised Timetable and Working Procedures to the parties and third parties to reflect the foregoing.

[31] In the event that the Panel were to pose such questions to the third parties, it would ensure that the parties are afforded an appropriate opportunity to comment on the third parties' responses.

ANNEX B-2

CONFIDENTIALITY RULING

Issued by the Panel on 16 May 2018

1 INTRODUCTION

1.1. This ruling addresses the complaints, made by the Russian Federation (Russia) in its letter dated 14 March 2018, of violations by the European Union of its confidentiality obligations under Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Panel's Working Procedures.

1.2. The European Union published its third-party written submission and third-party statement at the first meeting of the Panel (hereafter, the European Union's third-party submission and statement) on the website of the European Commission's Directorate-General for Trade. Russia alleges that, owing to certain contents of the European Union's published third-party submission and statement, the European Union thereby disregarded the confidential nature of: aspects of the positions of Russia and certain third parties; contents of procedural documents; contents of the Panel's questions to the parties and third parties during the first substantive meeting; information regarding the Panel's timetable; and certain details relating to another ongoing dispute, *Russia – Pigs*.

1.3. By communication dated 16 March 2018, the Panel invited the European Union and any other third parties, as well as Ukraine, to comment on Russia's complaint by 21 March 2018. Accordingly, on 21 March 2018, the European Union, Australia, Brazil, Canada, the United States and Ukraine each provided comments on Russia's complaint. The Panel invited Russia to respond to these comments by 4 April 2018. On that date, Russia provided its response.

2 RUSSIA'S COMPLAINT AND REQUEST TO THE PANEL

2.1. In its letter dated 14 March 2018, Russia alleges that specific paragraphs in the European Union's third-party submission and statement go beyond the disclosure of the European Union's own positions and disclose information that is required to be treated as confidential under the DSU and the Working Procedures. These paragraphs of the European Union's published third-party submission and statement allegedly involve:

a. Disclosure of aspects of Russia's position, particularly with respect to the measures at issue[1], and Russia's defence under Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994)[2], as well as aspects of other third parties' positions[3];

b. Disclosure of the contents of other procedural documents pertaining to the Panel's proceedings[4];

[1] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party submission, paras. 6 and 8).

[2] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring, *inter alia*, to the European Union's third-party submission, paras. 8, 10, and 11; and the European Union's third-party statement, paras. 3 and 8).

[3] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, paras. 13 and 36).

[4] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2, which, in turn, refers to the Panel's ruling on the grant of enhanced third party rights).

c. Disclosure of the contents of the Panel's questions to the parties and third parties during the first substantive meeting[5];

d. Disclosure of information regarding the Panel's timetable, such as the dates of the first substantive meeting and of receipt of the third-party submissions[6]; and

e. Disclosure of the contents of the first substantive meeting and details relating to the ongoing dispute *Russia – Pigs.*[7]

2.2. In Russia's view, Article 18.2 of the DSU and paragraph 2 of the Working Procedures, as well as Article 12.1 read with paragraph 2 of Appendix 3 of the DSU, require that the above-referenced information be treated as confidential. Russia considers that, by publishing its third-party submission and statement on the website of the European Commission's Directorate-General for Trade, the European Union has disclosed the above-referenced information, which is required to be treated as confidential, thereby violating the DSU and the Working Procedures.

2.3. Russia requests the Panel to take all necessary actions and to request the European Union to withdraw all publicly available statements containing information of a confidential nature relevant to this dispute and to the *Russia – Pigs* dispute, and to refrain from such unauthorized disclosure or similar actions in the future.

3 COMMENTS OF THE THIRD PARTIES AND UKRAINE

3.1 European Union

3.1. The European Union considers that Russia's request is based on an erroneous interpretation of the relevant legal provisions and should be dismissed by the Panel. The European Union advises that, consistent with the second sentence of Article 18.2 of the DSU, the European Union has a "well-established and consistent policy" of making available to the public written submissions, as well as the written versions of the oral statements, made by the European Union to panels and to the Appellate Body. The European Union implements this policy by publishing those documents on the website of the European Commission's Directorate-General for Trade. The European Union omits from those documents any information properly designated as confidential by other parties, in accordance with the third sentence of Article 18.2 of the DSU, or with any specific confidentiality procedures adopted by a panel. Moreover, the European Union considers that other WTO Members follow similar practices and, as far as the European Union is aware, no Member has complained about such practices in the context of a previous dispute.[8]

3.2. The European Union acknowledges that its third-party submission and statement, as published on the website of the European Commission's Directorate-General for Trade, contain certain references to provisions of the covered agreements invoked by Russia, as well as to arguments made by Russia in its first written submission or statement to the Panel at the first meeting. The European Union explains that it did not redact those references from the published versions of the European Union's third-party submission and statement because Russia had not designated any of the information contained in its first written submission or statements at the first meeting of the Panel as confidential. Had Russia done so, the European Union would have refrained from disclosing it in the published version of its third-party submission and statement, in accordance with the third sentence of Article 18.2 of the DSU.

3.3. The European Union argues that it has fully complied with the confidentiality requirements in Article 18.2 of the DSU because it has not published the written submissions or statements of Russia or of any other party to this dispute, but only its own submissions and statements. The European

[5] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 38).

[6] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

[7] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 25).

[8] The European Union notes that Russia has been a party to many disputes in which the European Union was also a party and has not previously complained about the European Union's publication of its written submissions and statements in those disputes.

Union considers that Russia has erroneously interpreted the scope of the confidentiality requirement in Article 18.2 of the DSU, specifically the first sentence of Article 18.2, to prohibit the disclosure of any of the contents of other parties' written submissions (including the cited provisions of the covered agreements and legal arguments).

3.4. The European Union argues that its publication practice relies on the second sentence of Article 18.2 of the DSU, which provides that "[n]othing in this Understanding" shall preclude a party to a dispute from disclosing statements of its own positions to the public. According to the European Union, a party's "position" is to a very large extent defined and developed in relation to the positions and arguments of the other parties. If a party could not refer to the positions and arguments of the other parties in the course of stating its own positions, it would effectively be prevented from disclosing statements of its own positions to the public in a complete and meaningful manner.[9]

3.5. The European Union argues that Russia's interpretation of the prohibition contained in the first sentence of Article 18.2 of the DSU would also render redundant the third sentence of that provision, which provides that Members shall treat as confidential "information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." If the first sentence of Article 18.2 were interpreted to require absolute confidentiality in respect of all of the contents of written submissions, there would be no need to require, pursuant to the third sentence of Article 18.2, that a Member designate certain information as confidential.[10] Moreover, it is not possible to reconcile a requirement of absolute confidentiality in respect of all of the contents of written submissions with the fact that panels are required by the DSU to summarize in their reports the positions and arguments of the parties.

3.6. The European Union argues that Article 18.2 of the DSU should be read in a harmonious manner, such that the second sentence of that provision allows the parties to disclose their own submissions and statements, provided they respect the confidentiality of information properly designated as confidential by other parties in accordance with the third sentence of Article 18.2 or any applicable specific confidentiality procedures adopted by a panel.[11] Neither Russia, nor any other party has designated as confidential any of the contents of the submissions or statements to which the European Union referred in its published third-party submission and statement. In any event, the European Union considers that the references in its third-party submission and statement to Russia's first written submission relate exclusively to Russia's legal arguments. Legal arguments are "inherently non-confidential" and could not have been properly designated as confidential under the third sentence of Article 18.2 of the DSU or under any applicable confidentiality procedures adopted by the Panel.

3.7. The European Union notes that the first sentence of Article 18.2 of the DSU, which refers only to "written submissions", does not cover the content of panel questions and procedural documents, including the timetable. Nor are those documents part of the Panel's "deliberations" for purposes of paragraph 2 of the Working Procedures, or covered by paragraph 2 of Appendix 3 of the DSU which concerns public observation of panel meetings and does not address the different issue of whether a party may refer to procedural documents when disclosing its position in accordance with the second sentence of Article 18.2 of the DSU.

3.8. Finally, as regards the European Union's comments in its third-party statement of details relating to the *Russia − Pigs* dispute, the European Union considers that Russia has failed to explain why those comments would disclose information that Russia has designated as confidential in that

[9] The European Union considers that similar considerations apply with respect to the disclosure of the Panel's questions − a party could not meaningfully disclose publicly its positions with respect to an issue raised by a panel question without revealing the content of that question.

[10] The European Union points to analogous reasoning by the Appellate Body in *US − Continued Suspension*, Annex IV, para. 4.

[11] The European Union refers to the approach of the panel in *Argentina − Poultry Anti-Dumping Duties*, para. 7.14, as supporting this reading of the obligations contained in Article 18.2 of the DSU. It considers that the Appellate Body's practice in *US − Continued Suspension* of opening the Appellate Body hearings to public observation (and in so doing, rejecting arguments of some third participants that this practice would violate Article 17.10 of the DSU) confirms this reading of Article 18.2. In particular, the European Union notes that the Appellate Body permitted the participants and third participants who wished to do so to make their oral statements and responses to questions subject to public observation without requiring that they be modified to prevent the disclosure of arguments or positions of the other third participants who did not wish to make their oral statements subject to public observation.

dispute. In any case, it is manifestly beyond this Panel's terms of reference to rule on issues resulting from an alleged breach of confidentiality requirements in the context of a different dispute, over which this Panel has no jurisdiction.

3.2 Other third parties and Ukraine

3.9. Australia requests the Panel to decline Russia's request. Australia considers that Russia's interpretation of Articles 18.2 and 12.1 of the DSU, in conjunction with Appendix 3 of the DSU, is flawed and unsupported by the text of those provisions. Australia interprets the first sentence of Article 18.2 as requiring that the "submission in its entirety" be treated as confidential. However, it does not establish obligations with respect to the publication of arguments contained in submissions, extracts from submissions or non-confidential information contained in submissions. This is supported by the second to fourth sentences of Article 18.2. The second sentence of Article 18.2 permits Members to publish statements of their own positions, including by publishing their entire written submission. Statements of a Member's positions may support or rebut arguments put by another Member, include extracts from another Member's submission, and address information provided by that other Member (except where the other Member has designated that information as confidential). The third sentence of Article 18.2 would be obsolete if the confidentiality requirements elsewhere in the DSU were interpreted as requiring absolute confidentiality.

3.10. Brazil considers that a proper reading of Article 18.2 should secure a balance between a Member's right to disclose statements of its own positions and obligation to respect the confidentiality of written submissions of other parties or third parties to a dispute. Brazil notes that when Members publish their submissions containing a description of another party's arguments and opinions, there may be a risk of inaccuracy, misrepresentation or biased selections of statements or positions, all of which may give a different meaning or tone to the actual arguments of that other party. Brazil argues that Article 18.2 treads carefully in this regard, by stipulating that a party may disclose statements of its own "positions" (rather than "submissions"). Brazil considers that this indicates that a party that wishes to publicize its positions may therefore be required to do some drafting work in order to respect the confidentiality of the submissions of other parties to a dispute. However, Brazil also acknowledges that it may sometimes be difficult for a party to convey its own positions without referencing the positions of another party. Brazil suggests that the Panel take into account the fact that a party can request a non-confidential summary of the other party's arguments which could then be disclosed to the public. Such a summary could then be incorporated into the statement of positions of the party wishing to disclose its positions.

3.11. Canada considers that the Panel should reject Russia's request. Canada strongly supports the ability of a WTO Member to disclose its own positions to the public as provided for in Article 18.2 of the DSU. Canada considers that one way for a Member to disclose statements of its positions is to disclose its written submissions. Moreover, disclosure by a party of information that relates to the positions of another party, that has not been designated as confidential by that other party and that is purely ancillary to the disclosure of the first party's own positions, would not be contrary to Article 18.2 of the DSU.[12] Canada further considers that the protection of information that a Member has designated as confidential is important, but that it is incumbent on Members to carry out such designation in good faith, and to apply the designation only to information that is "truly confidential".[13] Finally, Canada submits that, to the extent that Russia's request pertaining to the disclosures concerning the *Russia – Pigs* dispute suggests that the Panel has the authority to make findings or recommendations to the European Union beyond the bounds of its submissions in this dispute, such request is outside the scope of the Panel's role.

3.12. The United States considers that Russia's request is in error and legally flawed, as well as outside the Panel's terms of reference. As to the legal flaws, the United States observes that Russia's request proceeds on the assumption that a Member's right under Article 18.2 to disclose statements

[12] Canada considers that explaining one's position will almost certainly entail including information about another party's position, or at least, providing information from which it is possible to infer that party's position. To require a party to avoid including such information would frustrate the party's right to disclose its own position.

[13] Canada also notes that the requirement for confidentiality is not static. Information that was once confidential may no longer be so where, for example, it is subsequently disclosed by the originating party, or by standard WTO processes, such as publication on the WTO website.

of its own positions is reduced and constrained so as to preclude that Member from disclosing any of its own statements that might, in turn, disclose material that Russia argues should be treated as confidential. Yet the only references in Article 18.2 to maintaining something as confidential are with respect to "written submissions to the panel" and "information submitted by another Member to the panel … which that Member has designated as confidential." The United States argues that, even based on Russia's assumption, a number of the disclosures to which Russia has objected are not within the scope of Article 18.2.[14] The United States also considers that Russia's request is premised on an allegation that the European Union has violated the requirements set out in the DSU. Yet the Panel's terms of reference do not include a claim that the European Union has breached the DSU. Any claim of breach of the DSU would need to be addressed in a separate dispute, in which the full due process afforded by the DSU would be available to the European Union to respond to the claim.

3.13. Ukraine considers that Russia has failed to show that all of the categories of information disclosed by the publication of the European Union's third-party submission and statement are, in fact, confidential. In this regard, Ukraine argues that Russia has failed to identify which "contents of the first substantive meeting" it refers to and where that information is disclosed in the European Union's published third-party submission and statement. In addition, the information relating to the ongoing proceedings in *Russia – Pigs* that is included in the European Union's third-party statement is publicly available. Ukraine therefore considers that the Panel should dismiss Russia's request with regard to these two categories of information. Ukraine notes that the European Union has not made public Russia's written submissions or information designated by Russia as confidential or as BCI. Ukraine considers that, unless the complainant and respondent have marked information in their written submissions as confidential in accordance with the third sentence of Article 18.2, a third party is not precluded by Article 18.2 from disclosing its own positions on issues of legal interpretation. Should Russia have wished to prevent a third party from disclosing that Article XXI of the GATT 1994 is at issue in these proceedings, it should have marked that information in its submission as confidential.

4 RUSSIA'S RESPONSE TO THE COMMENTS OF THE EUROPEAN UNION, THE OTHER THIRD PARTIES, AND UKRAINE

4.1. Russia argues that the first sentence of Article 18.2 sets forth an obligation to maintain the confidentiality of *information contained in* written submissions, which covers arguments, positions, views or opinions of a party to a dispute that it expresses in such written submissions.[15]

4.2. Russia points out that each sentence of Article 18.2 provides for a different type of "object[]": (first sentence) written submissions, (second sentence) statements of a party's own position, (third sentence) information designated as confidential, and (fourth sentence) information contained in a written submission. Russia disagrees with the positions of Canada and some other third parties[16] that the confidentiality requirement does not apply to the "entire submission" made by a party and applies only to the specific information designated by a party as confidential. Russia considers this view to be contrary to the "text of Article 18.2", which "expressly" states that a party's submissions to the panel are confidential in their entirety *as well as the information contained therein*.

4.3. Russia acknowledges that the confidentiality obligation in the first sentence of Article 18.2 is balanced with the right of a party to disclose statements of its own position. Nevertheless, nothing in the second and fourth sentences of Article 18.2 allows a party to disclose the positions of another

[14] The United States refers specifically to the disclosures concerning the measures at issue, the Panel's questions, and the procedural documents, as none of these are a "written submission" or "information submitted by another Member". In addition, the United States considers that it is not Russia's place to object to disclosures of the positions of other third parties.

[15] Russia supports this position by pointing to excerpts from the Appellate Body reports in *Canada – Aircraft* ("[T]he provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding.") and *Brazil – Aircraft* ("[A]ll Members are obliged, by the provisions of the DSU, to treat these proceedings of the Appellate Body, including written submissions and other documents filed by the participants and the third participants, as confidential."). Appellate Body Reports, *Canada – Aircraft*, para. 145; and *Brazil – Aircraft*, para. 119. (emphasis omitted)

[16] Here, Russia refers to a statement that Canada made in paragraph 6 of its response to Russia's request. The statement provides that "disclosure by a party of information that relates to the position of another party, that has not been designated as confidential, and that is purely ancillary to the disclosure of a party's own position would not be contrary to Article 18.2".

party or effectively to make its own version of a non-confidential summary of any other party's submissions to the panel.

4.4. Russia admits that logically, a party's "positions" in a dispute are, to a very large extent, defined and developed in relation to the positions and arguments of other parties. However, in Russia's view, this is not an excuse for a party to avoid its obligations under Article 18.2 not to disclose confidential information. Russia considers that, should a party wish to disclose information other than statements of its own positions, it has the right to obtain a non-confidential summary of that information. Because the European Union did not request Russia to provide a non-confidential summary of the information contained in Russia's written submissions, the European Union could not disclose to the public the information contained in Russia's submissions. Russia acknowledges that information contained in written submissions may be "transformed" into a non-confidential summary, but emphasizes that such transformation may be carried out only by the party that submitted the information to the panel. This is because, as noted by Brazil, Members may misrepresent the arguments and opinions of other parties. Such Members may also improperly assess what information another party may regard as confidential.

4.5. Russia disagrees with the third parties that have stated that the confidentiality requirements of Article 18.2 of the DSU are limited to information that a Member specifically designates as confidential under the third sentence of Article 18.2. In Russia's view, the third sentence addresses the limited situation where information is submitted to the panel by a Member (as opposed to a party to the dispute) which is not a written submission, a statement of its own positions, or a non-confidential summary of information contained in a written submission, within the meaning of the first, second and fourth sentences of Article 18.2, respectively. According to Russia, this reading of the third sentence of Article 18.2 of the DSU is supported by the fourth sentence, which states that a "Member" may request a non-confidential summary. Given that a requesting "Member" is not always a party to the dispute, the fourth sentence of Article 18.2 suggests that a non-party Member is only entitled to the non-confidential summary, and not to all of the information contained in the written submissions of the party receiving the request. The parties to the dispute, however, are entitled to obtain the full version of the written submissions by virtue of the first sentence of Article 18.2.

4.6. Russia argues that the European Union's proposed interpretation of the scope of the confidentiality obligations under Article 18.2 of the DSU would deprive the first-level of general protection of confidentiality of any meaning and lead to the result that, in order to protect the confidentiality of information submitted in a dispute settlement proceeding, Members would have to designate the entire text of their submissions as confidential and request the adoption of additional working procedures for the protection of confidential information.

4.7. Russia considers that the European Union's proposed interpretation would also make it possible for a party to publish a statement of its own positions under the second sentence of Article 18.2 of the DSU by introducing the words "[Member X] agrees/disagrees with the following:", and copying the text of another party's written submission verbatim. Russia says that if the confidentiality requirements in Article 18.2 were meant to operate in this manner, Article 18.2 could have been limited to the last two sentences, replacing the words "information contained in its written submissions" with "such confidential information" in the last sentence.

4.8. Russia does not believe that the existing publication practices of the European Union and certain other Members justify compliance with Article 18.2 of the DSU in this particular instance. Russia considers that the rights set forth in the second sentence of Article 18.2 should be read together with the confidentiality requirements contained in Article 18.2. For these reasons, Russia states that it has successfully challenged disclosure of confidential information in a number of disputes to which it is a party, involving different Members as the other party.

4.9. Russia clarifies that it does not request the European Union to delete from the public domain *all* information pertaining to this dispute. Rather, Russia requests the Panel to take all necessary actions and to request the European Union to withdraw all publicly available statements that contain information of a confidential nature relevant to the present dispute and to the dispute *Russia – Pigs*, and to refrain from any such unauthorized disclosure or similar actions in the future. Therefore, Russia may agree with Ukraine's suggestions to redact its third-party submission and statement to remove the confidential information, rather than remove the European Union's third-party submission and statement, in their entirety, from the website.

4.10. In respect of other procedural documents and information that were disclosed by the European Union but were not directly linked to Russia's submissions in these proceedings, Russia argues that prior jurisprudence clearly states that participants should treat dispute settlement proceedings as a whole as confidential.

5 ANALYSIS

5.1 Whether the Panel has jurisdiction to rule on Russia's complaint

5.1. We begin by addressing whether Russia's request for a ruling that the European Union has violated Article 18.2 of the DSU is outside this Panel's terms of reference.

5.2. The United States argues that the Panel's terms of reference do not include a claim of violation of Article 18.2 of the DSU, and any such claim would therefore have to be the subject of a separate dispute, initiated by consultations and panel requests. The European Union, Canada and United States also argue that Russia's complaints regarding the alleged disclosure of confidential information pertaining to the *Russia − Pigs* dispute is outside this Panel's terms of reference.

5.3. It is true that the Panel's terms of reference do not include a claim that the European Union has violated Article 18.2 of the DSU.[17] However, Russia does not ask the Panel to rule on whether a measure identified in Ukraine's panel request is inconsistent with Article 18.2 of the DSU. Rather, Russia complains that *in the course of these proceedings*, a third party has failed to comply with certain obligations contained in the DSU and in the Panel's Working Procedures concerning the confidential treatment of material presented in the proceedings. The issue that Russia asks the Panel to address is therefore, by its nature, only capable of arising once the proceedings in this dispute have commenced.

5.4. International adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives automatically from the exercise of their adjudicative function.[18] One aspect of this inherent jurisdiction is the jurisdiction to determine all matters arising in relation to the exercise of their substantive jurisdiction and inherent in the judicial function.[19] This includes matters concerning the conduct of the proceedings before the Panel. In providing for the confidential treatment of written submissions and particular information submitted to panels and the Appellate Body, Article 18.2 of the DSU regulates certain aspects of the panel and appellate processes.[20] A party's request that we address a complaint against a third party arising out of an alleged failure by that third party to observe confidentiality obligations applicable to these proceedings falls squarely within our inherent jurisdiction.

[17] This is not surprising, because the European Union is a third party in this dispute. Moreover, the complaint against the European Union is made by the respondent, not the complainant.

[18] See International Court of Justice, Nuclear Tests Case (Australia v. France) (1974) ICJ Reports, 253, pp. 259-260; and Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) (1963) ICJ Reports, 15, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function, see Appellate Body Report, *Mexico − Taxes on Soft Drinks*, para. 45.

[19] An important aspect of an adjudicative tribunal's inherent jurisdiction is the jurisdiction to determine its own jurisdiction (the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French). The Appellate Body has held that panels have the power to determine the extent of their jurisdiction, see Appellate Body Reports, *US − 1916 Act*, fn 30 to para. 54; and *Mexico − Corn Syrup (Article 21.5 − US)*, para. 36.

[20] Article 1.1 of the DSU provides that the DSU applies to all WTO dispute settlement proceedings, subject to certain special or additional rules and procedures on dispute settlement identified in Appendix 2 of the DSU. (See Article 1.2 of the DSU.) The DSU itself is also one of the covered agreements listed in Appendix 1 to the DSU. Other examples of provisions of the DSU that address the way in which panel proceedings are to be conducted include Article 12 (setting forth various practical arrangements concerning the adoption of working procedures and the establishment of the timetable, the filing of submissions, the contents of panel reports and notification to the DSB of the timing of the report), Article 14 (providing that panel deliberations shall be confidential, that reports of panels are to be drafted without the presence of the parties and that opinions expressed in panel reports by individual panelists shall be anonymous), and Article 15 (setting forth the process to be followed at the interim review stage). The Panel's Working Procedures similarly regulate procedural aspects of the present proceedings.

5.5. We therefore find that we have jurisdiction to address the complaints before us. In Sections 5.2 through 5.6 below, we address each of Russia's objections. Our rulings on these objections are set forth in Section 6.

5.2 Objection to disclosures of aspects of Russia's and certain third parties' positions

5.6. Russia objects to the disclosures of aspects of Russia's positions, particularly with respect to the measures at issue and Russia's defence under Article XXI of the GATT 1994, as well as aspects of other third parties' positions.[21] Russia's objection raises the issue of whether the confidentiality protections that attach to the written submissions submitted to a panel or the Appellate Body by virtue of the first sentence of Article 18.2 of the DSU, preclude a party from referring to any defences, legal arguments or positions expressed in or derived from a written submission, in any statement of its own positions that it discloses to the public pursuant to the second sentence of Article 18.2 of the DSU.

5.7. Article 18 of the DSU is entitled "Communications with the Panel or Appellate Body". Article 18.1 prohibits *ex parte* communications with the panel or Appellate Body. Article 18.2 provides:

> Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.[22]

5.8. Russia argues that, while the European Union has a right under the second sentence of Article 18.2 of the DSU to disclose statements of its own positions to the public, it cannot do so in a manner that would disclose Russia's written submissions, which for Russia, include information concerning Russia's invocation of Article XXI of the GATT 1994 and Russia's legal arguments, positions, views and opinions, without violating the first sentence of Article 18.2. The European Union and certain of the other third parties argue that a party exercising its right under the second sentence of Article 18.2 of the DSU to disclose statements of its own positions to the public is not precluded from referring to the positions of other parties.

5.9. We begin our analysis by recalling the Appellate Body's statement that, under the DSU, confidentiality is *relative and time-bound*.[23] Panel proceedings are based on a complainant's panel request, which sets forth detailed information about the measures at issue, the claims of violation, and the connection between the measures and claims, thus establishing the legal basis for the complaint sufficient to present the problem clearly. Panel requests are publicly disclosed, as a result of which their contents are not confidential or capable of being designated as confidential. Panel reports, which are disclosed to the public at the conclusion of the panel process, contain summaries of the arguments of parties and third parties, evaluations of those arguments, analysis of the facts

[21] Russia refers specifically to the positions of Brazil and Japan as expressed in their third-party submissions. Brazil provided comments on Russia's complaint but did not refer specifically to the alleged disclosure of its positions, and Japan did not make any comments on Russia's complaint.

[22] Article 18.2 of the DSU is reflected in paragraph 2 of the Panel's Working Procedures (although with slight differences in terminology) as follows:

> The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Information designated as confidential shall be used only for the purposes of the proceedings under the DSU, during which such information was submitted. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

[23] Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 5.

and other evidence, as well as the complainant's request for findings and recommendations. Panel reports also disclose details of the panel process, such as the dates of various stages of the proceedings[24], any requests for rulings on issues prior to the issuance of the interim report, and the interim review process. Public disclosure of panel reports, and Appellate Body reports, is an inherent and necessary feature of our rules-based system of adjudication.[25]

5.10. Article 18.2 of the DSU addresses the confidential treatment of documents submitted to panels or the Appellate Body and of certain information contained in those documents, in light of the right of parties to disclose statements of their own positions to the public. Article 18.2 comprises four sentences. The first sentence refers to "written submissions" to the panel or the Appellate Body. The second sentence concerns "positions" of parties. The third sentence addresses "information" submitted to a panel or the Appellate Body which a Member has designated as confidential, while the fourth sentence concerns confidential information contained in written submissions. In order to give meaning and effect to the terms in each sentence, it is necessary to read each sentence of Article 18.2 in the context of the other sentences of that provision, as well as in the context of the other provisions of the DSU.[26]

5.11. The third sentence of Article 18.2 acknowledges that Members may specifically designate certain information that they submit to panels or the Appellate Body as confidential, while the fourth sentence of Article 18.2 entitles other Members to obtain a non-confidential summary of that information that could be disclosed to the public.[27] The third and fourth sentences clarify the scope of the right contained in the second sentence of Article 18.2, which provides that *nothing in the DSU* shall preclude a party from disclosing statements of its own positions to the public.[28] Thus, the second, third and fourth sentences, read together, provide that a party is permitted to disclose statements of its own positions to the public, subject to treating as confidential information submitted by a Member which that Member has designated as confidential, in which case the disclosing party is entitled to request a non-confidential summary of such information that could be disclosed to the public.[29]

5.12. The scope of the right in the second sentence of Article 18.2 of the DSU informs the nature of the confidentiality protection attaching to written submissions set forth in the first sentence of

[24] These dates refer to the following phases in a particular dispute: (a) the organizational meeting, (b) the adoption of the Working Procedures, (c) the adoption of Additional Working Procedures for the protection of certain information, (d) the adoption of the Timetable, (e) the receipt of any requests for preliminary rulings, (f) the issuance of any preliminary rulings to the parties, (g) the receipt of the parties' first written submissions, (h) the receipt of the third-party submissions, (i) the first substantive meeting, (j) the third-party session, (k) the parties' written responses to questions posed by the panel after the first substantive meeting, (l) the receipt of comments by the parties on the responses provided by the other parties, (m) the issuance of the panel's descriptive sections of its draft reports to the parties, (n) receipt of comments on the descriptive sections of the panel reports, (o) the panel's issuance of the interim report to the parties, (p) the requests for revisions of specific aspects of the interim report, (q) the comments of each party on the other party's request, and (r) the issuance of the panel's final report to the parties.

[25] See Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 5.

[26] See e.g. Appellate Body Reports, *EC − Asbestos*, para. 95; *Canada − Dairy*, paras. 133-134; *US − Section 211 Appropriations Act*, para. 338; *US − Gasoline*, p. 23, DSR 1996:I, 3, at p. 21 ; and *Japan − Alcoholic Beverages II*, pp. 12-13, DSR 1996:I, 97 at pp. 105-106.

[27] Russia argues that the third sentence covers the very different (and limited) situation where a Member that is not a party or third party to the proceedings nevertheless submits information to a panel or the Appellate Body. While it may be possible to interpret the third sentence this way when read in isolation from the other three sentences of Article 18.2, it is not a credible interpretation when read in the context of Article 18.2 as a whole, which imposes obligations on parties and third parties to a dispute to treat certain documents and information submitted in those proceedings as confidential.

[28] The second sentence of Article 18.2 states that "*[n]othing in this Understanding* shall preclude a party to a dispute from disclosing statements of its own positions to the public." (emphasis added)

[29] Our reading of Article 18.2 of the DSU is consistent with that of the panel in *Argentina − Poultry Anti-Dumping Duties*, which interpreted the first two sentences of Article 18.2, read together and in the context of one another, to mean that, while one party could not disclose the "written submissions" of another party, each party was entitled to disclose statements of its own positions, subject to respecting the confidentiality of information designated as confidential under the third sentence of Article 18.2. The panel considered that the only limitation on a party's ability to disclose statements of its own positions to the public under the second sentence of Article 18.2 was its obligation to treat as confidential any information that the other party had specifically designated as confidential pursuant to the third sentence of Article 18.2, see Panel Report, *Argentina − Poultry Anti-Dumping Duties*, para. 7.14.

Article 18.2. The first sentence of Article 18.2, in stating that written submissions to the panel or the Appellate Body shall be treated as confidential, requires that parties and other persons authorized to have access to the written submissions to a panel or the Appellate Body, ensure that access to those submissions is restricted to authorized persons who are similarly bound to treat the submissions as confidential.[30]

5.13. We consider that an expansive reading of the first sentence of Article 18.2, in which the confidentiality protections attaching to the written submissions encompass also all of the information that is contained in or derived from those documents (i.e. defences, legal arguments, positions, opinions, facts and any other evidence), would render redundant the third sentence of Article 18.2. It is also difficult to envisage how, as a matter of logic, it would be possible to provide a "non-confidential summary" of such information contained in the written submissions (understood in the expansive sense above), as required by the fourth sentence. We note that the Appellate Body in *US − Continued Suspension* reached a similar conclusion regarding the relationship between Article 17.10 of the DSU, which provides that the proceedings of the Appellate Body shall be confidential, and Article 18.2. The Appellate Body explained that Article 17.10 must be read in light of Article 18.2, and that the third sentence of Article 18.2 would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings.[31] In our view, the same considerations apply with respect to the interpretation of the first sentence of Article 18.2 in relation to the third sentence of that provision.

5.14. In addition, we note that the term "information" as used in the covered agreements refers to facts or other evidence, as distinct from legal arguments, positions, or opinions of a party to a dispute.[32] Moreover, the Appellate Body has previously observed that questions of legal interpretation are not inherently confidential.[33] We similarly do not consider that the legal arguments, positions and opinions of parties in WTO dispute settlement proceedings are inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU.

5.15. For the foregoing reasons, we do not consider that Article 18.2 of the DSU precludes a party, in exercising its right to disclose a statement of its own positions to the public in accordance with the second sentence of that provision, from making reference to the corresponding positions of the other parties to the dispute.[34] While a party disclosing a statement of its own positions to the public

[30] See Appellate Body Report, *Thailand − H-Beams*, para. 74 (providing an example of an instance in which it appeared that access to a submission in an Appellate Body proceeding was provided to an unauthorized person or entity).

[31] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 4.

[32] E.g. Article 13 of the DSU, Article 6.5.1 of the Anti-Dumping Agreement, Article 12.4.1 of the SCM Agreement, and additional working procedures for the protection of BCI. For example, in *EU − Footwear (China)*, China attempted to define the term "information" in Article 6.5 of the Anti-Dumping Agreement as "communication of the knowledge of some fact or occurrence; knowledge or facts communication about a particular subject, event, etc.; news; intelligence". The panel considered that the definition of "information" encompassed the names of companies as complainants or supporters of the complainant in an original anti-dumping investigation or expiry review request. (Panel Report, *EU − Footwear (China)*, paras. 7.669-7.671.) See also Appellate Body Report, *US − Continued Zeroing*, para. 347 (quoting Appellate Body Report, *Canada − Aircraft*, para. 192.) For examples of *facts sought by a panel under Article 13* of the DSU, see Appellate Body Reports, *Canada − Aircraft*, paras. 185 and 199 (referring to a public company's financing of a particular transaction); *EC − Bed Linen (Article 21.5 − India)*, paras. 159, 165, and 166 (referring to stocks and capacity utilization used by an investigating authority to make its injury determination); *US − Large Civil Aircraft (2nd complaint)*, para. 1145 (instruments and contracts funded by a government programme); and *US − Continued Zeroing*, paras. 342 and 347 (detailed, transaction-specific margin calculations). For examples of *information that was treated as confidential by an investigating authority* in a trade remedies investigation and was examined to determine whether a non-confidential summary should have been prepared, see Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.195 (referring to Panel Report, *EC − Fasteners (Article 21.5 − China)*, fn 200 to para. 7.145). See also Panel Reports, *China − Autos (US)*, paras. 7.8, 7.9, and 7.11; *China − Broiler Products*, para. 7.306; *EU − Footwear (China)*, paras. 7.706, 7.707, 7.721, 7.736, and 7.776; *China − GOES*, paras. 7.150 and 7.158; *China − X-Ray Equipment*, paras. 7.330, 7.337, , 7.344, 7.348 and 7.349; and *China − HP-SSST (Japan) /China − HP-SSST (EU)*, paras. 7.308-7.310, 7.316, and 7.319 (supported by Appellate Body Reports, *China − HP-SSST (Japan)/ China − HP-SSST (EU)*, para. 5.109).

[33] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 9.

[34] Our interpretation of Article 18.2 would not permit a party to disclose a statement of its own positions to the public by simply appending the written submissions of another party with the introductory words, "We

may not refer to information designated as confidential by a Member in accordance with the third sentence of Article 18.2, the information eligible for such designation is limited to facts and other evidence submitted to a panel or the Appellate Body and additionally excludes any information that is already publicly available.

5.16. We therefore conclude that the disclosures in the published version of the European Union's third-party submission and statement of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994, as well as aspects of the positions of other third parties, for the purpose of setting forth the European Union's positions on those issues, are not inconsistent with the confidentiality obligations contained in Article 18.2 of the DSU.

5.17. Paragraph 2 of the Working Procedures reflects the obligations in Article 18.2 of the DSU.[35] Although there are differences in terminology between paragraph 2 of the Working Procedures and Article 18.2 of the DSU, we do not consider any of the differences to be relevant to the issue before us. Therefore, we reach the same conclusion with respect to the alleged violations of paragraph 2 of the Working Procedures.

5.18. In the light of the above, we find it unnecessary to take any action regarding the European Union's published third-party submission and statement based on the disclosure of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994.

5.3 Objections to disclosure of contents of other procedural documents pertaining to the Panel's proceedings

5.19. Russia objects to the European Union's disclosure, in its published third-party statement, of the following excerpts from the Panel's ruling on the joint request for enhanced third-party rights: [this proceeding presents] "an exceptional situation"; [this proceeding raises issues of] "vital systemic importance"; and [the Panel's conclusions regarding the interpretive issues raised by Russia will have] "far-reaching effects on the determination of the ambit of the covered agreements and on the WTO as a whole".[36]

5.20. The Panel's ruling on the joint request for enhanced third-party rights was circulated to the parties and third parties on 9 January 2018, and was marked as "Confidential" by the Panel.

5.21. The European Union's published third-party statement quotes directly from the Panel's ruling for the purpose of introducing points that it wishes to make on issues that are distinct from those addressed in the Panel's ruling. It is therefore not possible to discern the context in which the Panel made the excerpted statements. The outcome of the Panel's ruling on the joint request for enhanced third-party rights was not disclosed and the Panel's reasoning in support of the outcome was not disclosed, nor was the ruling itself published.

5.22. In these circumstances, we do not consider that the confidentiality of the ruling was compromised. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on the quotation of excerpts from the Panels' ruling on the joint request for enhanced third-party rights.

5.4 Objections to disclosure of the contents of the Panel's questions to the parties and third parties

5.23. Russia objects that the European Union has disclosed the contents of the Panel's questions to the parties and third parties during the first substantive meeting in stating in the published version of its third-party statement: "[f]inally, with regard to the Panel's question concerning indirect transit routes …".[37]

do not agree with the following". This would amount to a publication of the actual written submission of the other party, contrary to the first sentence of Article 18.2 of the DSU.

[35] See fn 22 above.

[36] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

[37] Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 38).

5.24. Russia does not indicate which Panel question or questions it considers were thereby disclosed. However, the Panel notes that the advance questions which it sent to the third parties (with a copy to the parties) on 12 January 2018, were marked "Confidential", and included the following question:

> Leaving to one side the potential application of Articles XX and XXI of the GATT 1994, whether there are any circumstances in which a Member across whose territory goods are transiting may require that transit of such goods from a neighbouring Member not proceed directly across their mutual border, but through another country, without the designation of such "indirect" transit route amounting to a violation of Article V:2, first sentence.

5.25. The reference in the European Union's published third-party statement to "the Panel's question concerning indirect transit routes" was made by way of introduction to its statement of position on whether a particular route at issue in this dispute could be considered a "route most convenient".

5.26. In these circumstances, we do not consider that a reference to a "question concerning indirect transit routes" reveals the contents of the Panel's question so as to compromise the confidentiality of the Panel's questions to the parties and third parties. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on the reference to "the Panel's question concerning indirect transit routes".

5.5 Objections to disclosure of information regarding the Panel's timetable

5.27. Russia objects that the European Union disclosed the date of receipt of the third-party submissions and the date of the first substantive meeting of the Panel.

5.28. Russia does not identify where in the European Union's published third-party submission and statement the date of receipt of third-party submissions or date of the first substantive meeting is revealed directly, or if not revealed directly, how these dates are nevertheless revealed.[38] As Russia has not sufficiently explained the grounds for its objection, we decline to address it further.

5.6 Objections to disclosure of the contents of the first substantive meeting and details regarding the ongoing dispute of *Russia – Pigs*

5.29. Russia objects that the European Union disclosed the "contents of the first substantive meeting" and details relating to the ongoing dispute, *Russia – Pigs*.

5.30. Regarding the alleged disclosure of the contents of the first substantive meeting, it would appear from the paragraph of the European Union's published third-party statement to which Russia refers that Russia objects to the European Union's statement that, at the party session of the first substantive meeting, Russia referred to the amendments to Resolution No. 778 effected by Resolution No. 1292.

5.31. Paragraph 3 of the Working Procedures states that "[t]he Panel shall meet in closed session."

5.32. The European Union's reference to the fact that Russia referred to a particular amendment to Resolution No. 778 was made by way of introduction to a statement of the European Union's positions in *Russia – Pigs*, a dispute between the European Union and Russia, which is unconnected to the present dispute. Resolution No. 778 is one of the legal instruments set forth in Ukraine's panel request.[39] The panel request also refers to "any amendments …, extensions, implementing measures, and any other measures related to the measures listed above" which would include Resolution No. 1292.[40] In essence, the European Union has disclosed that, during the first substantive meeting, Russia referred to certain legal instruments implementing the measures at issue.

[38] Russia's letter dated 14 March 2018, pp. 1-3.
[39] Ukraine's request for the establishment of a panel, p. 2.
[40] Ukraine's request for the establishment of a panel, p. 3.

5.33. In these circumstances, we do not consider that the European Union has disclosed the contents of the first substantive meeting of the Panel and thus violated paragraph 3 of the Working Procedures. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on its reference to the fact that Russia referred to the amendments to Resolution No. 778 by Resolution No. 1292.

5.34. The details relating to the *Russia – Pigs* dispute that are the focus of Russia's other objection appear to concern the fact that the European Union disclosed, in its published third-party statement, that the reasonable period of time for Russia to have brought the measures in *Russia - Pigs* into compliance expired in December 2017, that Russia claimed that it had fully complied with the DSB recommendations and rulings in that dispute, and that the European Union considered that Russia had not complied. All of the information regarding these facts is publicly available, and therefore, is not confidential.[41]

5.35. Accordingly, we do not consider that the European Union's references to issues pertaining to the *Russia – Pigs* dispute in the European Union's published third-party statement contravene any confidentiality obligations to which the European Union is subject in these proceedings. We therefore find it unnecessary to take any action regarding the European Union's published third-party statement based on its disclosures concerning the *Russia – Pigs* dispute.[42]

6 RULING

6.1. For the reasons set forth above, the Panel rules as follows:

a. The Panel has jurisdiction to address Russia's complaints that the European Union has failed to observe confidentiality obligations applicable to these proceedings[43];

b. The disclosures in the European Union's published third-party submission and statement of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994, as well as aspects of the positions of other third parties, are not inconsistent with the confidentiality obligations contained in Article 18.2 of the DSU[44] or with paragraph 2 of the Working Procedures[45];

c. The quotations of excerpts from the Panel's ruling on the joint request for enhanced third party rights in the European Union's published third-party statement do not, in the circumstances, compromise the confidentiality of that ruling[46];

d. The reference to a "question concerning indirect transit routes" in the European Union's published third-party statement does not compromise the confidentiality of the Panel's questions to the parties and third parties[47];

e. As Russia has not sufficiently explained the grounds for its objection to the European Union's alleged disclosure of the date of receipt of the third-party submissions and the date of the first substantive meeting of the Panel[48], the Panel need not rule on it;

[41] See WT/DS475/15, WT/DS475/16, and WT/DS475/17.
[42] We wish to add, however, that it is an altogether separate issue whether the European Union's statements, in these proceedings, of its positions in an unconnected dispute between the European Union and Russia, are relevant to the issues before this Panel, and thus whether it was appropriate for the European Union to have made such statements in these proceedings.
[43] See paragraphs 5.4 and 5.5 above.
[44] See paragraph 5.16 above.
[45] See paragraph 5.17 above.
[46] See paragraph 5.22 above.
[47] See paragraphs 5.25 and 5.26 above.
[48] See paragraphs 5.27 and 5.28 above.

f. The disclosure in the European Union's published third-party statement of the fact that, during the first substantive meeting, Russia referred to certain legal instruments is not a violation of paragraph 3 of the Working Procedures[49]; and

g. The reference by the European Union to the ongoing dispute in *Russia – Pigs* in its published third-party statement does not disclose any "confidential information" which was not publicly available.[50]

6.2. The Panel therefore declines to take action against the European Union in relation to the publication of its third-party submission and statement on the website of the European Commission's Directorate-General for Trade.

[49] See paragraphs 5.29, 5.32, and 5.33 above.
[50] See paragraphs 5.29, 5.34, and 5.35 above.

ANNEX B-3

ADMISSIBILITY RULING

Issued by the Panel on 23 July 2018

1 INTRODUCTION

1.1. This ruling addresses the request of the Russian Federation (Russia) that the Panel exclude Exhibit UKR-106 (BCI) from the record in this dispute. Russia regards the late submission of this exhibit as contrary to paragraph 7 of the Working Procedures and "an abuse of process" by Ukraine. Ukraine considers that Exhibit UKR-106 (BCI) is evidence submitted for purposes of rebuttal, which may be submitted after the first substantive meeting in accordance with paragraph 7 of the Working Procedures.

1.2. The issue before us is whether Ukraine's submission of Exhibit UKR-106 (BCI) at the second substantive meeting was timely in the circumstances, particularly in light of paragraph 7 of the Working Procedures. Paragraph 7 of the Working Procedures provides that:

> [E]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.3. Exhibit UKR-106 (BCI) is evidence that pertains to a disputed issue between the parties, namely, whether Ukraine has demonstrated that a category of measures, the "2014 transit bans and other transit restrictions", existed at the time of Ukraine's panel request.

1.4. Russia's basic position is that Exhibit UKR-106 (BCI) is factual evidence that is not *necessary* for purposes of rebuttal, within the meaning of paragraph 7 of the Working Procedures, given the nature of the exchanges between the parties on the issue at the first substantive meeting, and the fact that the evidence in question was available to Ukraine prior to the first substantive meeting and could have been submitted at the first substantive meeting.[1]

1.5. Ukraine's position is that Exhibit UKR-106 (BCI) directly rebuts Russia's argument, made at the first substantive meeting, that one of the legal instruments through which the measures in question are implemented (*Rosselkhoznadzor* instruction No. FS-NV-7/22886) does not apply, and has never applied, with respect to Ukraine.[2] Therefore, the requirement of paragraph 7 of the Working Procedures, that factual evidence be submitted no later than during the first substantive meeting, does not apply to the present situation, and Ukraine may submit this factual evidence at any point during the proceedings following the first substantive meeting.[3]

[1] Letter of the Russian Federation dated 13 June 2018, pp. 1 and 3.
[2] Ukraine's comments on Russia's response to Panel question No. 8, para. 37.
[3] Ukraine's comments on Russia's response to Panel question No. 8, para. 37. Ukraine also denies that its filing of Exhibit UKR-106 (BCI) with its opening statement at the second substantive meeting deprived Russia of the opportunity to verify the information contained in the exhibit and to prepare an appropriate response. It considers that Russia had opportunities to comment on this evidence in its closing statement at the second meeting of the Panel, or in its response to Panel question No. 8 following the second meeting with the Panel. (Ukraine's comments on Russia's response to Panel question No. 8, paras. 38-40.)

2 ANALYSIS

2.1. According to the Appellate Body, due process is best served by working procedures that provide for appropriate factual discovery at an early stage in panel proceedings.[4] Under standard working procedures, the complaining party is required to put forward its case, with a full presentation of the facts on the basis of the submission of supporting evidence, during the first stage of panel proceedings, that is, up to and including the first substantive meeting of the panel with the parties.[5] This requirement of the standard working procedures is reflected in paragraph 7 of the Working Procedures in this dispute. Paragraph 7 of the Working Procedures also recognizes that, as the proceedings develop, it may become necessary for a party to submit additional evidence in order to rebut arguments that have subsequently arisen, to respond to questions posed by the panel or other party, or to comment on answers to questions provided by the other party.

2.2. The question is whether Exhibit UKR-106 (BCI) falls under one of these exceptions. In the first round of arguments, Ukraine's arguments concerning the existence of the measures in question related to their legal existence in Russia's legal system without reference to any specific instances of application. That is, Ukraine's arguments related to the existence of the measures "as such".[6] Russia's answer was that Ukraine failed to prove that the measures were ever applied in respect of Ukraine.[7] At the second substantive meeting, Ukraine reiterated its "as such" argument while also submitting the contested exhibit concerning the application of the measure, in one instance, as evidence in support of its main argument.[8] But this does not make such evidence "necessary for purposes of rebuttal" within paragraph 7 of the Working Procedures.[9]

3 DECISION

3.1. We therefore grant Russia's request and exclude Exhibit UKR-106 (BCI) from the record, on the basis that it constitutes factual evidence that was not submitted in a timely manner as required by paragraph 7 of the Working Procedures, and does not fall within either of the exceptions provided for in that paragraph.

_____

[4] Appellate Body Report, *Thailand – Cigarettes*, para. 149 (referring to Appellate Body Report, *India – Patents (US)*, para. 95.) Due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party and that each party be provided with an opportunity to respond to claims made against it. (Appellate Body Report, *Thailand – Cigarettes*, para. 150 (referring to Appellate Body Report, *Australia – Salmon*, para. 278).)

[5] Appellate Body Report, *US – Gambling*, para. 271 and fn 316 thereto (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.)

[6] In its opening statement at the first substantive meeting, Ukraine notes that, because *Rosselkhoznadzor* instruction No. FS-NV-7/22886 entered into force on 30 November 2014 and continues to apply in its amended form, "[i]t is […] unclear why the Russian Federation now complains that Ukraine provided no evidence of the continuing application of the legal instruments through which the 2014 transit ban and other transit restrictions are imposed." Ukraine adds that the instruction at issue and the amendment thereto have not "expire[d] or los[t] their legal effects." (Ukraine's opening statement at the first meeting of the Panel, paras. 9-14.) Ukraine later clarifies in its second written submission that its claims as regards the instruction at issue and the amendment to the instruction are "as such" claims, and that Ukraine is not challenging the instructions "as applied". (Ukraine's second written submission, para. 25.) See also Ukraine's comments on Russia's response to Panel question No. 8, para. 32.

[7] Russia's opening statement at the first meeting of the Panel, para. 6.

[8] Ukraine submitted Exhibit UKR-106 (BCI) "[f]or the avoidance of any doubt on this matter" and to reinforce Ukraine's arguments. (Ukraine's opening statement at the second meeting of the Panel, para. 7.)

[9] This is apparent from Ukraine's comment on Russia's response to Panel question No. 8 that "the success of Ukraine's claims regarding the 2014 transit ban and other transit restrictions *does not depend* on evidence of the application of those instructions with respect to Ukraine." (Ukraine's comments on Russia's response to Panel question No. 8, para. 37. (emphasis added)) See also Ukraine's second written submission, para. 25; and opening statement at the second meeting of the Panel, para. 32.

ANNEX C

ARGUMENTS OF THE PARTIES

UKRAINE

RUSSIAN FEDERATION

ANNEX C-1

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. INTRODUCTION

1. The present dispute concerns various bans and other restrictionsimposed by the Russian Federation on traffic in transit by road and rail transportfromthe territory of Ukraine, through the territory of the Russian Federation, to the territory of Kazakhstan, the Kyrgyz Republic and certain other third countries in Central and Eastern Asia and the Caucasus, and the publication and administration of those bans and restrictions. Some measures at issue apply to traffic in transit of all goods, while others apply to traffic in transit of non-zero duty goods and goods from certain countries (the United States, the European Union, Canada, Australia, Norway, Albania, Montenegro, Iceland, Liechtenstein and Ukraine) of which the importation into the Russian Federation is prohibited ("Resolution No. 778 goods").

II. MEASURES AT ISSUE

2. Ukraine challenges four categories of measures of the Russian Federation:

- The 2014 transit ban and other transit restrictions, imposed by Instructions of Rosselkhoznadzor Nos. FS-NV-7/22886[1] and FS-AS-3/22903, prohibiting transit of veterinary Resolution No. 778 goods through the checkpoints of the Republic of Belarus; requiring that transit of such goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the Customs Union of the Eurasian Economic Union ("EAEU"); requiring that a permit is obtained in order for such traffic in transit to pass through the territory of the Russian Federation; and requiring that traffic in transit of plant Resolution No. 778 goods passes through the checkpoints across the state border of the Russian Federation.
- The 2016 general transit ban and other transit restrictions, imposed by Decree No. 1[2],prohibiting that traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic directly passes through the territory of the Russian Federationat the border between Ukraine and the Russian Federation, requiring that such traffic in transit passes via the Belarus route (which includes the entry and exit control point requirement)and satisfies the identification and registration card requirements.
- The 2016 product-specific transit ban and other transit restrictions, imposed byDecree No. 1[3], prohibiting that traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic directly passes through the territory of the Russian Federation, requiring that such traffic in transit passes via the Belarus route (which includes the entry and exit control point requirement), provided that the request and authorisation requirements are met and that the traffic in transit satisfies the identification and registration card requirements.
- The de facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit from the territory of Ukraine and destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan ("the de facto application of the 2016 general and product-specific transit bans").

3. Contrary to the Russian Federation's allegations, the 2014 transit ban and other transit restrictionscontinue to exist.On the one hand, Instruction No. FS-NV-7/22886 was formally amended by Instruction No. FS-EN-7/19132 on 10 October 2016. On the other hand, Decree No. 1 and Resolution No. 1 did not causeInstructions Nos. FS-NV-7/22886 and FS-AS-3/22903 to expire or lose their legal effect. Only in so far as there is a conflict will the provisions contained in Decree No. 1 and Resolution No. 1prevail over the provisions contained in Instruction No. FS-NV-7/22886in certain defined cases.

[1] As amended by Instruction No. FS-EN-7/19132.
[2] As amended by Decree No. 319 and Decree No. 643, and implemented by Resolutions Nos. 1, 147 and 276 (as amended) and PJSC Russian Railways Order No. 529r.
[3] Ibid.

4. The de facto application of the 2016 general and product-specific transit bansis an unwritten measure consisting of the application of a written measure of general and prospective application to a type of traffic in transit that is not covered by that written measure. Ukraine submits that its burden to show the existence of that measure cannot be identical to that which applies in case of an unwritten measure that is unrelated to a written measure of general and prospective application. Ukraine has shown that (i) the measure is attributable to the Russian Federation; that (ii) the content of the measure is the application of the general and product-specific transit bans in Decree No. 1, as amended, to transit destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan; and that (iii) the ban applied to transit destined for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan applies in general and in the future.

III. UKRAINE'S PANEL REQUEST SATISFIES THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

5. Ukraine asks the Panel to reject the Russian Federation's objections, raised in Section III of its opening statement at the first substantive meeting, as regards whether the Panel request properly identifies the specific measures at issue and provides a legal basis that is sufficient to present the problem clearly.

6. The fact that Ukraine decided to identify the specific measures at issue in this dispute by presenting them in two separate sections of its Panel request[4] does not automatically mean that, in doing so, the measures identified in each section must be presumed to "operate together".

7. Furthermore, the Russian Federation has not put forward any argument, based on an interpretation of Article 6.2 of theUnderstanding on rules and procedures governing the settlement of disputes ("DSU")and an assessment of the structure and the terms of the Panel request read as a whole, in support of its complaint that Ukraine did not identify whether the specific measure identified in the sixth paragraph of Section III.A of the Panel request is written or unwritten and is challenged as such or as applied. In that sixth paragraph, Ukraine identified as a distinct measure the application in fact of the measures introduced by Decree No. 1 and Resolution No. 1 to traffic in transit destined for territories other than those covered by Decree No. 1 and Resolution No. 1. By identifying that measure through, inter alia, the phrase "territories in Central and Eastern Asia and Caucasus", Ukraine did not refer to an open-ended list.

8. Finally, the Panel request puts the Russian Federation in a well-informed position so that it is able to defend itself against each claim made with respect to the specific measures at issue. On the plain terms of the Panel request, read as a whole, it is clear what case the Russian Federation must answer.

IV. CLAIMS UNDER ARTICLE V OF THE GATT 1994 AND PARAGRAPH 1161 OF THE WORKING PARTY REPORT

9. Ukraine submits that the 2014 transit ban and other transit restrictions, the 2016 general transit ban and other transit restrictions, the 2016 product-specific transit ban and other transit restrictions and the de facto application of the 2016 general and product-specific transit bans apply to traffic in transit as defined for the purposes of Article V of theGeneral Agreement on Tariffs and Trade 1994 ("GATT 1994") and, as a result, aresubject to the obligations laid down in that provision.

10. Ukraine claims that the Russian Federation, through the measures at issue, violates Articles V:2, first and second sentences, V:3, V:4 and V:5 of the GATT 1994. By establishing such violations, Ukraine has also, in each instance, shown a violation of paragraph 1161 of the Working Party Report[5].

A. Violation of Article V:2, first sentence, of the GATT 1994

[4] Russia – Measures Concerning Traffic in Transit – Request for the Establishment of a Panel by Ukraine, WT/DS512/3 (10 February 2017) ("Panel request").

[5] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization dated 17 November 2011, WT/ACC/RUS/70 and WT/MIN(11)/2 ("Working Party Report").

11. The first sentence of Article V:2 of the GATT 1994establishes the freedom of transit for traffic in transit to or from the territory of other World Trade Organization ("WTO") Members. Corresponding with that freedom is the basic obligation for all WTO Members to guarantee, as regards traffic in transit passing through their territory, freedom of transit via the routes most convenient for international transit.The qualification "via the routes most convenient for international transit" makes it clear that WTO Members must let foreign goods pass across their territory for the purpose of international transit and in a manner that facilitates trade by offering access to the most convenient routes of passage.

12. In making an objective assessment of the conditions under which international transit may occur, Ukraine considers that is relevant to consider, inter alia: (i) the mode of transport; (ii) the provenance of the goods; (iii) the destination of the goods; (iv) the length of the transit route; (v) the available access to the transit routes; (vi) the administrative formalities and charges incurred; (vii) the cost of using the transit routes; (viii) the operator's right to choose a mode of transport; and (ix) the product characteristics.

13. Ukraine submits that the 2014 transit ban, the 2016 general and product-specific transit bans and the de facto application of the 2016 general and product-specific transit bans violate Article V:2, first sentence, of the GATT 1994.Through those measures, the Russian Federation precludes traffic in transit from passing, via the most convenient routes, from the territory of either Belarus or Ukraine, through the territory of the Russian Federation, to the territories of certain third countries.More specifically:

- the 2014 transit banprohibits the entry of traffic in transit of veterinary Resolution No. 778 goods at the border between Belarus and the Russian Federation;

- the 2016 general transit ban prohibitsdirecttraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic and prohibits indirecttraffic in transit of such goods other than through the Belarus route;

- the 2016 product-specific transit ban prohibits direct traffic in transit and as good as prohibits indirect traffic in transit by road and rail transport of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and

- the de facto application of the 2016 general and product-specific transit bansprohibitsdirecttraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistanand, for Resolution No. 778 goods and non-zero duty goods, also prohibits indirecttraffic in transit through the territory of the Russian Federation.

14. Whereas the freedom of transit guaranteed by the first sentence of Article V:2 of the GATT 1994 is to be qualified by the specific rules as regards charges, regulations and formalities found in the other paragraphs of Article V, Ukraine submits that those specific rules do not provide that a measure *prohibiting* traffic in transit may nonetheless be consistent with Article V. In other words, where a measure is found to *prohibit* traffic in transit via the most convenient routes, that finding is sufficient to conclude that the measure is inconsistent with Article V:2, first sentence, of the GATT 1994.

15. Ukraine submits that the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions violate Article V:2, first sentence, of the GATT 1994, because those restrictions interfere with the freedom of transit via the most convenient routes. More specifically:

- the 2014 other transit restrictionsrequire that traffic in transit of veterinary Resolution No. 778 goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the EAEU Customs Union;

- the 2016 general other transit restrictionsrequire thattraffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfiesthe identification and registration card requirements; and

- the 2016 product-specific other transit restrictionsrequire that traffic in transit of Resolution No. 778 goods and non-zero duty goodsby road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republicpasses via the Belarus route (which includes the entry and exit control point requirement), provided that the request and authorisation requirements are metand that the traffic in transit satisfies the identification and registration card requirements.

16. Ukraine claims that, by imposing each of those restrictions, the Russian Federation impedes the freedom of transit by rendering traffic in transit, and therefore possibly also exportation and importation, more burdensome, expensive, slow or even (nearly) impossible. In so far as the restrictions fall within the scope of the other paragraphs of Article V of the GATT 1994, Ukraine shows that those restrictions are inconsistent with the conditions laid down in those paragraphs.

B. Violation of Article V:2, second sentence, of the GATT 1994

17. Ukraine submits that the 2014 transit ban and other transit restrictions, the 2016 general and product-specific transit bans and other transit restrictions and the de facto application of the 2016 general and product-specific transit bans violate the Russian Federation's obligation under the second sentence of Article V:2 of the GATT 1994, by distinguishing between traffic in transit based on prohibited criteria. More specifically:

- the 2014 transit ban and other transit restrictions distinguish (i) based on the place of origin and entry of traffic in transit into the territory of the Russian Federation by prohibiting the entry of traffic in transit of veterinary Resolution No. 778 goods at the border between Belarus and the Russian Federation and by requiring that the entry of such traffic in transit occurs at a limited number of checkpoints located at the Russian part of the external border of the EAEU Customs Union; (ii) based on the place of destination of traffic in transit of veterinary Resolution No. 778 goods passing through the territory of the Russian Federation by imposing different transit permit requirements depending on whether the goods are destined for Kazakhstan or other third countries; and (iii) based on the place of origin by requiring that the movement of traffic in transit of plant Resolution No. 778 goods occurs through the checkpoints across the state border of the Russian Federation;

- the 2016 general transit banand other transit restrictionsdistinguish(i) based on the place of departure, entry, exit and destination of traffic in transit, by prohibiting the direct traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and (ii) based on the place of departure, entry, exit, and destination of traffic in transit, by subjecting traffic in transit from Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic to the Belarus route requirement (which includes the entry and exit control point requirement), together with the identification and registration card requirements;

- the 2016 product-specific transit banand other transit restrictions distinguish (i) based on the place of origin and destination of traffic in transit, by prohibiting traffic in transit of Resolution No. 778 goods and non-zero duty goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic; and (ii) based on the place of origin, departure, entry, exit and destination of traffic in transitfrom Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic, making the derogation from the ban on indirect traffic in transit dependent on the request and authorisation requirements and on compliance with the Belarus route requirement (which includes the entry and exit control point requirement), and the identification and registration card requirements; and

- the de facto application ofthe 2016 general and product-specific transit bans distinguish based on the place of origin, departure, entry and destination of traffic in transit, by prohibiting direct traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan, and by prohibiting all traffic in transit of Resolution No. 778 goods and non-zero duty goodsby road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

C. Violation of Article V:3 of the GATT 1994

18. Ukraine claims that the 2016 general and product-specific other transit restrictions violate Article V:3 of the GATT 1994 by subjecting traffic in transit through the territory of the Russian Federation, which has been entered at a customs house, to unnecessary delays or restrictions. In particular, the Belarus route requirement (which includes the entry and exit control point requirement), the conditional access to the Belarus route (for traffic in transit of Resolution No. 778 goods and non-zero duty goods),and the identification and registration card requirements result in delays or restrictions that go beyond what is necessary in order to put traffic in transit under a transit procedure in order to ensure that goods move through the territory (and eventually leave the territory) as traffic in transit instead of entering the territory (in the sense of importation). Those requirements have no bearing whatsoever on the objective of putting that traffic in transit under a transit procedure. Moreover, the identification and registration card requirements are unnecessary because traffic in transit made subject to those requirements is already put under a customs transit procedure and therefore has already been entered at a customs house upon starting the passage through the customs territory of the EAEU Customs Union.

D. Violation of Article V:4 of the GATT 1994

19. Ukraine submits that the Russian Federation violates Article V:4 of the GATT 1994 by imposing unreasonable regulations − meaning regulations that are not adequate and fair for achieving the purpose on the basis of which they are applied, taking into account the conditions of the traffic − on traffic in transit to or from the territories of WTO Members. In particular, the Russian Federation makes the derogation from the ban on traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic (meaning access to the Belarus route) dependent on the request and authorisation requirements. Ukraine has shown that the conditional access to the Belarus route in the form of the request and authorisation requirements is a regulation imposed by the Russian Federation on traffic in transit to or from the territory of other WTO Members, and that such conditional access is not reasonable, having regard to the conditions of the traffic. It renders the enjoyment of the freedom of traffic in transit entirely dependent on the unfettered discretion of both the third WTO Member for whose territory traffic in transit is destined and the WTO Member through whose territory traffic in transit would pass.

E. Violation of Article V:5 of the GATT 1994

20. Ukraine submits that the Russian Federation violates Article V:5 of the GATT 1994 by applying regulations in connection with transit that accord to traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan, the Kyrgyz Republic and certain other third countries in Central and Eastern Asia and the Caucasus treatment less favourable than that accorded to traffic in transit from the territory of another (non-)WTO Member and destined for the territory of another (non-)WTO Member.

21. In respect of the regulations and formalities imposed by the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions, Ukraine claims that the Russian Federation fails to accord, to traffic in transit from the territory of Ukraine, the treatment accorded to traffic in transit from the territories of other countries and destined for the territories of other countries. In particular, the less favourable treatment accorded to such traffic in transit is based on an express distinction based on the place of departure, origin, entry, exit and/or destination and therefore results in *de jure* discrimination. Ukraine has already established that Article V:2,second sentence,of the GATT 1994 prohibits distinctions made on the basis of those criteria. Where the treatment accorded as a result of such a distinction modifies the conditions of competition in the marketplace to the detriment of traffic in transit from or to a WTO Member, there is also a violation of Article V:5 of the GATT 1994.

22. In particular, through the 2014 other transit restrictions and the 2016 general and product-specific other transit restrictions, the Russian Federation treats traffic in transit from Ukraine less favourably than traffic in transit from the territory of other countries and destined for other countries, which has a detrimental impact on the conditions of competition for traffic in transit from the territory of Ukraine. More precisely:

- the 2014 other transit restrictionsrequire that transit of veterinary Resolution No. 778 goods through the territory of the Russian Federation is allowed only through nine identified checkpoints located at the Russian part of the external border of the EAEU Customs Union; require that a permit is obtained from the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of Kazakhstan in order for such traffic in transit to pass through the territory of the Russian Federation to the territory of Kazakhstan; and require that traffic in transit of plant Resolution No. 778 goods passes through the checkpoints across the state border of the Russian Federation; and

- the 2016 general and product-specific other transit restrictions require that traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territories of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfies the identification and registration card requirements, and furthermore require that traffic in transit of Resolution No. 778 goods and non-zero duty goods from Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic meets also the request and authorisation requirements.

23. Finally, Ukraine has already shown that the 2014 transit ban, the 2016 general and product-specific transit bans and the de facto application of the 2016 general and product-specific transit bans make distinctions that are prohibited and therefore violate Article V:2, second sentence, of the GATT 1994. Those measures are also regulations in connection with traffic in transit. It follows that those measures violate Article V:5 of the GATT 1994, by failing to accord to traffic in transit from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic (the 2016 general and product-specific transit bans) and for the territories of Mongolia, Tajikistan, Turkmenistan and Uzbekistan (the de facto application of the 2016 general and product specific transit bans), the treatment given to traffic in transit from the territory of other countries and destined for other countries. The Russian Federation also accords, to traffic in transit of goods originating in the countries listed in Resolution No. 778, treatment less favourable than that accorded to traffic in transit of goods originating in other countries. Likewise, the less favourable treatment accorded to such traffic in transit is based on an express distinction based on the place of origin, departure, entry, exit and/or destination and therefore results in *de jure* discrimination.

V. CLAIMS UNDER ARTICLES X:1 AND X:2 OF THE GATT 1994 AND PARAGRAPHS 1426, 1427 AND 1428 OF THE WORKING PARTY REPORT

24. Ukraine submits that the fact that Article X:1 of the GATT 1994 does not expressly include the terms "traffic in transit" or "transit" does not mean that measures covered by Article V of the GATT 1994 fall outside the scope of the publication and administration requirements contained in Article X of the GATT 1994. Measures falling within the scope of Article V may, depending on their content, design and operation, pertain to "rates of … taxes or other charges" *and/or* affect the "transportation …, warehousing, inspection … or other use".

A. Violation of paragraph 1426 of the Working Party Report and Article X:1 of the GATT 1994

25. Ukraine submits that the Russian Federation violates both paragraph 1426 of the Working Party Reportand Article X:1 of the GATT 1994 by failing to publish promptly (i) Decree No. 319; (ii) PJSC "Russian Railways" Order No. 529r; (iii) PJSC "Russian Railways" Notice of 17 May 2016; and (iv) the de facto application of the 2016 general and product-specific transit bans.

26. While paragraph 1426 of the Working Party Report and Article X:1 of the GATT 1994 contain the same substantive obligation of prompt publication, paragraph 1426 expands the scope of application of that requirement in Article X:1vis-à-vis the Russian Federation. Indeed, Article X:1 applies to legal instruments pertaining to or affecting a limited list of subject-matters, while paragraph 1426 applies to the broader category of legal instruments "pertaining to or affecting trade in goods, services, or intellectual property rights".Consequently, a violation of Article X:1 of the GATT 1994 implies a violation of paragraph 1426 of the Working Party Report.

27. Ukraine submits that the prompt publication requirements apply to these four measures because they are laws or regulations of general application made effective by the Russian Federation which affect the transportation of goods.The Russian Federation did not (adequately) publish PJSC "Russian Railways" Order No. 529r, PJSC "Russian Railways" Notice of 17 May 2016 and the de facto application of the 2016 general and product-specific transit bans, and did not publish promptly Decree No. 319.

B. Violation of paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994

28. Ukraine submits that the Russian Federation violates both paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994 by making effective and enforcing the following measures prior to their publication: (i) Decree No. 319; (ii) PJSC "Russian Railways" Order No. 529r;(iii) the de facto application of the 2016 general and product-specific transit bans; and (iv) Decree No. 643. These measures are laws or regulations of general application made effective by the Russian Federation which affect the transportation of goods, and impose new and more burdensome requirements on imports. Ukraine submits that the Russian Federation did not (adequately) publish PJSC "Russian Railways" Order No. 529r and the de facto application of the 2016 general and product-specific transit bans, and enforced Decrees No. 319 and No. 643 prior to their publication.

29. As paragraph 1428 of the Working Party Report expands both the scope of application and the substantive publication requirement of Article X:2 of the GATT 1994, a violation of Article X:2 of the GATT 1994 implies a violation of paragraph 1428 of the Working Party Report.

C. Violation of paragraph 1427 of the Working Party Report

30. Ukraine submits that the Russian Federation violates paragraph 1427 of the Working Party Report, which creates a new obligation vis-à-vis the Russian Federation, by failing to publish the following twentymeasures prior to their adoption: (i) Resolution No. 778; (ii) Resolution No. 830; (iii) Resolution No. 625; (iv) Resolution No. 842; (v) Resolution No. 981; (vi) Resolution No. 1397; (vii) Resolution No. 1; (viii) Resolution No. 147; (ix) Resolution No. 157; (x) PJSC "Russian Railways" Order No. 529r; (xi) Resolution No. 276; (xii) Resolution No. 388; (xiii) Resolution No. 472; (xiv) Resolution No. 608; (xv) Resolution No. 732; (xvi) Resolution No. 897; (xvii) Resolution No. 1086; (xviii) Resolution No. 790; (ixx) Resolution No. 1292; and (xx) Decree No. 643.

31. Those measuresare regulations of general application pertaining to or affecting trade in goods.The Russian Federation did not adequately publish PJSC "Russian Railways" Order No. 529r before or after being finalised, and did not publish the nineteenother resolutions and the decree of the Russian Federationprior to their adoption, meaning before they were finalised.

VI. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994

32. Ukraine claims that the Russian Federation violates Article X:3(a) of the GATT 1994 by failing to administer Decree No. 1, as amended by Decree No. 319, in a reasonable manner.

33. First, the Russian Federation blocks, at the border between Belarus and the Russian Federation, the entry of traffic in transit by road and rail transport from the territory of Ukraine and destined for the territories of Kazakhstan and the Kyrgyz Republic without providing any explanation of the reasons underlying that decision.This failure to state reasons constitutesan unreasonable administration of Decree No. 1, as amended.

34. Second, the Russian Federation administers paragraphs 1.1 and 1.2 of Decree No. 1, introduced by Decree No. 319, in an unreasonable manner because − as a result of the absence of any criteria on the basis of which it decides whether or not to authorise a derogation from the 2016 product-specific transit ban so that traffic in transit of Resolution No. 778 goods and non-zero duty goods from the territory of the Ukraine and destined for the territories Kazakhstan and the Kyrgyz Republic may, exceptionally, pass through the territory of the Russian Federation via the Belarus route − that regulation inherently contains the possibility of arbitrary decisions.

VII. THE RUSSIAN FEDERATION'S DEFENCE UNDER ARTICLE XXI(B)(III) OF THE GATT 1994 MUST FAIL

35. The Russian Federation argues that *all of the measures* challenged by Ukraine in these proceedings are, as regards *all of the claims* made by Ukraine, justified on the basis of Article XXI(b)(iii) of the GATT 1994. Besides asking the Panel to find that the measures at issue are not WTO-inconsistent, the Russian Federation also submits that neither the Panel nor the WTO as an institution enjoys jurisdiction to hear this dispute.

36. Ukraine submits that the Russian Federation cannot, on the one hand, argue that the Panel lacks jurisdiction to review the application of Article XXI of the GATT 1994 and, on the other hand, request the Panel to find that the measures at issue are not WTO-inconsistent. In any event, the Russian Federation's general jurisdictional objection is not supported by any valid legal argument and the Russian Federationhas not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994.

A. The Panel enjoys jurisdiction to examine the Russian Federation's invocation of Article XXI of the GATT 1994

37. Ukraine submits that there is no basis in the WTO covered agreements for the Russian Federation's position that the Panel is precluded from hearing and deciding on this dispute because it may not review the application of Article XXI of the GATT 1994.Accepting that all WTO Members may justify all of their otherwise WTO-inconsistent measures on the grounds of essential security interests without any possibility for scrutiny by a third party would seriously impair the functioning of the WTO and its dispute settlement system and possibly threaten its existence.

38. First, Article XXI of the GATT 1994 lays down an affirmative defence for measures which otherwise would be inconsistent with an obligation under the GATT 1994.As a result, Ukraine claims that it is for the Russian Federation to put forward evidence and legal arguments in support of its assertion that each of the measures at issue, with respect to which it invokes Article XXI(b)(iii) of the GATT 1994, satisfies the requirements of that provision.

39. Second, Article XXI of the GATT 1994 does *not* provide for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU.Conversely, the DSU itself does *not* contain a security exceptions clause. Nor does any other part of the GATT 1994 or the other WTO covered agreements offer a basis for excluding Article XXI of the GATT 1994 from the jurisdiction of WTO panels and the Appellate Body.

40. Third, taking into account the Panel's terms of reference, the Panel enjoys jurisdiction to examine and, where relevant, to make findings and recommendations with respect to each of the provisions of the WTO covered agreements cited by either Ukraine or the Russian Federation.Interpreting Article XXI of the GATT 1994 as being non-justiciable would undermine the Panel's terms of reference under Article 7 of the DSU and the general standard of review laid down in Article 11 of the DSU.

41. Fourth, as a result of the Russian Federation's argument, WTO Members would be authorised to adopt unilateral actions that may not be scrutinised by the WTO dispute settlement system. This would also mean that a WTO Member, instead of resorting to the WTO dispute settlement system for obtaining redress of violations of WTO rules, could instead turn to unilateral action based on Article XXI of the GATT 1994. Such unilateral actions would threaten the stability and predictability of the multilateral trade system and disregard Article 23 of the DSU.

42. Fifth, the Russian Federation disregards the distinction between the jurisdiction of the Panel and the applicable standard of review as regards the interpretation and application of the WTO covered agreements. The fact that the text of Article XXI of the GATT 1994 grants a certain degree of deference to the WTO Member invoking its security interestsdoes not mean that total deference is the appropriate standard of review.Should it be correct that Article XXI of the GATT 1994 grants WTO Members unfettered discretion to invoke the protection of their essential security interests, there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that otherwise is inconsistent with the GATT 1994.

43. Sixth, should the Panel be precluded from making an objective assessment of the entirety of the matter before it, it would also be precluded from making findings and recommendations regarding that matter. Its findings and recommendations would need to be limited to finding that the measures at issue are inconsistent with the GATT 1994. However, the Russian Federation expressly asks the Panel to find that the measures at issueare *not* inconsistent with its WTO obligations.

44. Seventh, the Russian Federation's position on jurisdiction cannot find support in the GATT dispute *US − Nicaraguan Trade*.Unlike what was the case in that dispute, the terms of reference of the Panel in these proceedings do not expressly exclude examining the invocation of Article XXI(b)(iii) of the GATT 1994.

45. The GATT 1994 and the DSU therefore confer on the Panel jurisdiction to examine the Russian Federation's reliance on Article XXI(b)(iii) of the GATT 1994.

B. Interpretation of Article XXI(b)(iii) of the GATT 1994

46. In order to successfully defend an otherwise WTO-inconsistent measure under Article XXI(b)(iii), the invoking WTO Member must show that (i) the measure was "taken in time of war or other emergency in international relations"; that (ii) the measure was taken "for the protection of its essential security interests; and that (iii) it considers the measure "necessary" to protect its essential security interests.

47. Unlike what is the case for the introductory paragraph of Article XXI(b) of the GATT 1994, the text of Article XXI(b)(iii)does not include the phrase "which it considers". It follows that the phrase "taken in time of war or other emergency in international relations" is to be given an objective meaning by a panel, and that a WTO Member invoking Article XXI(b)(iii) cannot unilaterally determine whether such circumstances exist. Ukraine submits that an emergency in international relations occurs where there is a serious disruption in international relations that demands action by a WTO Member so as to protect its "essential security interests".In order to enable a panel to establish whether the measure is "taken in time of war or other emergency in international relations", the WTO Member invoking Article XXI(b)(iii) must provide sufficient arguments and evidence showing that the measure at issue was taken in such circumstances.

48. The fact that the text of Article XXI(b) of the GATT 1994 expressly states that it is for a WTO Member to decide what action it considers necessary for protecting its essential security interests does not mean that a WTO Member enjoys total discretion.

49. First, the introductory paragraph of Article XXI(b) of the GATT 1994 makes it clear that the exception in Article XXI(b) is only triggered where a WTO Member acts "for the protection of its essential security interests".Ukraine submits that a panel must interpret the phrase "for the protection of its essential security interests" in accordance with the customary principles of interpretation and review whether a defending Member relies on Article XXI(b) in order to justify actions that protectits essential security interests. In order to do so, a panel must examine whether (i) the interests or reasons advanced by the defendant Member for imposing the measures fall within the scope of the phrase "its essential security interests" for the purposes of Article XXI(b)(iii) of the GATT 1994; and whether (ii) the measures are directed at safeguarding the defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.Through that analysis, a panel in essence verifies also whether the defending WTO Member has applied Article XXI of the GATT 1994 in good faith.

50. In order to enable a panel to conduct such an examination, a Member relying on Article XXI(b) of the GATT 1994must provide sufficient evidence,putting a panel in a position to reach a conclusion as to whether the advanced interests can reasonably be considered to correspond with the meaning of "essential security interests" and as to whether the measures at issue are capable of protecting the essential security interests pursued. Where no arguments and evidence are produced, a panel cannot reach any conclusions and must find that the respondent has failed to satisfy its burden of proof.

51. Second,the respondent WTO Member must consider the challenged measure to be "necessary" to protect its essential security interests.While a large degree of deference should be accorded to the Member taking the measure, Ukraine submits that a panel is to review whether, based on the facts available, the defending Member could reasonably arrive at the conclusion that the measures are necessary for protecting its essential interests.

C. The Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994

52. Ukraine submits that the Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994. Its sole argument in relying on this affirmative defence is the reference to an alleged emergency in international relations in 2014. This is insufficient to invoke successfully Article XXI(b)(iii) of the GATT 1994.

53. First, the Russian Federation failed toprovide arguments or evidence showing that the measures at issue were"takenin time of war or other emergency in international relations".As a result, Ukraine and the Panel are left in the dark as to what particular emergency in international relations caused the Russian Federation to adopt the measures at issue.

54. Second, the Russian Federation failed to produce arguments or evidencein order to put the Panelin a position to reach a conclusion as to whether the interests advanced by the Russian Federation can reasonably be considered to correspond with the meaning of "essential security interests" and whether the measures at issue are capable of protecting the essential security interests pursued. Without such evidence, the Panel is unable to determine whether the measures at issue aregenuinely taken for the protection of the security interests of the Russian Federation, and not for purely economic reasons.

55. Third, the Russian Federation has not demonstrated that it could reasonably arrive at the conclusion that the measures at issue are necessary for the protection of its essential interests.

56. Ukraine concludesthat the burden falls on the Russian Federation to show a serious disruption in international relations constituting an emergency that is sufficiently connected to the Russian Federation so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify action necessary to protect those interests.In relying on Article XXI(a) of the GATT 1994, the Russian Federation uses that exception to evade its burden of proof under Article XXI of the GATT 1994. Article XXI(a) exists, as an affirmative defence, in other to justify measures that otherwise would be inconsistent with transparency obligations under the GATT 1994, such as the publication requirements under Article X of the GATT 1994 and various obligations under the GATT 1994 to inform other WTO Members. It may not be invoked in order to evade the Russian Federation's obligations as a respondent WTO Member invoking an affirmative defence.

ANNEX C-2

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. INTRODUCTION

1. In these proceedings, the Russian Federation does not contest any of the claims made by Ukraine under Articles V and X of the GATT 1994 and under the Working Party Report. The Russian Federation's rebuttal is limited to: (i) raising new objections regarding Ukraine's Panel request; (ii) complaining that the 2014 transit ban and other transit restrictions no longer exist or were never applied with respect to Ukraine; and (iii) relying on Article XXI(b)(iii) of the GATT 1994 in order to justify all of the measures at issue with respect to all of the claims made by Ukraine. Unlike the Russian Federation, the third parties have addressed Ukraine's interpretation of Article V of the GATT 1994 in response to the Panel's questions. The Panel has also raised of its own motion a question relating to whether one of the measures was properly identified in the Panel request.

II. THE PANEL REQUEST SATISFIES THE CONDITIONS OF ARTICLE 6.2 OF THE DSU

2. The Panel raised of its own motion and prior to the first substantive meeting the question of whether the de facto application of the 2016 general and product-specific transit bans was properly identified in the Panel request. That matter has not been raised by the Russian Federation which, in its first written submission, complained only about an entirely separate question of fact, namely whether there was sufficient evidence of the existence of this unwritten measure.

3. The Russian Federation's response to the Panel's question was to raise a number of new challenges to the Panel request and the Panel's terms of reference.

4. The Russian Federation claimed that the Panel request failed, on the one hand, to identify adequately the specific measures at issue (and not only the *de facto* application of the 2016 general and product-specific transit bans) and, on the other hand, to establish the necessary nexus between the measures at issue and the relevant provisions of the WTO covered agreements which those measures violate. However, as demonstrated by Ukraine, the statements of the Russian Federation in its first and second written submissions show that the Russian Federation was well aware of the measures at issue and the claims made by Ukraine. Ukraine also rebutted each of the arguments made by the Russian Federation in its responses of 20 February 2018.

5. In its second written submission, the Russian Federation presented a new allegation, namely that due to the use of the phrase "each group of measures in Section I ("Background) of the Panel request, the specific measures at issue *are* the "First group of measures and the "Second group of measures. In its Panel request, Ukraine clearly indicated that the specific measures at issue are identified *in* Sections II and III of the Panel request and are organised in two groups. There is nothing in the Panel request to support that either group of measures *is* the specific measure at issue. Each section identifies the specific measures at issue as well as the legal instruments through which the Russian Federation imposes those measures (Sections II.A and III.A), followed by a clear explanation of the specific WTO provisions with which the measures identified in each section are inconsistent (Sections II.B and III.B).

6. In its second written submission, the Russian Federation also objected to the final paragraph of Section III.A of the Panel request. It argued that any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation may fall into this category of, what Ukraine assumes to be, the *de facto* application of the 2016 general and product-specific transit bans.

7. Ukraine argues that the Russian Federation's reading of the Panel request is not grounded in the words actually used in that request, considered as a whole. The sixth paragraph of Section III.A makes it clear that the matter before the Panel includes the *de facto* application of Decree No. 1 and Resolution No. 1, and thus the restrictions on traffic in transit imposed by both instruments to countries in Central and Eastern Asia and the Caucasus other than Kazakhstan and the Kyrgyz Republic. Furthermore, Ukraine has demonstrated that the phrase "Central and Eastern Asia and

Caucasus comprises a sufficiently precise and defined list of countries. Taking into account also Ukraine's submissions made during these proceedings − which the Panel may consult in order to confirm the meaning of the terms used in the Panel request − Ukraine submits that the Russian Federation has not shown how the terms of the Panel request have prejudiced its ability to defend itself.

8. Moreover, the Russian Federation fails to acknowledge that the final paragraph of Section III.A refers to "related measures, meaning measures that are connected or have a relation to other measures identified in the Panel request. By adding the final paragraph in Section III.A, Ukraine did no more than to ensure that measures bearing a relationship with the specific measures at issue, without changing the essence of those measures, fall within the Panel's terms of reference.

9. In light of the above, and taking into account Ukraine's previous submissions, Ukraine respectfully asks the Panel to confirm that the Panel request satisfies the conditions of Article 6.2 of the DSU.

III. THE 2014 TRANSIT BAN AND OTHER TRANSIT RESTRICTIONS CONTINUE TO EXIST AND APPLY WITH RESPECT TO UKRAINE

10. The Russian Federation continues to allege that Instructions Nos. FS-NV-7/22886 (the 2014 veterinary transit ban and other transit restrictions) and FS-AS-3/22903 (the 2014 plant transit restriction) impose measures that fall outside the Panel's terms of reference. Ukraine respectfully requests that the Panel rejects these arguments.

11. First, the Russian Federation wrongly assumes that, in order to challenge the measures imposed by Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903, Ukraine must show that those measures are applied to goods originating from Ukraine.

12. Second, Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 are not expired measures and continue to apply today. The fact that, on 1 January 2016, the 2016 general transit ban and other transit restrictions entered into force does not mean that the Instructions stopped applying or having any effect on traffic in transit passing through Ukraine or originating from Ukraine. Indeed, there is no evidence before the Panel that either instruction has been repealed (expressly or implicitly). Furthermore, by adopting Instruction No. FS-EN-7/19132, the Russian Federation expressly confirmed on 10 October 2016 (i.e. after the filing of the request for consultations) that Instruction No. FS-NV-7/22886, as amended, continued to apply. If neither instruction ever applied with respect to Ukraine, there would have been no need to adopt Instruction No. FS-EN-7/19132.

13. Third, in any event, the text of Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 make it clear that, even after the imposition of the 2016 general and product-specific transit bans and other transit restrictions, the measures which they impose apply with respect to certain traffic in transit passing through Ukraine. Ukraine emphasizes that the 2016 general and product-specific transit bans and other transit restrictions do not apply to, inter alia, traffic in transit from Ukraine and destined for territories *other than* those of Kazakhstan, Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Thus, although the legal provisions contained in Decree No. 1 and Resolution No. 1 prevail to the extent that there is a conflict over the legal provisions contained in both instructions, the instructions still apply to traffic in transit from Ukraine and of Ukrainian goods *not covered* by the 2016 general and product-specific transit bans and other transit restrictions. By admitting that Decree No. 1 effectively abolished any requirements set out in those instructions with respect to Ukraine, the Russian Federation in essence confirmed that, before 1 January 2016, both instructions imposed requirements with respect to Ukraine.

14. Fourth, the objections of the Russian Federation fail to recognise that Ukraine's claims regarding Instructions Nos. FS-NV-7/22886 and FS-AV-3/22903 are "as such. Therefore, the success of Ukraine's claims regarding the 2014 transit ban and other transit restrictions does not depend on evidence of the application of those instructions with respect to Ukraine.

15. For the avoidance of any doubt on this matter, and although Ukraine is not required to show the application of either instruction in order to demonstrate that the measures existed at the time of the establishment of the Panel, Ukraine submitted Exhibit UKR-106 (BCI) together with its opening statement at the second substantive meeting. Exhibit UKR-106 (BCI) shows that, even after the filing of the Russian Federation's first written submission, the Russian Federation continued to rely

expressly on Instruction No. FS-NV-7/22886 in order to ban traffic in transit arriving from Ukraine by train.

16. Exhibit UKR-106 (BCI) was filed as evidence in direct response to the Russian Federation's allegation that Instruction No. FS-NV-7/22886 does not apply and has never applied with respect to Ukraine. Taking into account that that allegation was made by the Russian Federation in its opening statement at the first substantive meeting, Ukraine may submit, according to paragraph 7 of the Panel's Working Procedures, this rebuttal evidence after the filing of its first written submission and after the first substantive meeting. Pursuant to paragraph 7, no good cause needs to be shown with respect to rebuttal evidence that is submitted after the first substantive meeting. Moreover, by filing Exhibit UKR-106 (BCI), Ukraine did not raise a new issue in these proceedings that was previously unknown to the Russian Federation or to the Panel. As a result, the submission of Exhibit UKR-106 (BCI) does not conflict with paragraph 7 of the Working Procedures and does not otherwise affect the Russian Federation's due process rights in these proceedings.

17. For these reasons, Ukraine respectfully requests the Panel to reject the Russian Federation's objection with regard to Exhibit UKR-106 (BCI) and to confirm that the 2014 transit ban and other transit restrictions fall within the Panel's terms of reference.

IV. UKRAINE HAS MADE A *PRIMA FACIE* CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLES V AND X OF THE GATT 1994 AND PARAGRAPHS 1161, 1426, 1427 AND 1428 OF THE WORKING PARTY REPORT

18. The Russian Federation did not present any meaningful argument or evidence in rebuttal of Ukraine's claims under Articles V and X of the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of the Working Party Report.

19. With regard to Article V of the GATT 1994, the Russian Federation's main rebuttal was that Ukraine suspended the operation of routes included in Map 1 of Exhibit UKR-104. Map 1 of Exhibit UKR-104 contains the principal road and rail routes which were used for transit of goods from Ukraine to Kazakhstan and the Kyrgyz Republic prior to 2014. While certain international checkpoints at the border between Ukraine and the Russian Federation, which are included in Map 1 of Exhibit UKR-104, are currently not open, Ukraine emphasizes that 10 out of the 17 international road checkpoints and four out of the six international rail checkpoints remain open. Those international checkpoints are currently being used for bilateral trade and, in the absence of the measures at issue, could be used also for international transit covered by those measures.

20. The only other response with regard to Article V of the GATT 1994 is the Russian Federation's assertion that Ukraine has allegedly taken a number of measures. Ukraine reiterates that this case is *not* about any measures which Ukraine might have taken. The main question at issue in this dispute and falling within the Panel's jurisdiction concerns the Russian Federation's decision not to allow traffic in transit from Ukraine and destined for Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan to pass the border between Ukraine and the Russian Federation. In that regard, Ukraine also asks the Panel to be mindful of its terms of reference in this dispute and of Ukraine's rights of defence in other WTO dispute settlement proceedings.

21. Besides the suspension of the operation of routes included in Map 1 of Exhibit UKR-104 and the measures allegedly taken by Ukraine, the Russian Federation has neither contested Ukraine's interpretation or application of Article V of the GATT 1994 nor disputed any facts put forward by Ukraine in support of its claims.

22. However, as several third parties addressed the meaning of Article V of the GATT 1994 in response to the questions raised by the Panel, Ukraine offers its own views on those questions.

23. First, on the question of whether a violation of the freedom of transit in the first sentence of Article V:2 of the GATT 1994 follows necessarily from a violation of any other part of Article V of the GATT 1994, including the second sentence of Article V:2, Ukraine reiterates its position that where a measure applies to goods transiting via the most convenient routes of passage and is found to violate other parts of Article V of the GATT 1994, including the second sentence of Article V:2 of the GATT 1994, then such a measure is also inconsistent with the obligation of a WTO Member to guarantee the freedom of transit via the most convenient routes. In that situation, Ukraine submits that a claim under the first sentence of Article V:2 of the GATT 1994 may be consequential.

24. A separate question arises where a measure applies to traffic in transit passing via routes *other than* the most convenient routes. Ukraine submits that the obligations under Article V of the GATT 1994 should be interpreted as applying, unless otherwise stated (such as in the first sentence of Article V:2 of the GATT 1994), to all traffic in transit passing through the territory of a WTO Member, irrespective of whether the route taken is part of the most convenient routes. In other words, unlike the first sentence of Article V:2 of the GATT 1994, the obligations in Articles V:3 to V:6 of the GATT 1994 apply to traffic in transit passing through the territory of a WTO Member irrespective of the route through which such traffic moves. In the event that the Panel agrees with that interpretation, Ukraine submits that this should not alter the Panel's assessment of whether Ukraine has made a *prima facie* case with respect to each of its claims. As Ukraine explained in its first written submission, it has submitted arguments and evidence in order to make a *prima facie* case for each claim under different paragraphs of Article V of the GATT 1994.

25. Second, Ukraine submits that the purpose for which a delay or restriction on traffic in transit may be "necessary within the meaning Article V:3 of the GATT 1994 is that of putting traffic in transit under a transit procedure in order to ensure that goods move through the territory (and eventually leave the territory) as traffic in transit instead of entering the territory (in the sense of importation). Delays or restrictions that are not necessary for that purpose and do not involve a failure to comply with applicable customs laws or regulations result in a violation of Article V:3 of the GATT 1994. Ukraine adds that other legitimate purposes are recognised in the exceptions clauses in the GATT 1994. Such clauses have a distinct function and impose separate obligations.

26. Ukraine also considers that, in the context of the present proceedings, it is not necessary for the Panel to take a position on whether, as one third party submitted, *force majeure* might be a reason explaining why delays or restrictions unrelated to compliance with customs laws and regulation might nonetheless be necessary. In any event, any finding that *force majeure* precludes the wrongfulness of an unnecessary delay or restriction would not be based on an objective recognised in Article V:3 of the GATT 1994 or an affirmative defence for which the GATT 1994 provides. It would be based on general international law.

27. Third, Ukraine reiterates that charges, regulations or formalities in connection with transit must respect the MFN obligation in Article V:5 of the GATT 1994. Insofar as such charges, regulations or formalities also fall within the scope of Article V:3 of the GATT 1994, they must comply with that provision. Although the obligations laid down in Articles V:3 and V:5 of the GATT apply together, the type of obligation differs: Article V:5 sets out a discrimination obligation whereas Article V:3 prohibits a WTO Member from subjecting traffic in transit to delays and restrictions that are not necessary for the purposes recognised under that provision and the charges that are not expressly identified therein. It is thus appropriate to consider those measures falling within the scope of both obligations first under Article V:3.

28. Fourth, Ukraine repeats that it does *not* argue that every violation of the second sentence of Article V:2 of the GATT 1994, due to a distinction based on place of origin, departure, entry/exit and destination, violates also Article V:5 of the GATT 1994. Rather, a successful challenge under Article V:5 of the GATT 1994 requires comparing the treatment accorded and establishing that the treatment given modifies the conditions of competition in the marketplace to the detriment of traffic in transit from or to the WTO Member alleging the violation.

29. Ukraine respectfully asks the Panel to find that Ukraine has made a *prima facie* case as regards its claims under Articles V and X of the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of the Working Party Report, and to make the relevant recommendations.

30. Ukraine also requests the Panel to make findings and recommendations as regards the two amendment measures adopted by the Russian Federation, namely Decree No. 643 and Resolution No. 1292. Those measures, which fall within the Panel's terms of reference, were not published in accordance with paragraph 1427 of the Working Party Report. Furthermore, by making effective and enforcing Decree No. 643 prior to its publication, the Russian Federation violated both paragraph 1428 of the Working Party Report and Article X:2 of the GATT 1994.

V. THE RUSSIAN FEDERATION'S DEFENCE UNDER ARTICLE XXI OF THE GATT 1994 MUST FAIL

31. Ukraine asks the Panel to confirm that it enjoys jurisdiction in these proceedings to review the Russian Federation's reliance on Article XXI of the GATT 1994, to conclude that the Russian Federation has not satisfied its burden of proof under Article XXI of the GATT 1994 in order to justify the measures at issue and to make findings and recommendations as regards the measures at issue.

32. Ukraine does not contest the right of every WTO Member to take measures for the protection of its essential security interests. However, by acceding to the WTO, each WTO Member has accepted that its right to take otherwise WTO-inconsistent measures for this purpose must be exercised in accordance with the requirements laid down in Article XXI of the GATT 1994. The GATT 1994 provides for limited and conditional exceptions clauses allowing WTO Members to pursue certain non-trade objectives to derogate from the substantive obligations in the GATT 1994. In these proceedings, the Russian Federation has made no attempt at showing that those conditions are satisfied.

A. The Panel enjoys jurisdiction to review the Russian Federation's invocation of Article XXI of the GATT 1994

33. All third parties, save one, agree with Ukraine that the GATT 1994 and the DSU confer on the Panel jurisdiction to interpret and review the application of Article XXI(b)(iii) of the GATT 1994 by the Russian Federation in these proceedings.

34. The United States and the Russian Federation argue in essence against such jurisdiction, submitting that the Panel's mandate is limited to acknowledging that the Russian Federation has invoked Article XXI of the GATT 1994 and concluding that it cannot make findings on whether the measures at issue are consistent with the Russian Federation's WTO obligations or formulate recommendations.

35. At paragraphs 92 to 119 of its opening statement at the first substantive meeting, Ukraine set out the many reasons why the Panel enjoys jurisdiction. Ukraine also notes that the United States and the Russian Federation have mostly *not* responded to those arguments as well as to the reasons put forward by other third parties.

36. The argument that, whilst the Panel has jurisdiction to hear the present dispute, it may not make findings or formulate recommendations in this dispute is based primarily on the interpretation of the phrase "which it considers as meaning that all of the conditions laid down in Article XXI(b)(iii) of the GATT 1994 are self-judging.

37. Ukraine strongly objects to the position that the entirety of Article XXI(b)(iii) of the GATT 1994 is self-judging and that therefore total deference is due to a respondent. Rather, the discretion which the phrase "which it considers confers on a WTO Member is limited to the question of the necessity of the action. Should the phrase "which it considers be read to mean that a WTO Member enjoys absolute discretion with regard to an action taken for the purpose of protecting essential security interests, there would have been no need to include in the text of Article XXI(b) the conditions laid down in subparagraphs (i) to (iii). Nor would there be any ground to review whether measures allegedly imposed for the protection of essential security purposes are in fact disguised restrictions on trade or taken for purposes recognised in other exceptions clauses in the GATT 1994. Although the United States and the Russian Federation insist on the need to respect the wording used in Article XXI, Ukraine and most other third parties ask the Panel to interpret and give effect to all of the wording used in that provision and not only to the phrase "which it considers or the term "essential security interests.

38. Ukraine underscores that these proceedings are by no means the first instance in which the question of a State's reliance on essential security grounds is put before an international court or tribunal. The practice of other courts and tribunals shows that a phrase such as "which it considers and the fact that deference is due as regards the necessity of an action do not mean that judicial review is excluded.

39. Ukraine submits that the negotiating history of Article XXI of the GATT 1994 does *not* support interpreting Article XXI in a manner that excludes the possibility of judicial review. Rather, the negotiating history shows that the drafters were concerned with, on the one hand, laying down conditions in Article XXI that would ensure that that provision serves the specific purpose of protecting essential security interests and, on the other hand, avoiding that, under the guise of essential security, a WTO Member seeks to justify GATT-inconsistent measures for the protection of a purpose that, as a matter of WTO law, may not be invoked.

40. Finally, in stressing that the multilateral trading system is concerned with trade, and not security, relations, the United States and the Russian Federation ignore the fact that, as the Appellate Body has recognised, the WTO Agreement, as a whole, reflects the balance struck by WTO Members between trade and non-trade-related concerns. In fulfilling their task, panels and the Appellate Body must interpret the WTO covered agreements in a manner that upholds that balance as reflected in the text of the WTO covered agreements.

B. Interpretation of Article XXI(b)(iii) of the GATT 1994

41. Assuming the Panel confirms that it enjoys jurisdiction to review the Russian Federation's invocation of Article XXI(b)(iii) of the GATT 1994, it must then consider what is the appropriate order of analysis, the burden of proof and the standard of review to be applied.

Ukraine submits that an objective assessment of the invocation of Article XXI(b)(iii) of the GATT 1994 entails a three-step test that is to be applied with respect to each of the specific measures at issue for which the Russian Federation relies on that defence. The first step is whether the measure at issue is "taken in time of war or other emergency in international relations. The second step is whether the measure at issue is an "action … for the protection of its essential security interests. The third step is whether the measure at issue is an "action which it considers necessary for the stated objective. All of these questions must be answered by the Russian Federation. As the Russian Federation has failed to provide those answers, it cannot prevail in its defence under Article XXI(b)(iii) of the GATT 1994. Furthermore, it is not the task of the Panel itself to seek from Ukraine the answers which the Russian Federation failed to provide.

42. Therefore, for each of these steps, the Panel is to assess whether the Russian Federation has satisfied its burden of proof and is to review the arguments and evidence submitted. Each step assists in establishing whether Article XXI(b)(iii) is being applied in good faith for the protection of essential security interests and is not used in order to pursue protectionist objectives and/or to apply disguised restrictions on trade. Article XXI(b)(iii) should not be abused or misused for purposes for which it was not designed.

43. Thus, a mere statement that Article XXI(b)(iii) of the GATT 1994 is invoked is insufficient. Nor is it enough for the Russian Federation to rely on a hypothetical question. The Russian Federation itself has reiterated during these proceedings that the relevant elements are provided in the legal acts imposing the measures. No prompt and positive solution of this dispute may be found based on hypothetical questions bearing no connection with the specific measures at issue or the specific circumstances that led the Russian Federation to adopt these measures.

44. Furthermore, the fact that the measures at issue might not economically protect the sectors of the WTO Member invoking the affirmative defence is not one of the three elements of a successful invocation of Article XXI(b)(iii) of the GATT 1994.

1. First step: whether the measure is "taken in time of war or other emergency in international relations

45. If the measures at issue are not "taken in time of war or other emergency in international relations, they may not be justified on the basis of Article XXI(b)(iii) of the GATT 1994. Unlike what is the case for paragraph (b) of Article XXI of the GATT 1994, the phrase "which it considers does not appear in subparagraph (iii).

46. A panel must examine whether the invoking Member has shown that all of the measures at issue were taken in time of war or other emergency in international relations. Ukraine interprets Article XXI(b)(iii) of the GATT 1994 to mean there must be a serious disruption in international relations constituting an emergency that is alike a war and sufficiently connected to the defendant WTO Member so as to result in a genuine and sufficiently serious threat to that Member's security interests. Furthermore, there must be a temporal connection between the action taken and the emergency in international relations.

47. The burden falls on the invoking Member to identify and demonstrate the war or other emergency in international relations at the time at which the measures at issue were taken. The invoking Member bears the burden of establishing both the legal and factual elements of its defence.

48. Ukraine strongly disagrees with the Russian Federation's position that there is no room for review for a panel to determine whether a sovereign State is at war or not. Accepting the Russian Federation's interpretation would mean that WTO Members may resort to self-help without any means of review. Unlike what is the case for paragraph (b) of Article XXI of the GATT 1994, the phrase "which it considers does not appear in any of the subparagraphs of Article XXI(b) of the GATT 1994. If total deference would be due to the respondent, which could suffice with the statement that the conditions of Article XXI(b)(iii) of the GATT 1994 are satisfied without any possibility for review, there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests and circumstances that may be invoked in order to justify an otherwise WTO-inconsistent measure.

2. Second step*: whether the measure constitutes "action … for the protection of its essential security interests*

49. If the measures at issue are not designed to protect a WTO Member's essential security interests, they may not be justified on the basis of Article XXI(b)(iii) of the GATT 1994. Thus, assuming that a WTO Member invoking Article XXI(b)(iii) of the GATT 1994 demonstrates that the measures at issue are "taken in time of war or other emergency in international relations, a panel must examine next whether it has been shown that the measures at issue constitute action for the protection of the "essential security interests of that Member.

50. Although it is for each WTO Member to decide what are its essential security interests and what level of protection of those interests it pursues, a panel must interpret, pursuant to Article 3.2 of the DSU, the phrase "for the protection of its essential security interests in accordance with the customary rules of interpretation of public international law. In light of its interpretation, a panel must then establish whether the interests or reasons advanced by the defendant Member for imposing the measures at issue fall within the scope of the phrase "its essential security interests for the purposes of Article XXI(b)(iii) of the GATT 1994.

51. Under the second step of the analysis under Article XXI(b)(iii) of the GATT 1994, a panel must examine what content is given by the invoking Member to the concept of "essential security interests in the context of the measures at issue. A panel must also review whether that content can reasonably be considered as falling within the meaning of the phrase "its essential security interests. If a panel decides that this is the case, the panel must then make an objective assessment of whether the measures at issue are designed to protect the security interests of the invoking Member. In other words, a panel must be satisfied that there is a rational relationship between the measures at issue and the protection of the essential security interests.

52. Where no arguments and evidence are produced, and a WTO Member invoking Article XXI(b)(iii) of the GATT 1994 merely states that its measures protect its essential security interests without any explanation, a panel cannot reach any conclusions on the merits of the defence. In those circumstances, a panel must find that that Member has failed to satisfy its burden of proof. The identification of the essential security interests must be specific enough to allow a panel to assess whether there is a reasonable link or connection between the invoking Member's decision to take the action and the essential security interests identified by that Member. A panel may not assume that such a connection exists.

3. Third step: whether the measure constitutes "action which it considers necessary …

53. Assuming that the WTO Member invoking Article XXI(b)(iii) of the GATT 1994 has shown that the measures at issue are "taken in time of war or other emergency in international relations and constitute "action … for the protection of its essential security interests, a panel must then establish whether that Member plausibly could conclude that the measures at issue are necessary for protecting those interests.

54. The wording of the phrase "which it considers suggests that the standard of review under Article XXI of the GATT 1994 cannot be the same as that with respect to the necessity test under Article XX of the GATT 1994. More deference must be accorded to the WTO Member taking the measure. The text of Article XXI indicates that the necessity of the measure is a matter for the consideration of the defendant WTO Member. Thus, it is for that Member to assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake.

55. The specific task of a panel is, as regards the third step of the analysis, to determine whether, based on the facts available, the invoking Member could plausibly arrive at the conclusion that the measures taken are necessary for protecting its essential security interests. In that regard, Ukraine finds support in the decision of the Arbitrators in *EC − Bananas II (Ecuador) (Article 22.6 − EC)*. That task also comprises an assessment of whether any discretion which Article XXI(b)(iii) of the GATT 1994 might confer on the invoking Member was exercised in good faith, including whether the interests of third parties were taken into account. In accordance with Article 11 of the DSU, that review must be based on an objective assessment of the facts. It cannot be based entirely on the subjective intention of the WTO Member invoking the defence.

C. Application of Article XXI(b)(iii) of the GATT 1994

1. The Russian Federation has not demonstrated that the measures at issue are "taken in time of war or other emergency in international relations

56. The Russian Federation has, in the present proceedings, failed to explain what are the circumstances causing it to impose the measures at issue. As a result, the Russian Federation failed to show that the measures at issue were taken in time of war or other emergency in international relations.

57. At the first substantive meeting, the Russian Federation made it clear that it was neither required nor able to provide any reasons. Its explanation was, on the one hand, that the circumstances leading to the imposition of the measures at issue were publicly available and known to Ukraine and, on the other hand, that the Russian Federation was not required to disclose any information which it considers to be contrary to its essential security interests.

58. The Russian Federation also insisted that the information included in the legal acts imposing the measures at issue shows that Decree No. 1 was adopted on the basis of the Federal Law No. 281-FZ and due to the suspension of the application of the Free Trade Agreement within the Commonwealth of Independent States in respect of Ukraine (CIS FTA). The latter is, according to the Russian Federation, suspended due to the exceptional circumstances affecting the interests and economic security of the Russian Federation and requiring immediate measures.

59. In its second written submission, the Russian Federation argued that the basis for imposing the measures as well as the original circumstances that led to their imposition were publicly available and known to Ukraine and are available on the internet. It also advanced that the measures at issue and Resolution No. 778 were adopted because of internationally wrongful acts or unfriendly acts of certain foreign state or their bodies and officials.

60. Those are the only facts deemed relevant by the Russian Federation to its defence in these proceedings and on which the Panel must decide. Arguments and facts that were not invoked by the Russian Federation may not be relied upon by the Panel in order to decide on the Russian Federation's defence. Moreover, the Panel may not make the case for either party or make good the absence of argumentation on a party's behalf. It is also not for the Panel to second-guess the events to which the Russian Federation appears to refer.

61. Ukraine asks the Panel to disregard the Russian Federation's arguments.

62. First, Ukraine submits that it is of no consequence, in relying on Article XXI(b)(iii) of the GATT 1994, that the basis for and circumstances leading to the imposition of certain measures are publicly available or known to the complainant.

63. The Russian Federation appears to allege that it is no longer necessary for a respondent to produce argument and evidence in order to satisfy its burden of proof as regards an affirmative defence. The consequence of the Russian Federation's position is that that burden should be placed on the complainant and the Panel: it is sufficient that they carry out an internet search in order to establish the justification of the measures at issue. Such a position on the burden of proof lacks any basis in law. Furthermore, the Russian Federation's position risks altering altogether the character of provisions such as Articles XX and XXI of the GATT 1994. In fact, the burden would fall on the complainant to show that it did *not* know what caused the defendant to impose the measures at issue.

64. Second, the Russian Federation has offered no rebuttal of Ukraine's position that, in accordance with well-established case-law, the sole fact that a measure refers to an objective and, *a fortiori*, a law such as Federal Law No. 281-FZ is not, in and of itself, sufficient to establish that a measure is designed to achieve that objective. A panel would not make an objective assessment of the matter before it if, in reviewing whether a defendant has shown that the measures are taken in time of war or other emergency in international relations, it would verify only the legal basis under national law for those measures.

65. Third, the Russian Federation failed to explain why the unilateral suspension of the application of the CIS FTA with respect to Ukraine is a circumstance that is relevant under Article XXI(b)(iii) of the GATT 1994. It is not for Ukraine to comment on why the Russian Federation has neglected to produce any argument on this question. Ukraine nonetheless notes that a closer look at the texts of Resolutions Nos. 842 and 959 and of Decree No. 1 shows that the suspension of the CIS FTA is expressly tied to the entry into force of the EU-Ukraine Association Agreement.

66. The objective evidence available before the Panel shows that what is known is that the Russian Federation adopted Decree No. 1 in light of its unilateral suspension of the CIS FTA with respect to Ukraine. In turn, that suspension − as are many other measures that apply as of 1 January 2016 − is linked to the application of the EU-Ukraine Association Agreement. As a result, should the Panel uphold the Russian Federation's defence with regard to the 2016 general and product-specific transit bans and other transit restrictions, it would mean that, in essence, a WTO Member may invoke Article XXI of the GATT 1994 in order to justify WTO-inconsistent measures taken in response to other WTO Members' exercise of the right under Article XXIV of the GATT 1994.

67. Fourth, the Russian Federation's attempt to justify the measures at issue by pretending they are a response to Ukraine's economic sanctions has no factual basis. The 2014 transit ban and other transit restrictions and the 2016 general transit bans and other transit restrictions are measures taken *before* Ukraine allegedly adopted any of the measures to which the Russian Federation refers in its second written submission. Furthermore, when looking at the text of Resolutions Nos. 778 and 842, it becomes clear that the application of the import ban to goods from Ukraine was expressly linked to when paragraph 1 of Resolution No. 959 became effective and *not* to any economic sanctions applied by Ukraine. In turn, the application of the import duties in Resolution No. 959 depended entirely on whether or not Ukraine applies the EU-Ukraine Association Agreement.

68. Ukraine therefore respectfully requests that the Panel concludes that the Russian Federation has not shown that the measures at issue are "taken in time of war or other emergency in international relations. As a result, Russian Federation's defence under Article XXI(b)(iii) of the GATT 1994 fails.

2. The Russian Federation has not shown that the measures at issue constitute "action … for the protection of its essential security interests

69. The Russian Federation has failed to identify what are the essential security interests to be protected by each of the measures at issue. Nor has it provided evidence and arguments explaining the connection between the measures at issue and the essential security interests which they are allegedly designed to protect.

70. According to Ukraine, the fact that the text of certain measures at issue refers to Federal Law No. 281-FZ is an insufficient basis for the Panel to conclude that the measures are designed for the protection of the Russian Federation's essentials security interests. Nor can that conclusion be based on solely the reference in those measures to the Russian Federation's decision to suspend the application of the CIS FTA with respect to Ukraine.

71. The Russian Federation continues to refuse offering an explanation of the essential security interests that are at issue in these proceedings on the ground that it is not required to disclose such information. It relies on Paragraph 1 of the 1982 Decision concerning Article XXI of the General Agreement in order to argue that the disclosure of information regarding the measures taken under Article XXI of the GATT is subject to the exceptions of Article XXI(a) of the GATT 1994.

72. Ukraine submits that Article XXI(a) of the GATT 1994 addresses a situation distinct from that covered under Article XXI(b) of the GATT 1994. Indeed, Article XXI(a) may be invoked by a WTO Member in order to justify not complying with information and transparency obligations found in the GATT 1994. In these proceedings, the Russian Federation has not invoked Article XXI(a) of the GATT 1994 in order to justify measures at issue that are inconsistent with its obligations under Articles X:1 and X:2 of the GATT 1994 and paragraphs 1426, 1427 and 1428 of the Working Party Report.

73. According to Ukraine, Article XXI(a) of the GATT 1994 may not be used in order to evade a WTO Member's burden of proof in relying, in the context of dispute settlement proceedings, on an affirmative defence. An overly broad interpretation of Article XXI(a) of the GATT 1994 would render subparagraphs (i) to (iii) ineffective. Thus, as the Russian Federation has failed to provide certain information on the basis of Article XXI(a) of the GATT 1994, it must accept that, as a possible consequence, it will be found not to have met its burden of proof under Article XXI(b) of the GATT 1994.

74. If the Panel finds that the measures at issue are taken in time of war or other emergency in international relations, Ukraine respectfully requests that the Panel rejects the Russian Federation's reliance on Article XXI(b) of the GATT 1994 for failure to identify the essential security interests pursued by the measures at issue and to demonstrate that the measures at issue are designed to protect those interests.

3. The Russian Federation has failed to show that the measures at issue constitute "action which it considers necessary …

75. If the Panel would find that the measures at issue are taken in time of war or other emergency in international relations and are designed to protect the essential security interests of the Russian Federation, Ukraine respectfully requests that the Panel rejects the Russian Federation's reliance on Article XXI(b) of the GATT 1994 for failure to provide an explanation of how the Russian Federation could plausibly arrive at the conclusion that the measures taken are necessary for protecting its essential security interests.

D. Conclusion

76. The Russian Federation has failed to show, as regards each and every measure at issue, what is the emergency in international relations that caused the Russian Federation to adopt all of the measures at issue, what are the essential security interests which the Russian Federation is seeking to protect through these measures, and whether the Russian Federation plausibly could conclude that the measures at issue are necessary for protecting these interests. As a result, the Russian Federation has not satisfied its burden of proof under Article XXI(b)(iii) of the GATT 1994.

ANNEX C-3

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

A. INTRODUCTION

1. The Russian Federation expresses its deepest concerns regarding Ukraine's decision to challenge the fundamental rights of the WTO Members related to the protection of their essential security interests despite Ukraine's full awareness of the original circumstances that led to the imposition of the measures at issue. These attempts to disguise a politically motivated onset as a regular trade dispute presents a deliberate threat to the multilateral trading system and undermines the role of the WTO as an international trade forum that has long been guarded by other WTO members.

2. The Russian Federation would like to stress the importance and sensitivity of the issues related to protection of national security, not only for the Russian Federation, but also for any other WTO Member. The outcome of this dispute will have far-reaching consequences for the Membership and the entire multilateral trading system, requiring a great measure of care when approaching the issues raised in this dispute in relation to Article XXI of the GATT.

B. PRELIMINARY ISSUES.

3. In Russia's view, Ukraine failed to meet the minimum standards applied to a request for the establishment of a panel[1], as it failed to establish clearly the grounds upon which it found its case and the nexus between the elements (measures) within each group of the challenged measures. In particular, Ukraine in its Panel Request identified the specific measures at issue by dividing them into two "groups of measures"[2] and failed to clarify what particular elements (measures) at issue constitute the first or the second group of measures and how these elements operate together (collectively)[3], what is a common rational behind them as well as what particular treaty provision is violated by each of the elements challenged. Ukraine failed to clarify this even in its First Written Submission, rearranging the challenged measure into four new groups.

4. In a similar vein, Ukraine's First Written Submission presented the challenged measures in a completely different manner setting them out as four individual measures that are not connected and do not operate together.

5. In this regard, the Russian Federation as a respondent is placed in an uncertain situation in presenting its defense because it has to guess what the panel would identify as the measures at issue on the basis of the panel`s interpretation of the substance of the alleged violation.[4]

6. In the Panel Request Ukraine intends to challenge de facto application of Decree No. 1 to the transit to the countries in Central and Eastern Asia and Caucasus. Taking into account the number of countries that can be considered as part of these regions, as well as the second element in combination with the third element identified by Ukraine in its Panel Request as a measure at issue in the second group of measures, Russia cannot be expected to discern whether the measure in question is challenged as such or as applied, as written or unwritten, and what the geographic scope of the application of the challenged measure is. Ukraine also failed to specify whether it challenges a written or an unwritten measure. The measure in question constitutes an imprecise open-ended list that can be expanded by the claimant at any moment. Therefore, in addition to the fact that Ukraine failed to identify how the three elements set out in the "Second Group of Measures" in its Panel Request or in its First Written Submission operate together as a group, the measures identified by Ukraine as the second and the third elements in the Section pertaining to the "Second Group of Measures in the Panel Request cannot be reasonably expected to be the measures against which Ukraine launched its challenge in its First Written Submission as the measures allegedly applied to transit destined to Mongolia, Tajikistan, Turkmenistan and Uzbekistan. "[S]uch an 'open ended' list

[1] Appellate Body Report, *EC – Bananas III*, para. 142.; Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22; Appellate Body Report, *Korea – Dairy*, para. 127.

[2] WT/DS512/3, p. 1.

[3] See Panel Report and Appellate Body Report, *China – Raw Materials.*

[4] Appellate Body Report, EC – Selected Customs Matters, para. 136.

would not contribute to the 'security and predictability' of the WTO dispute settlement system as required by Article 3.2 of the DSU."[5]

7. Thus, Ukraine`s Panel Request, in general and in respect of separate elements (measures), fails to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU; it fails to establish the nexus between the elements (measures) within each group of the measures claimed; it fails to give the opportunity to the Russian Federation to defend itself by providing claims that change their form and content from the Panel Request to its First Written Submission; Ukraine fails to act in a predictable way by challenging the "open ended" list of the measures at issue; it fails to identify "de facto application of the 2016 general and products-specific transit bans in Decree No.1, as amended, to transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" in a manner that satisfies the requirements of Article 6.2 of the DSU, as Ukraine failed to indicate the nature of the measure and the gist of what is at issue.[6] Deciding otherwise will erode the disciplines of Article 6.2 of the DSU allowing Members, when requesting the establishment of a panel, to claim any abstract measure that could be applied by another Member, thus depriving the respondent of any adequate notice of the challenge brought against it.

C. "2014 TRANSIT BAN AND OTHER TRANSIT RESTRICTIONS".

8. The "2014 transit ban and other transit restrictions", as challenged by Ukraine, were introduced by the Letters of Rosselkhoznadzor No. FS-NV-7/22886 and FS-AS-3/22903 of 21 November 2014 as amended.[7]

9. Firstly, we would like to note that the Letter (Instruction) of the Rosselkhoznadzor No. FS-AS-7/22903 of 21 November 2014 does not exist. Taking into account the possibility of a typographical error in the Panel Request, the Russian Federation would presume that Ukraine actually implied in this case the Letter (Instruction) No. FS-AS-3/22903. Otherwise, we would like to request the Panel to disregard any parts in Ukraine's First Written Submission that refer to No. FS-AS-3/22903 since this document is not covered by the Request for Consultations and the Panel Request and thus falls outside the scope of the Panel's Terms of Reference.

10. Secondly, the Russian Federation draws the Panel's attention to a general rule established in the WTO jurisprudence, according to which the measure covered by a panel`s terms of reference must be a measure in existence at the time of the establishment of the panel.[8]

11. In accordance with the mentioned Letters of Rosselkhonadzor the transit of goods included in the list set out by the Resolution of the Government of the Russian Federation of 7 August 2014 No.778 (hereinafter Resolution 778) is only allowed through the designated checkpoints situated on the State border of the Russian Federation. Resolution 778 contains a list of particular goods originating from particular countries (also listed in the Resolution) that adopted a decision to introduce and apply economic sanctions in respect of legal and natural persons of the Russian Federation as well as countries that have joined such a decision.

12. When the Letters of Rosselkhoznadzor in question were adopted, Ukraine was not included in the list of the countries contained in Resolution 778. Therefore, the measures contained in the said Letters could not and were not applied to the goods originating from Ukraine.

13. On 1 January 2016 Ukraine was added to the list of countries set out in Resolution 778, and Decree No. 1 and Resolution No. 1 were adopted, allowing the transit of goods from Ukraine only through the checkpoint situated on the state border of the Russian Federation inside its Russia-Belarus sector. The measures adopted by the Government of the Russian Federation override the measures taken by Rosselkhoznadzor. As a result, the measures contained in the Letters of Rosselkhoznadzor have never been applied to the transit of goods from Ukraine.

14. The Russian Federation notes that no evidence was provided by Ukraine in support of the continuing application of the Letters of Rosselkhoznadzor in respect of Ukraine, not to mention evidence showing that the transit ban was introduced by these Letters. In this regard, the Russian Federation contests the credibility of the complainant's allegations that the Letter No. FS-NV-7/22886 applies in respect of Ukraine. Thus, the Russian Federation states that the measure at issue does not exist.

[5] Panel Report, *China – Raw Materials*, paras. 11-13.
[6] Appellate Body Report, *US – Continued Zeroing*, para. 168-169.
[7] First Written Submission of Ukraine, para. 55.
[8] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

15. There are no measures that "prolong, replace, amend, implement, extend or apply transit prohibition" of goods subject to veterinary and phytosanitary surveillance through the checkpoints of Belarus introduced since 30 November 2014, as well as there are no measures regarding issuance of the transit permits, as alleged by Ukraine. Moreover, Ukraine has failed to identify the source of this prohibition, which, according to the Appellate Body in *US − Gambling*, deprives the responding party of a possibility to prepare adequately its defense.[9]

16. Thus, transit prohibition and other transit restrictions of 2014, as challenged by Ukraine, are outside the Panel`s Terms of Reference as they did not exist at the time of the establishment of the Panel and there is no legal instrument enacted prior to, on or after the date of the establishment of the Panel that extends the term of the measures identified in the Panel Request. A non-existing measure cannot have any benefits nullification or impairment effect under the covered agreements.[10]

17. If the Panel considers that these measures do exist and are within the Panel's terms of reference, the Russian Federation would like avail itself of the provisions of GATT Article XXI(b)(iii).

D. DE FACTO APPLICATION OF THE 2016 GENERAL AND PRODUCT-SPECIFIC TRANSIT BANS IN DECREE No. 1, AS AMENDED, TO TRAFFIC IN TRANSIT DESTINED FOR MONGOLIA, TAJIKISTAN, TURKMENISTAN AND UZBEKISTAN.

18. In the light of the facts presented by Russia, "the de facto application of the 2016 general and products-specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" does not exist as Ukraine failed to prove the opposite.

(i) Ukraine failed to substantiate its "as such" claims in respect of "de facto application"

19. Ukraine is wrong in asserting that the "de facto application" of the 2016 general and product-specific transit bans in Decree No. 1 constitutes a separate claim and is inconsistent with Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3 (a) of the GATT 1994 as well as paragraph 2 of Part I of the Accession Protocol of the Russian Federation.

20. As the Appellate Body noted in *US- Certain Anti-Dumping Methodologies (China)* and *Argentina − Import Measures*, the specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged.[11]

21. In its First Written Submission Ukraine referred to the following features of the "de facto application": 1) unwritten character of the measure; 2) the challenged measure is neither comprised of individual instances of application of a measure, nor constitutes a rule or norm of general and prospective application, but, instead, it shares certain attributes of both; 3) the measure is challenged "as such".

22. This inventive approach, in particular, the position that the measure at issue is challenged by Ukraine as "a measure sharing certain attributes of both" is based on a highly selective, incoherent and misquoted use of Appellate Body's jurisprudence.

23. Contrary to the elaboration by the Appellate Body on the notion of "as such" claims in *US − Oil Country Tubular Goods Sunset Reviews*, Ukraine failed to provide evidence showing that the challenged measure affects existing trade and also the security and predictability needed to conduct future trade.[12] Contrary to the Appellate Body's pronouncements in previous disputes,[13] Ukraine failed to provide any evidence demonstrating the general and prospective application of the challenged measure. Similarly, Ukraine failed to bring "as such" claim independently, so it would not share the attributes of application of the challenged provisions in specific instances.

24. Ukraine also claims that "de-facto application of the 2016 general and product-specific transit bans" is an unwritten measure. Contrary to the high standard for challenging unwritten measures

[9] Appellate Body Report, *US − Gambling*, para. 125

[10] Appellate Body Report, *US − Upland Cotton*, para. 263

[11] Appellate Body Report, *US- Certain Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina − Import Measures,* paras. 5.108 and 5.110)

[12] Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 82.

[13] Appellate Body Report, *US- Certain Anti-Dumping Methodologies (China)* para. 5.127; Appellate Body Report, *US − 1916 Act*, paras. 60 − 61; Appellate Body Report, *US − Zeroing*, paras. 231 − 232.

set out by the Appellate Body in *US − Zeroing*,[14] Ukraine failed to demonstrate that: the alleged "rule or norm" is attributable to the respondent; its precise content; and that it has general and prospective application.

25. In this regard given the unwritten form of a measure called "the de facto application of the 2016 general and product-specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" challenged by Ukraine, the latter failed to formulate the content of this measure and the claims in respect of this measure clearly as well as to demonstrate the general and prospective[15] application of this measure. Thus, such measure cannot be successfully challenged "as such", and cannot be found inconsistent with the Russian Federation`s obligations under the covered agreements.

(ii) "De facto Application" does not exist

26. Furthermore, the Russian Federation disputes the existence and operation of the mentioned measure, as Ukraine did not provide any credible evidence in support of its "as such" challenge.

27. Due to the unwritten character of the measure as well as the absence of any evidence of its general and prospective application, the Panel should be very careful in assessing the claims purported by Ukraine, in particular the evidence describing the content of the measure and demonstrating its alleged attribution to the Russian Federation.

28. The unwritten character of the measure requires the Panel to consider the appropriate relevance, credibility, weight and probative value of the evidence, while exercising caution in its assessment of the facts of the case.[16]

29. The Russian Federation believes that the evidence provided by Ukraine regarding the operation of the measure at issue has limited value and cannot be given any evidentiary weight.

30. All the evidence presented by Ukraine in order to prove the existence of "de facto application of the ban" is presented in only one exhibit. This evidence is limited in time, in terms of the cases identified, and the goods' coverage. Thus, even if one presumed that during the two weeks covered by the exhibit there were some occasional problems, this is not enough to assert the existence of the measure as it is formulated by Ukraine. Other evidence submitted on this issue also cannot be relied upon as it was presented by interested Ukrainian parties and the Panel should exercise great caution in giving evidentiary weight to such information.

31. Further, Ukraine attributes the application of the measure to customs and other authorities of the Russian Federation and claims that decisions to refuse transit through the Russian territory to the territory of Mongolia, Tajikistan, Turkmenistan and Uzbekistan from Ukraine are acts of the organs of a state.[17] However, Ukraine does not provide any evidence in support of sufficient government involvement, in any case sufficient to sustain the challenge against these measures.

32. Furthermore, the data provided by the Federal Customs Service of the Russian Federation clearly demonstrates that transit from Ukraine through the Russian territory to Mongolia, Tajikistan, Turkmenistan and Uzbekistan continues and was not suspended either in 2016 or in 2017.

33. Thus the evidence presented shows that the alleged unwritten measure attributable to Russia does not exist.

34. However, should the Panel find that such measure exists, the Russian Federation would like avail itself of the provisions of GATT Article XXI(b)(iii).

E. ARTICLE XXI OF THE GATT.

35. In respect of the measures (groups of measures) challenged by Ukraine in this dispute, the Russian Federation would like to state that these measures and the legal acts that contain such measures were introduced by the Russian Federation in time of emergency in international relations and such measures are considered by the Russian Federation as actions necessary for the protection of essential security interests of the Russian Federation taken in time of emergency in international relations, as provided for in the GATT Article XXI.

[14] Appellate Body Report, *US − Zeroing*, paras. 196 − 198.
[15] Appellate Body Report, *US − Zeroing,* paras. 231 − 232.
[16] Panel Report, *Argentina − Import Measures*, para. 6.115.
[17] First Written Submission of Ukraine, para. 146.

36. The basis for the imposition of such measures as well as the original circumstances that led to the imposition of such measures were publicly available and known to Ukraine. The wording of the acts implementing the measures in question challenged by Ukraine is also unambiguous, explicitly providing that the actions were taken for the purpose of protection of national security of the Russian Federation. The underlying act is the Federal Law of 30 December 2006 No. 281-FZ "On Special Economic Measures". In accordance with this Federal Law the President of the Russian Federation adopts special economic measures, in particular, when circumstances require immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state or its bodies and officials, when such act poses a threat to the interests and security of the Russian Federation and/or violates the rights and freedoms of its citizens.

37. In the absence of any panel`s or Appellate Body rulings on the interpretation and/or application of the GATT Article XXI, the Russian Federation would like to state the following.

38. Article XXI of the GATT represents an all-embracing exception, established by its mandatory chapeau language "nothing in this Agreement shall be construed […]". Should one examine the background of the GATT Article XXI in the historic perspective in order to establish its object and purpose, the following is of relevance to the present case.

39. In 1949, when addressing restrictions on export to Czechoslovakia, it stated that "every country must be the judge in the last resort on questions relating to its own security".[18]

40. In 1961, Ghana justified its boycott of Portuguese goods on the basis of the provisions of Article XXI: (b) (iii), noting that "each Contracting Party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests".[19]

41. In 1982 the EEC justified its measures against imports from Argentina by stating that "every Contracting Party was − in the last resort − the judge of its exercise of these rights", meaning rights under Article XXI. As was claimed by the EEC, the measures taken constituted a general exception, constitute its inherent right and did not require "neither notification, justification nor approval, procedure confirmed by thirty five-years of implementation of the General Agreement".[20]

42. The United States at the same time noted that "the General Agreement left to each Contracting Party the judgment as to what it considered to be necessary to protect its security interests. The Contracting Party had no power to question that judgment [] Forcing GATT […] to play a role for which it was never intended, could seriously undermine its utility, benefit and promise for all contracting parties".[21]

43. In 1985 the United States justified its restrictions on imports of all goods and services of Nicaraguan origin and all US exports to Nicaragua on the basis of Article XXI. The US Government stated that the exception left it to each contracting party to judge what action it considered necessary for the protection of its own essential security interests.[22] Furthermore, the United States argued that GATT`s effectiveness in addressing trade issues would only be weakened if it became a forum for debating political and security issues.

44. In 1991 the EC, Australia, Austria, Canada, Japan, New Zealand, Norway, Sweden, Switzerland and the United States adopted certain restrictive measures (economic sanctions) against Yugoslavia, including suspension of trade concessions granted to Yugoslavia under bilateral cooperation agreement with the EC. The EC justified its measures with a reference to its essential security interests and GATT Article XXI.[23]

45. There are many reasons why Article XXI of the GATT was drafted the way we see it today as there are many reasons why this particular Article of the GATT was never subject to the interpretation by the Membership, even though there have been numerous instances throughout GATT/WTO history when measures necessary for protection of national security were taken by

[18] Summary Record of the Meeting, *United States − Restrictions on Exports to* Czechoslovakia, GATT/CP.3/SR.22, Corr. 1.

[19] Summary Record of the Session, SR.19/12, p. 196.

[20] Minutes of Meeting of Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, C/M/157, p. 10.

[21] Minutes of Meeting of Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, C/M/157, p. 8.

[22] Panel Report, *United States − Trade Measures Affecting Nicaragua*, para. 4.6, L/6053.

[23] Communication from the Permanent Mission of the Socialist Federal Republic of Yugoslavia, *EEC − Trade Measures Taken for Non-Economic Reasons*, DS27/2, dated 10 February 1992.

Members, both with and without invocation of Article XXI of the GATT or similar provisions of other multilateral trade agreements.

46. The national security of a State is a multifaceted matter, covering all issues pertaining to functioning of a State, ensuring the well-being of its population. Determining the exact elements of national security of a State are within the sole discretion of that State. Those elements might vary from one State to another. For some states climate change will not be part of national security strategy, while for others it will be the main factor determining the nation's existence; states can have very diverse views on exhaustible natural resources or public health as areas falling within the ambit of their national security.

47. The Russian Federation is of the view that Article XXI (a) and (b) of the GATT is of a self-judging nature. Each of the WTO Members individually and without any external involvement determines what its essential security interests are and how to protect them. Other reading of this Article will result in interference in internal and external affairs of a sovereign state.

48. The outcome of this dispute will have far reaching consequences for the Membership and the entire multilateral trading system. Throughout the existence of the GATT/WTO system its Members protected by the provisions of Article XXI of the GATT have been adopting and maintaining measures not only aimed at protection of their national security individually but also those required to protect peace and security in the world, including exports control and non-proliferation commitments. The change in balance of rights and obligations of the Members under Article XXI as a consequence of its interpretation, even the slightest and the most reserved one, may change the level of legal protection of such measures with respective negative consequences for their WTO legality. Such risks are high and should be avoided.

49. Any examination of the wording contained in the GATT Article XXI (b)(iii) must be limited to a simple conclusion: 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 and nothing shall prevent that Member from taking any such actions in such form, with such coverage and for such duration as it considers necessary.

50. In Ukraine's view, given the fact that it claims that measures taken by the Russian Federation are inconsistent with certain provisions of the WTO Agreement, such provisions should have prevented the Russian Federation from taking the measures challenged by Ukraine. However, this is contrary to what is provided for in the GATT Article XXI, i.e. "nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interest taken in time of war or other emergency in international relations". Any ruling sustaining Ukraine`s claims would in itself be a prevention of a Member from taking such actions and, consequently, inconsistent with Article XXI of the GATT and Article 3.2 of the DSU providing that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

51. In accordance with the preamble of Decree No.1 that is titled "On the Measures Ensuring the Economic Security and National Interests of the Russian Federation in the course of the International Transit from the territory of Ukraine to the territory of Republic of Kazakhstan or Republic of Kirgizstan through the territory of the Russian Federation", the Decree was adopted on the basis of the Federal Law No.281-FZ and due to the suspension of the application of the Free Trade Agreement within the Commonwealth of Independent States in respect of Ukraine (CIS FTA).

52. The CIS FTA was suspended in accordance with the Decree of the President of the Russian Federation of 16 December 2015 No.628. The preamble of the latter Decree establishes that this measure is taken due to the exceptional circumstances affecting the interests and economic security of the Russian Federation that require immediate measures.

53. Similarly, the Decree of the President of the Russian Federation of 6 August 2014 No.560 was adopted for the purpose of protection of national interests of the Russian Federation and in accordance with the Federal Law No.281-FZ and Federal Law of 28 December 2010 No.390-FZ "On Security", as provided for in this Decree.

54. The Federal Law No/390-FZ "On Security" as set out in Article 1 thereof defines the fundamental principles and content of the activities on ensuring the security of the State, public security, environmental security, personal security and other types of security provided for in the legislation of the Russian Federation, i.e., the national security of the Russian Federation.

55. Implementing Resolutions of the Government of the Russian Federation adopted in pursuance of the Presidential Decrees at issue have the same scope and underlying grounds, as evident from the text of each and every Resolution.

56. Therefore, these acts, both on their face and in substance, establish that the actions set out therein and the implementing measures are taken for the purpose of, and are necessary for, the protection of Russia's essential security interests taken in the time of war or other emergency in international relations.

57. The Russian Federation believes that, for the purposes of the Panel's consideration of the arguments presented by the parties in relation to Article XXI of the GATT, it is highly relevant and important to keep in mind subparagraph (a) in Article XXI of the GATT.

58. Implying that the Russian Federation is required to provide any information additional to that it has already disclosed in respect of the measures challenged in this dispute would be inconsistent with the provisions of Article XXI(a) of the GATT, as nothing in that Agreement shall be construed to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests. The Russian Federation believes that disclosure of any such additional information would be contrary to Russia's essential security interests. This is confirmed by the text of the Decision Concerning Article XXI of the General Agreement of 30 November 1982 that creates a link between the provisions of Article XXI(a) and (b).

59. While Russia never asserted that the Panel in this dispute was established with the specific terms of reference other than those provided in accordance with Article 6.2 of the DSU, it has made it clear that this does not mean that the Panel has jurisdiction to evaluate the measures taken with reference to Article XXI of the GATT. Neither the Panel nor the WTO has jurisdiction over the matters related to the measures necessary for the protection of Member`s national security interests. This is explicitly reflected in the wording of Article XXI of the GATT, leaving the necessity, the form, design and the structure of such measures within the sole discretion of the Member invoking the Article.

60. The WTO, being a trade organization, does not deal with, and has no competence over, the issues that relate to politics, national security or international peace and security. Therefore, the WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case. All of these issues go beyond the scope of trade and economic relations among Members established in Article II:1 of the Marrakesh Agreement establishing the World Trade Organization. Consequently, all of these issues are outside the scope of the WTO.

F. CONCLUSION.

61. Therefore, we request the Panel:

(1) to evaluate the defects of the complainant's Panel Request and the unlawful attempts of Ukraine to cure those defects in its First Written Submission that prevent Ukraine from meeting the requirements of Article 6.2 of the DSU.

(2) to establish, in particular, that "2014 transit ban and other transit restrictions" allegedly imposed by the Letters of Rosselkhoznadzor and de facto application of "2016 general and product specific transit bans in Decree No.1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan", did not exist as at the date of the Panel Request.

(3) with respect to the measures in respect of which Article XXI of the GATT was invoked to limit Panel's findings to the recognition of the fact of such invocation without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT.

ANNEX C-4

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

A. DEFECTS IN UKRAINE'S PANEL REQUEST

1. Ukraine had failed to meet the minimum standards applied to a request for the establishment of a panel. In order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize the language used in the panel request.[1]

2. The Appellate Body has explained that, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed" and "only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer and begin preparing its defense'"[2], in other words "which 'problem' is caused by which measure or group of measures".[3]

3. It is evident from the Panel Request in this dispute that "each group of measures" set out therein is alleged to be WTO inconsistent, but not the distinct measures (elements) forming such group. The legal basis for the complaint as it is set out in the Panel Request is provided only in respect of "each of the groups" of measures set out in the Panel Request (the first group of measures in Section II and the second group of measures in Section III).

4. If Ukraine intended to challenge each particular element of each of the groups identified in the Panel Request, in addition to identification of such elements as "measures at issue", it should have specified which concrete provision(s) is (are) allegedly violated by "each of the measures at issue", not by "each group of measures".

5. The issue of "grouping" of the challenged measures is not a problem merely with the structure of the Panel Request or that of the subsequent submissions of Ukraine. This is a matter that affects the Panel's terms of reference. Since defects of Ukraine's Panel Request "cannot be 'cured' in the subsequent submissions"[4], they prevent Ukraine from challenging the measures as they are described in its First Written Submission. The opposite will prejudice the ability of the Russian Federation to defend itself as Ukraine's Panel Request does not meet the requirements under Article 6.2 of the DSU.

6. The choice of the "structure" in combination with the existent WTO jurisprudence requires the Complainant to show what particular elements comprise each group of measures, what particular treaty provision is violated by each of the elements challenged, and how these elements operate together.

7. In its First Written Submission Ukraine challenged four distinct measures, shifting its claims from the two groups of measures and their legal basis as they were formulated in the Panel Request. By replacing two groups of measures by four individual measures Ukraine modified the subject matter of the dispute and broke the link between the measures in question and the relevant provisions of the WTO Agreements that are allegedly violated by such measures.

8. Therefore the four individual measures as they are put forward by Ukraine in its First Written Submission are outside the terms of reference of the Panel as their individual operation was not covered by the Panel Request.

9. Furthermore, in respect of particular elements constituting each of the two groups of measures identified in the Panel Request Ukraine failed to provide any evidence of their existence. It also failed to show how the elements of each of the two groups operate together. Ukraine has not provided any

[1] Appellate Body Report, *EC – Fasteners*, para. 562.
[2] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162, citing Appellate Body Report, *Thailand – H-Beams*, para. 88.
[3] Appellate Body Report, *China – Raw Materials*, para. 220.
[4] Appellate Body Report, *EC – Bananas III,* para. 143.

evidence of inconsistency with a particular provision of the WTO Agreements of any of the two groups or the particular elements that each of the groups.

10. In addition to that, the way Ukraine formulated certain measures does not allow to present the problem clearly. In particular, the second group of measures identified in the Panel Request[5] contains two elements:

"Second, the Russian Federation also imposes restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic.

Third, due to the fundamental lack of transparency concerning some of the measures at issue and the Russian Federation's failure to observe the transparency and publication obligations of the GATT 1994 and of its Accession Protocol, this Panel Request also covers any other related measures adopted and/or applied by the Russian Federation concerning traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation, including measures that implement, complement, add to, apply, amend or replace any of the measures mentioned in Section II.A or Section III.A."

11. The so-called "de facto application of the 2016 general and product-specific transit bans" might be the compilation of these two elements. According to this wording of the second element of this measure ("restrictions on the traffic in transit") in combination with the third element of this measure ("any other related measures concerning traffic in transit") provided for in the Panel Request any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation may fall into this category making it an open-ended list of measures.

12. It took two Written Submissions from the Complainant to bring some certainty that it was not Ukraine's intention to challenge, in particular, the entire Customs Code of the Eurasian Economic Union that applies to traffic in transit through the territory of the Russian Federation to any destinations, including countries of Central/Eastern Asia and Caucasus. However, it is still not clear for the Russian Federation why Ukraine believes that the list of "measures applied in respect traffic in transit to the countries of Central/Eastern Asia and Caucasus" should apparently be limited to the four countries listed in Ukraine's First Written Submission, i.e. Mongolia, Tajikistan, Turkmenistan and Uzbekistan. By Ukraine's logic, if in the course of consultations the parties to a dispute have discussed measures applied only in respect of Mongolia, this would have been sufficient to include in a first written submission the measures applied only in respect of China, as long as the request for consultations and the panel request had such a broad geographical scope as provided for in Ukraine's Panel Request. This comment on the geographical scope of a measure in question is also relevant in the context of the second element of the second group of measures.

13. An open-ended list does not contribute to the security and predictability of the WTO dispute settlement system as required by Article 3.2 of the DSU. Therefore, the measures formulated by Ukraine as "open-ended" should not fall within the Panel's terms of reference and shall not be examined by the Panel.

14. These inconsistencies of Ukraine's Panel's Request with the requirements of Article 6.2 of the DSU severely prejudice the ability of the Russian Federation to defend itself in this dispute.

B. TRANSIT REQUIREMENTS IN QUESTION

15. Ukraine believes that when a claimant raises an "as such" claim it is not under obligation to provide evidence regarding the application of a measure challenged "as such".[6] This assertion by Ukraine, in particular, relates to its claims related to the Letters of Rosselkhoznadzor and the "de facto application of 2016 general and product-specific transit bans".

[5] Request for the establishment of a panel by Ukraine (WT/DS512/3), Section III.
[6] Ukraine`s Second Written Submission, para. 25.

16. Ukraine failed to establish *prima facie* case in support of its claims that such measures indeed existed, exist and, moreover, will continue to exist in the future. Ukraine did not provide any evidence in support of its claims regarding the Letters of Rosselkhoznadzor. The sole evidence in respect of the so-called "de facto application" is limited by a two-week period from two years ago. The statistics provided by the Russian Federation[7] au contraire proves that the transit allegedly banned by the Russian Federation continues to flow unrestrictedly.

17. During the Second Substantive meeting Ukraine filed Exhibit UKR-106 that contained new factual evidence in respect of its claims on the Letters of Rosselkhoznadzor. In Russia's view, this Exhibit is not necessary for the purposes of rebuttal, answers to questions or comments on answers provided by the other party and therefore its submission at such a late stage is inconsistent with the Working Procedures adopted in this dispute. Russia's detailed position on this issue is set out in its Request dated 13 June 2018.

C. ARTICLE XXI OF THE GATT

18. The measures challenged by Ukraine in this dispute in respect of which Russia has invoked the provisions of Article XXI of the GATT are the actions that the Russian Federation considers necessary for the protection of Russia's essential security interests taken in time of emergency in international relations and in response to the circumstances that arose in 2014, evolved between 2014-2018 and remain in place to this date. The Russian Federation considers that all actions taken were necessary for protection of such interests at the time of their adoption. Moreover, such measures are still necessary and attain the purposes for which they have initially been adopted.

19. The information regarding the basis for the imposition of the measures is set out in the Decrees of the President of the Russian Federation and the relevant implementing acts. In addition, the original circumstances that led to the imposition of the measures are publicly available in abundance, in particular, in the Internet. More importantly, the text of the relevant legal acts expressly provides for the rationale behind them and the circumstances that have called for their adoption.

20. The measures at issue are the response of the Russian Federation to the circumstances that required immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state or its bodies and officials, when such act poses a threat to the interests and security of the Russian Federation and/or violates the rights and freedoms of its citizens. Such internationally wrongful acts or unfriendly acts of certain foreign state or their bodies and officials resulted in application of the measures in question, as well as in the adoption of the list of such states or their unions.

21. This list is set out in the Resolution of the Government of the Russian Federation of 7 August 2014 No.778[8] and includes the states or unions of states that have adopted a decision to introduce and apply economic sanctions in respect of legal and natural persons of the Russian Federation as well as countries that have joined such a decision.

22. Besides Ukraine, this list includes a number of third parties to this dispute, including the EU. For the purposes of these proceedings the EU for obvious reasons attempts to shift the focus away from such unilateral actions that are applied in respect of Russia[9], in particular, by the EU and Ukraine, in violation of the UN Charter and that are impairing the authority of the UN Security Council.

23. From the beginning of this dispute Russia was consistent in demonstrating that the situation that is the matter of these proceedings and surrounding circumstances are of political nature, involving not measures aimed at regulation of trade, but measures designed to protect national security of the Russian Federation, the essential security interests of our State.

[7] Exhibit RUS-9.

[8] Exhibit – RUS 7.

[9] European Union`s responses to the questions from the Panel to the third parties following the first substantive meeting, paras. 4-5.

24. Map 1 produced in Exhibit UKR-104 by Ukraine identifies the principal road and rail routes which were used for transit of goods from Ukraine to Kazakhstan and the Kyrgyz Republic prior to 2014. However, Ukraine has omitted the fact that traffic through railway corridor 8 Chervona Mohyla (or Krasnaya Mogila) was suspended by Ukraine pursuant to Article 29 of the Statute of Ukrainian Railways (on the basis of "force majeure circumstances") by virtue of the telegram of 6 June 2014 No. CZM-14/946.[10] Traffic through the checkpoint Izvaryne (E40) was suspended in May 2014 by the Ministry of Revenue and Duties of Ukraine.[11] Traffic through the checkpoint Uspenskaya–Kvashino was suspended in accordance with the telegram of Ukrainian Railways of 8 July 2014 No. CZM-14/1134 on the basis of "force majeure circumstances" as well.[12] Furthermore, the Regulation of the Cabinet of Ministers of Ukraine No. 106-r of 18 February 2015 suspended traffic through 23 checkpoints on Ukraine-Russia border.[13] Therefore, the operation of the routes mentioned by Ukraine was suspended by Ukrainian side.

25. Moreover, by virtue of the Resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147 "On the ban on imports of goods originating from the Russian Federation to the customs territory of Ukraine"[14] Ukraine has adopted an import ban on certain products originating from the Russian Federation which is in force until 1 January 2019.

26. Furthermore, the Cabinet of Ministers of Ukraine adopted the Resolution of 20 January 2016 No. 20[15] which restricts transit of goods listed in the Resolution No. 1147 through the designated checkpoints at the border with the Russian Federation and Belarus.

27. The Decree of the President of Ukraine of 15 May 2017 No. 133/2017 "On Decision of the National Security and Defense Council of Ukraine of 28 April 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"[16] contains consolidated list of special economic measures ("sanctions") applied by Ukraine in respect of legal and natural persons of the Russian Federation. The basis for adoption of this Presidential Decree of Ukraine was the Law of Ukraine of 14 August 2014 No. 1644-VII "On Sanctions"[17] that provides for application of special economic and other restrictive measures (sanctions).

28. The number of "sanctions" adopted by Ukraine in respect of Russia continued to expand in 2018. Among others, Ukraine adopted a ban on exportation of certain Ukrainian civil aviation products to the Russian Federation by virtue of a Decree of the President of Ukraine of 6 March 2018 No. 58/2018 "On Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 "On Emergency Measures on Protection of National Security of the State in the Sector of Aviation Motors Building".[18] The list of special economic and other restrictive measures (sanctions) was further expanded in accordance with the Decree of the President of Ukraine of 6 March 2018 No. 57/2018 "On Entry into Force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 "On Application of personal special economic and other restrictive measures (sanctions)".[19] These measures include export restrictions, transit restrictions, limitations on supply of services, restrictions in respect of particular natural and legal persons.

29. The Russian Federation would like to reiterate that the basis for the imposition of the measures provided for in the Decrees of the President of the Russian Federation and the relevant implementing acts as well as the original circumstances that led to the imposition thereof may be well established on the basis of the submissions already made by Russia, both on the basis of the texts of the acts

[10] Exhibit RUS – 14.
[11] Exhibit RUS – 15.
[12] Exhibit RUS – 18.
[13] Exhibit RUS – 17.
[14] As amended by Resolution of the Cabinet of Ministers of Ukraine of 20 January 2016 No. 28 "On amendments to list of goods originating in the Russian Federation and prohibited for imports into Ukraine", Resolution of the Cabinet of Ministers of Ukraine of 6 July 2016 No. 417 "On amendments to the resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147", Resolution of Cabinet of Ministers of Ukraine of 20 December 2017 No. 1022 "On amendments to resolution of the Cabinet of Ministers of Ukraine of 30 December 2015 No. 1147" (Exhibit RUS – 19).
[15] Exhibit RUS – 16.
[16] Exhibit RUS – 20.
[17] Exhibit RUS – 21.
[18] Exhibit RUS – 22.
[19] Exhibit RUS – 23.

cited by Russia in its First Written Submission[20] and Statements at First Substantive Meeting[21], as well additional explanation provided by Russia in respect of the operation of these acts.

30. It is at discretion of a Member taking the measures under GATT Article XXI(a) and (b) to determine, inter alia, whether its national security interests are at stake, whether such interests are essential ones, whether a particular action is necessary for the protection of such interests.
31. A statement by that Member that the measures taken are the actions which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations, as the case may be, is sufficient for that Member to benefit from the exception set out in Article XX(b) of the GATT. This assessment by a Member cannot be doubted or re-evaluated by any other party or judicial bodies, as the measures in question are not ordinary trade measures regularly assessed by the WTO panels.

32. Thus, Russia is not in a position to disclose information that is related to the ongoing emergency, besides the information it has already provided, fully satisfying the burden of proof. The reasons for that, include not only the matters of confidential information and national security of the Russian Federation, but also the efforts of the Russian Federation to keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters.

33. In respect of the judgments of the International Court of Justice referred to by Ukraine the Russian Federation would like to note the following.

34. By citing certain extracts from the *Military and Paramilitary Activities in and against Nicaragua* case and *Oil Platforms* case Ukraine tries to create an impression that the ICJ came to a conclusion that Article XXI of the GATT, in particular paragraph (b) thereof, is not of a self-judging nature. Ukraine attempts to present the judgments of the ICJ in these two cases as if the ICJ has ruled that even though the two treaties in question do not contain the language similar or identical to the language of Article XXI of the GATT, in particular the "it considers" language, this wording is implied in the text of the respective provisions of the treaties in question, which nevertheless does not prevent the ICJ from examining the cases and concluding that the respondent in those cases was under an obligation to show that its actions were indeed necessary for the purpose of protection of its essential interests. Moreover, Ukraine seems to suggest that the ICJ adopted the element of "taken in the time of war or other emergency in international relations" of GATT Article XXI(b)(iii) in the context of its judgments, even though the relevant language is not present in the text of the treaties examined by the ICJ.

35. Ukraine's assessment of the ICJ's judgement is erroneous for the following reasons.

36. Article XXI(1)(d) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua reads as follows:

"The present Treaty shall not preclude the application of measures:

…

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

In accordance with Article XX(1)(d) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran:

"The present Treaty shall not preclude the application of measures:

…

[20] First Written Submission by the Russian Federation, paras. 16 – 19.
[21] First Substantive Meeting Opening Statement by the Russian Federation, paras. 30-36.

(d) necessary to fulfil the obligations of a High Contracting Party for maintenance or restoration of international peace and security, or necessary to protect its essential security interest".

37. These two provisions are similar to each other. However, they are conceptually different from the relevant part of Article XXI(b) of the GATT. This difference was expressly reflected in the judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*. Ukraine cited certain provisions from this judgment of the ICJ. However, it failed to provide the full quote from paragraph 222 thereof.

38. In this paragraph the ICJ states clearly "that the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such"[22].

39. Thus, the ICJ has made the explicit distinction between Article XXI of the Treaty of Friendship, Commerce, and Navigation of 1956 and Article XXI of the GATT.

40. Ukraine misinterprets the conclusions of the ICJ.[23] In paragraph 282 of the ICJ Judgment in *Military and Paramilitary Activities in and against Nicaragua* the Court expressly stated that "by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as Court has emphasized (paragraph 222), purely a question for a subjective judgment of the party; the text does not refer to what a party "considers necessary" for that purpose. We would like to highlight the following: "by the terms of the Treaty itself" and "the text does not refer to what a party "considers necessary" for that purpose".

41. Ukraine draws false conclusions both regarding the limits of the scope of "necessity" and the possibility of any measures taken to protect essential security interest be subject to judicial review.[24]

42. The Russian Federation notes that the conclusion of Ukraine regarding judicial review is partially correct. Some measures taken for the purpose of protection of essential security interests may indeed be subject to judicial review. However, as the ICJ has pointed out, the objective judgment in that respect should be allowed by the terms of a treaty itself. For that purpose, quoting the ICJ again, the treaty should "not refer to what a party "considers necessary"".

43. The conclusions of the ICJ in *Oil Platforms* Judgment are also taken by Ukraine out of context. That leads to flawed conclusions by Ukraine. To sum up, the overall logic of Ukraine relies upon one particular phrase in that judgment containedin paragraph 43 thereof. The ICJ examined the application of Article XX(1)(d) of the US-Iran Treaty and came to a conclusion that:

"On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests."

44. Based on this sentence Ukraine comes to a far-reaching conclusion that what the ICJ did was ruling that the "it considers" language is implied in the text of the US-Iran Treaty. However, that is not the case. The ICJ merely stated that certain measures may or may not be justified on the basis of the provisions of a particular treaty. The provisions of US-Iran Treaty and US-Nicaragua Treaty allowed for this scenario as well as an assessment by the ICJ. The reason for that was the text of the particular treaties, which did not contain the "it considers" language.

45. Therefore, contrary to what Ukraine suggests, in *Oil Platforms* the ICJ did not add any new elements to what have already been established on this issue in *Military and Paramilitary Activities in and against Nicaragua.* Notably, the ICJ merely confirmed that a State may consider that the

[22] ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 222.
[23] Second Written Submission of Ukraine, para. 85.
[24] Second Written Submission of Ukraine, para. 86.

measure it has taken is necessary for the purpose of protection of its essential security interests. However, whether such assessment is correct is of self-judging nature and is at full discretion of that State or may be subject to objective review by a court depends on the particular treaty provisions. In case of US-Nicaragua and US-Iran treaties objective assessment by the ICJ was possible due to the relevant provisions of the treaties in question. These provisions are substantially different from the GATT Article XXI(b) as the ICJ has emphasized in paragraph 222 of its judgment in *Military and Paramilitary Activities in and against Nicaragua*: unlike Article XXI(b) of the GATT, the US-Nicaragua Treaty, "on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such".

46. It shall also be noted that certain aspects of the conclusion by the Court regarding the criteria of proportionality and necessity borrowed by Ukraine from *Oil Platforms* Judgment are completely irrelevant for the purposes of these proceedings for yet another reason.

47. The *Oil Platform* dispute dealt simultaneously with two issues. First, the interpretation by the US of Article XX of the US-Iran Treaty. Second, the invocation by the US of the right to self-defense.

48. In the context of the claims by the US that it considered in good faith that its certain actions were necessary to protect its essential security interests, the ICJ states that "the Court does not have to decide whether the United States interpretation of Article XX, paragraph 1(d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion". The Court will therefore turn to the criteria of necessity and proportionality in the context of international law on self-defence"[25]. Therefore, the ICJ does not provide any guidance in respect of the provision of the US-Iran Treaty in question that could be relevant to the issues raised in the present dispute.

49. The cases referred to by Ukraine only highlight the critical difference between the provisions of the relevant treaties examined by the ICJ and the GATT Article XXI. The Russian Federation sees that difference in two main elements: the "it considers" language and "taken in time of war or other emergency in international relations".

50. The UN Charter and the Statute of the ICJ provide for broad jurisdiction of the Court. As the Russian Federation has already stated, the World Trade Organisation is a trade organization. The Marrakesh Agreement established specific area of competence of this organisation[26]. The DSB being a body of this trade organisation may not in any way assume the functions of the ICJ. However, this is exactly what Ukraine compels the DSB to do.

51. The Russian Federation also notes that, in our view, Ukraine mistakenly links the principle of good faith in the context of the issue of exercise of discretion by a State with the jurisprudence developed by the ICJ in *Oil Platforms* and *Military and Paramilitary Activities in and against Nicaragua*[27]. Paragraph 145 of the Judgment by the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters* refers to the said disputes involving the US in the context of the issues of competence of the Court. The issue of good faith principle is, however, referred to in the context of *The Certain Interests in Polish Upper Silesia* and *Free Zones of Upper Savoy and the District of Gex*. Therefore the conclusions drawn by Ukraine from *Certain Questions of Mutual Assistance in Criminal Matters* are also flawed and not relevant to this particular dispute.

52. The Russian Federation also notes that Ukraine follows the EU in referring to the ECJ jurisprudence and the EU *aquis*. Although such references by the EU might be understandable, they are completely irrelevant for the purpose of these proceedings.

[25] ICJ, *Oil Platforms,* para.73.
[26] Para. 6 of Russia's Closing Statement at First Substantive Meeting.
[27] Para. 92 of the Ukraine's Second Written Submission.

D. CONCLUSION

53. Ukraine attempts to present its case as if the measures in question adopted by the Russian Federation were adopted for a sole purpose of economic protectionism. As Russia has indicated on numerous occasions, the measures in respect of which the provisions of Article XXI of the GATT were invoked were adopted by the Russian Federation solely for the purpose of protection of its national security and do not even by their design or nature result in "economic protectionism", mainly because there are no specific economic interests that may be hypothetically protected by the measures in question. There is no industry or a single producer of the Russian Federation that would be afforded protection as the result of these measures.

54. The Russian Federation would like to highlight once again that the conclusions that will be made by the Panel in this dispute will have far-reaching consequences for the multilateral trading system.

55. These conclusions would not only affect the ability of sovereign States to appropriately react to international emergencies for the purpose of protection of their national security on an *ad hoc* basis. These conclusions will inevitably have spillover effects, including on the existing systems of exports control and non-proliferation commitments. These systems currently operate under the umbrella of Article XXI, in particular paragraph (b) thereof. The change in balance of rights and obligations of the Members under Article XXI, as a result of its interpretation, even a slightest and reserved one, may change the level of legal protection of such measures causing respective negative consequences for their WTO consistency.

56. The risk of abuse of Article XXI of the GATT is indeed high. Moreover, current trends show that these risks manifest themselves at a speed of an avalanche. However, Article XXI of the GATT itself provides a counterbalance for such potential risks.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (the GATT 1994) as well as the rights and obligations of WTO Members and the proper function of panels provided for under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

II. THE EXCEPTIONAL NATURE OF THE SECURITY EXCEPTION

2. Australia recalls that Article XXI(b) is an exception to a Member's obligations under the GATT 1994, and its use is explicitly limited by the text of the provision.

3. This text reflects the shared concerns of the drafters, understandable in light of two world wars, regarding the interplay of national security and sovereignty in the realm of international trade. The specific reference to fissionable materials reflects concerns regarding the devastating nuclear experience during World War II. A call for coherence with the United Nations Charters reflects the expectation that the "International Trade Organisation" would function as a UN organisation, like other Bretton Woods institutions.

4. The US delegation that contributed to drafting the original security exception expressly observed the delicate balance the provision would need to address, stating:

> … we cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial focus.[1]

5. In addition, the Norwegian Chair of the Working Group foresaw that the spirit in which Members interpreted these provisions would be the only guarantee against abuse.[2]

6. This spirit is best reflected in the restraint WTO Members have demonstrated for the past 20 years. It is no accident that, in over two decades of WTO jurisprudence, this is the first time a WTO panel has been called upon to consider a Member's invocation of Article XXI.

7. In light of the balance of sensitive interests Article XXI seeks to accommodate − as well as the responsibility of Members to guard against undue use of this exception − Australia submits that each invocation of Article XXI must be considered carefully on a case-by-case basis.

III. JURISDICTION OF A PANEL TO REVIEW A MATTER WHERE A MEMBER INVOKES ARTICLE XXI(b)

8. In its First Written Submission, Russia appears to suggest that a Member's invocation of Article XXI(b) automatically takes a dispute outside the jurisdiction of a panel.[3]

9. Russia submits that neither the Panel nor the WTO as an institution has jurisdiction over this *matter*[4] on the basis that the measures Ukraine has challenged were introduced pursuant to Russia's right "to take any action which it considers necessary for the protection of its essential security interests in the time of war or other emergency in international relations".[5]

(i) Does the Panel have jurisdiction to consider this matter?

10. Article 7(1) of the DSU defines a panel's standard terms of reference as: to examine the matter referred to it, in the light of the relevant provisions in the covered agreement(s) cited by the

[1] EPCT/A/PV/33, p. 20-21 and Corr.3.
[2] GATT/CP.3/SR.22, Corr.1
[3] First Written Submission of the Russian Federation, para. 47.
[4] First Written Submission of the Russian Federation, para. 7. (emphasis added)
[5] First Written Submission of the Russian Federation, para. 5.

parties to the dispute; and make such findings as will assist in making the recommendations or rulings provided for in the relevant agreement(s). Article 7(2) of the DSU further provides that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

11. The Appellate Body has explained that the use of the words "shall address" indicates that panels are in fact "*required* to address the relevant provisions in any covered agreement or agreements *cited by the parties* to the dispute".[6]

12. The Panel in this dispute was established with these standard terms of reference.[7]

13. In this dispute, Ukraine has cited Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3(a), XI:1 and XXIII:1 of the GATT 1994, claiming that the measures at issue violate Russia's obligations with respect to these provisions. Russia has cited Article XXI(b)(iii) of the GATT 1994 as a complete defence to Ukraine's claims of violation (while also advancing additional arguments related to temporal matters).

14. In Australia's view, it follows that Article 7 of the DSU vests the Panel with the jurisdiction to examine and make findings with respect to each of the "relevant provisions in the covered agreements" that Ukraine and Russia have cited. Australia therefore disagrees with Russia's submission that the Panel does not have jurisdiction over this matter.

(ii) Does the Panel have the discretion to decline to exercise its jurisdiction?

15. As outlined above (at paragraphs 11 and 12), Article 7 of the DSU does not simply *empower* a panel to address the relevant provisions of the covered agreements cited by the parties, but in fact *requires* a panel to do this.

16. In discharging this adjudicative function, Article 11 of the DSU obliges a panel to:

> … make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, 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.

17. More broadly, Article 3.2 of the DSU recognises that the dispute settlement system: (i) is a "central element in providing security and predictability to the multilateral trading system"; and (ii) serves to preserve the rights and obligations of Members under the covered agreements. This is reinforced by Article 3.3 of the DSU, which highlights that the ability of Members to bring disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

18. In addition, Article 19.2 of the DSU prohibits a panel from making findings that would "add to or diminish the rights and obligations provided in the covered agreements".

19. The Appellate Body has confirmed that the dispute settlement system is the fundamental means through which Members' rights and obligations are enforced:

> … allowing measures to be the subject of dispute settlement proceedings … is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements".[8]

20. The Appellate Body has also recognised that, while panels enjoy some discretion in discharging their core adjudicative function, "this discretion does not extend to modifying the substantive provisions of the DSU".[9]

[6] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. (emphasis added)
[7] Dispute Settlement Body – Minutes of meeting held in the centre William Rappard on 21 March 2017 (WT/DSB/M/394).
[8] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.
[9] Appellate Body Report, *India-Patents (US)*, para. 92. (emphasis added)

21. In addition, in examining a panel's obligation in Article 11 of the DSU, the Appellate Body has observed that "[i]t is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".[10]

22. Furthermore, the Appellate Body has noted that a Member's right under Article 3.3 of the DSU to initiate a WTO dispute when it considers that benefits accruing to it are being impaired by another Member implies that a Member "is *entitled* to a ruling by a WTO panel".[11]

23. It was on the basis of these rights and obligations − with respect to both Members and panels − that the Appellate Body upheld the panel's conclusion in *Mexico − Taxes on Soft Drinks* that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in that case that ha[d] been brought before it".[12]

24. In Australia's view, if the Panel were to decline to exercise its jurisdiction in this matter, this would deprive Ukraine of its rights under Articles 3.2 and 3.3 of the DSU to bring a dispute in order to remedy the benefits it considers Russia's measures are impairing.

25. Australia considers that declining to exercise jurisdiction in this dispute would also be inconsistent with the Panel's obligations under Articles 7, 11 and 19.2 of the DSU to:

(i) address the relevant provisions of the covered agreements cited by Ukraine and Russia;
(ii) make an objective assessment of this matter, including an objective assessment of the facts and the applicability of and conformity with the relevant provisions of the GATT 1994; and
(iii) not add to or diminish the rights and obligations of either Ukraine or Russia.

26. Accordingly, in order to give full effect to the rights and obligations provided in the DSU, Australia submits that the Panel cannot decline to exercise its jurisdiction to address the matters before it.

IV. SCOPE OF REVIEW OF ARTICLE XXI(B) OF THE GATT 1994

27. By its terms, Article XXI(b) provides that nothing in the GATT 1994 shall be construed to prevent a Member "from taking action which it considers necessary for the protection of its essential security interests" in three specific factual circumstances.

28. Australia considers that the use of the words "it considers necessary" in Article XXI(b) of the GATT 1994 indicates that it is for a *Member* to determine "its essential security interests" and the actions "it considers necessary" for the protection of those interests.[13] In Australia's view, a panel's task in reviewing the "necessity" aspect of Article XXI(b) is limited to determining whether the Member *in fact* considers the action necessary (such as by having regard to the Member's statements and conduct).

29. Accordingly, in this dispute, Australia submits that Article XXI(b) does not require the Panel to make its own determination of what "it considers necessary" (such as by engaging in a proportionality analysis) or to substitute its determination for that of Russia's. In this light, considerations of "reasonableness" or "plausibility" risk infringing upon the deference that must be accorded to Russia under Article XXI(b) by having the Panel second-guess what Russia considers necessary.

30. However, this deference to Russia does not preclude the Panel from undertaking *any* review of Russia's invocation of Article XXI(b) or dispense with the Panel's obligation to undertake an

[10] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 51.
[11] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 52. (emphasis original)
[12] Appellate Body Report, *Mexico − Taxes on Soft Drink*, para. 57. See also Appellate Body Report, *Canada − Measures Affecting the Export of Civilian Aircraft*, para. 187 (quoting *The Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1283); Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 89.
[13] Australia's third party oral statement at the first meeting of the Panel, para. 11.

objective assessment of the matter before it, including an objective assessment of the facts of the case.

31. While Australia considers that the text of Article XXI(b) empowers a Member to determine for itself what action "*it considers necessary*" − and, accordingly, a panel's nature and scope of review of this "necessity" aspect is limited − Australia sees a *broader* role for a panel in determining whether that (necessary) action was taken "*for the protection of*" the Member's essential security interests.

32. Australia observes that the ordinary meaning of "for" is "[w]ith the object or purpose of"; "with a view to"; "conducive to; leading to; giving rise to; with the result or effect of".[14] In Australia's view, a factual assessment of this "purposive" aspect of Article XXI(b) requires a panel to examine whether there is a "sufficient nexus" between the action taken and the Member's essential security interests.[15] If the action taken by a Member is not "*capable* of making … *some* contribution"[16] to protecting the essential security interests identified, it would be reasonable for a panel to determine that the action was not *in fact* taken "*for*" such a purpose, consistent with Article XXI(b).[17]

33. In Australia's view, this factual analytical framework allows a panel to discharge its obligations under the DSU to make an objective assessment of the matter before it,[18] while giving effect to the explicit deference accorded to Members under Article XXI(b).

34. Accordingly, in this dispute, Australia submits that it is for Russia to determine for itself what action "it considers necessary" under Article XXI(b). However, the Panel must undertake a factual analysis of whether Russia does *in fact* consider the action necessary; and, if so, whether that (necessary) action was *in fact* taken "*for the protection of*" Russia's essential security interests.

V. CONCLUSION

35. In order to give proper effect to Members' rights and obligations under the WTO covered agreements, and to the Panel's obligations and terms of reference under the DSU, Australia submits that the Panel should exercise its jurisdiction to address all relevant provisions in the GATT 1994 cited by Ukraine and Russia in this dispute, including Article XXI(b)(iii).

36. Article XXI(b)(iii) reflects the critical importance of national security interests to Members' fundamental sovereignty. Deference to a Member's determination of what action "*it considers necessary*" to protect its essential security interests is explicit in the text of this provision and must be given proper effect. However, in Australia's view, this deference is not absolute.

37. In Australia's view, in undertaking its objective assessment of this matter, the Panel should determine:

(i) whether Russia in fact considers the actions it has taken are *necessary* for the protection of its essential security interests (such as by having regard to Russia's statements and conduct); and

(iii) whether those (necessary) actions were in fact taken *for the protection of* Russia's essential security interests.

[14] *The New Shorter Oxford English Dictionary*, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 996.

[15] European Union's third party submission, para. 56; Appellate Body Report, *EC − Seal Products*, para. 5.169.

[16] Appellate Body Report, *EC − Seal Products*, para. 5.228, cited in Appellate Body Report, *US − COOL (Article 21.5 − Canada and Mexico)*, para. 5.209.

[17] European Union's third party submission, para. 53; Appellate Body Report, *Colombia-Textiles*, para. 5.68.

[18] *Understanding on Rules and Procedures governing the Settlement of Disputes* Article 11.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil made four main points in its third party submission and oral statement: (I) a proper application of the security exceptions of Article XXI of the GATT 1994 requires an adequate balance between two competing interests; (II) the mere invocation of the security exceptions of Article XXI does not exclude a Panel's jurisdiction over the matter before it; (III) the subparagraphs of Article XXI(b) provide for objective circumstances which condition the recourse to the security exception of that literal; and (IV) Members invoking security exceptions have the burden of at least indicating the reasons why they consider certain measures necessary for the protection of their essential security interests.

I. A proper application of the security exceptions of Article XXI involves the balancing of two competing interests.

2. In its first written submission, Brazil focused on the two competing interests to be taken into account when considering the invocation of security exceptions. On the one hand, there is a Member's unquestionable right to protect its essential security interests; on the other, there is the need to prevent the abuses that could ensue if security exceptions were misused to exempt measures of a strictly commercial nature from the agreed GATT disciplines. A proper balance must be struck between those two.

II. The mere invocation of the security exceptions of Article XXI does not exclude the Panel's jurisdiction over the matter brought before it.

3. Brazil considers that Article 7 of the DSU bestows upon the panel the jurisdiction to examine and to make findings in relation to each of the "relevant provisions in the covered agreements" cited by the parties. More specifically, Article 7(2) does even more than that, as it does not simply *allow* the panel to address the provisions invoked by the parties, it *requires* the panel to do so. Therefore, the fact that Russia chose to cite Article XXI of the GATT 1994 as a defense obliges the Panel to examine this provision.

4. As a result, unless otherwise justified by the exercise of true judicial economy, a panel is required by WTO law to examine and to make findings with respect to *all* provisions cited by the parties, which in the current proceedings include Article XXI.

III. Subparagraphs (i) through (iii) of Article XXI(b) provide for objective circumstances which condition the recourse to the security exception of that literal.

5. Brazil argued that, in its relevant part, Article XXI(b) states that nothing in the GATT shall be construed to prevent a Member from taking any action *it considers* necessary for the protection of its essential security interests *under three specific sets of circumstances*. In other words, Article XXI(b) does not stop at the chapeau. It goes on to list an exhaustive number of circumstances under which the exceptions apply.

6. Therefore, Article XXI(b) contains both a subjective component – i.e., the judgment regarding the necessity of the measure – and an objective component – which relates to the presence of at least one of the circumstances exhaustively listed in subparagraphs (i) through (iii).

7. Accordingly, the Panel's first step should be the assessment of whether one or more of the circumstances in subparagraphs (i) through (iii) – as invoked by the party asserting the defense – are present.

8. As Russia has invoked the security exception of Article XXI(b)(iii), it is Brazil's understanding that the Panel must be satisfied that the challenged measures to be justified under the

exception constitute actions "taken in time of war or other emergency in international relations".

9. Furthermore, Brazil considers that, since the recourse to exceptions is in the nature of an affirmative defense, it is the burden of the Member invoking Article XXI(b)(iii) to adduce evidence of the fact that the challenged measures constitute actions taken in time of war or other emergency in international relations. This means that it is not enough for a Member to simply "refer" to one of the circumstances in article XXI; it must present evidence to demonstrate that the circumstance exists.

IV. Members invoking security exceptions have the burden of at least indicating the reasons why they consider certain measures necessary for the protection of their essential security interests.

10. Brazil argued that although the language of Article XXI – "it considers" – confers a great deal of discretion regarding the necessity of the measure, that does not mean that the autonomy accorded by this provision is completely unfettered. In this respect, Brazil understands that Members invoking Article XXI bear the burden of at least justifying their assertion of necessity. Therefore, it is not sufficient for Members to state *that* they consider certain measures necessary; they must also explain *why* they consider those measures necessary.

11. In explaining the reasons for considering the challenged measures necessary, the invoking member should offer some indication as to which essential security interests motivated the challenged measures. Otherwise, it would be impossible for the panel to ascertain whether they are indeed interests related to security and whether there is a connection with the circumstances provided for in subparagraphs (i) to (iii), as raised by the Member.

12. Brazil considers that only essential interests related to *security* may serve as the basis for the recourse to the exceptions in Article XXI(b). Interests pertaining to different areas, but which may also affect trade obligations, are covered by the general exceptions of Article XX.

13. Moreover, the Panel must be satisfied that there is a connection between the challenged measure and the war or emergency deemed present pursuant to subparagraph (iii) of Article XXI(b). Brazil believes that the need for this connection is justified because precluding this analysis could lead to untenable results, as a Member would be allowed to disregard its obligations under the GATT in relation to *all* WTO members, in a manner that could be entirely unrelated to the particular situation of war or emergency.

14. Finally, the Panel should also be satisfied that there is a plausible link between the challenged measure and the purpose stated in its motivation. Brazil believes that a Member is not required to delineate in detail what its "essential security interests" are, since this could be sensitive information in the sense of Article XXI(a). However, it should, at a minimum, justify the actions taken in the name of protecting its "essential security interests" in a manner that allows the Panel to assess if the action was reasonable or plausible in view of, in the present case, the events described in Article XXI(b)(iii), i.e., "war or other emergency in international relations".

Main points made by Brazil in its answers to the Panel's questions

15. With regard to the degree of specificity to be provided by a Member in relation to the essential security interests it aims to protect, Brazil considers that the level of detail expected of the invoking Member "will necessarily vary from measure to measure, provision to provision, and case to case"[1] and that there should be no rigid formula as to what information a Member's explanation must contain. In any case, the information provided by the Member invoking Article XXI(b) must be sufficient for the panel to be able to assess whether the recourse to the security exception is legitimate or whether it constitutes abuse. In this sense, the essential security interests at stake only need to be identified to the extent necessary for the panel to be able to conduct its analysis.

[1] Appellate Body Report, *US – Shirts and Blouses*, pg. 14.

16. With regard to the Panel's analysis of good faith, Brazil believes that findings that a Member has *not* invoked Article XXI(b) in good faith should be limited to situations in which there is a flagrant lack of logical consistency in the Member's argumentation.

17. With regard to the interaction between Article XXI(a) and Article XXI(b), Brazil considers that the two provisions deal with very different situations. On the one hand, Article XXI(a) is concerned with a scenario in which a Member is required to provide pieces of information the disclosure of which is, *in itself*, a threat to essential security interests. It would seem that the core of Article XXI(a) is related to a request for information and to transparency obligations. On the other hand, Article XXI(b) deals with situations in which actions that would otherwise violate obligations assumed under the GATT are nonetheless needed to protect essential security interests. In this context, it would seem that explaining why a measure is necessary for security purposes is not *per se* incompatible with Article XXI(a). Thus, the party invoking Article XXI(b) has to achieve a minimum evidentiary threshold that enables the panel to discern genuine invocations of Article XXI(b) from abuses.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE XXI OF THE GATT 1994

1. Canada is of the view that Article XXI is a needed part of the international rules-based trading system but that Members should be prudent and sparing in their use of Article XXI. While Members must be able to take actions necessary for their security, they must also not abuse the international rules-based trading system of which they are willing parties and beneficiaries. The WTO is not intended or equipped to resolve security issues or conflicts and, as a general matter, Canada urges Members involved in such situations to proactively and constructively engage to peacefully resolve the situation and avail themselves of any means that may assist them in doing so.

A. Article XXI is justiciable

2. If Article XXI is invoked by a Member in a dispute then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference. In a letter to the Chairman of the Panel, Canada observed that: "the DSU makes it clear that panels do not have the discretion to decline exercising the jurisdiction conferred on them by those terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11". Canada also concurs with the analysis set out in Australia's third party submission in paragraphs 4-22 regarding the jurisdiction of a panel.

B. A panel must make an objective assessment of the invoking Member's good faith belief that the elements required to invoke Article XXI exist

3. All obligations in the WTO Agreements must be interpreted in good faith and in light of their object and purpose. Each Article must also be interpreted on its own merits. Canada cautions against importing tests developed in jurisprudence to interpret other Articles, such as Article XX, as tools to interpret Article XXI. Unlike Article XX, the chapeau of Article XXI does not include any conditions and is thus broad in scope, though still subject to interpretation in the overall context of the treaty and its object and purpose.

4. Article XXI(b), of which subparagraph (iii) has been invoked by Russia, provides for a subjective standard with the following language: "... any action which it considers necessary for the protection of its essential security interests ". It is the invoking Member which determines the interests, the actions and the necessity of the actions. Canada is of the view that this subjective standard also applies to the language of sub-paragraph (iii) as it completes the phrase begun in the opening words of paragraph (b) and it would defeat the broad discretion accorded to the invoking Member if the assessment of the situation that gave rise to the need for the action were to be subject to a different standard from that set out in the chapeau. At the same time, a panel is tasked under Article 11 of the DSU to make an objective assessment of the matter before it. As such, for Article XXI, the panel should make an objective assessment of a subjective perspective; in other words, the panel's task is to determine whether the invoking Member believes in good faith that the elements required to invoke Article XXI exist.

C. The invoking Member must substantiate its good faith belief that the elements required to invoke Article XXI exist

5. The subjective standard and the particularly sensitive nature of the subject matter of Article XXI mean that an invoking Member must be accorded a high level of deference by a panel. However, to guard against abuse of the provision, Canada is of the view that an invoking Member must substantiate its good faith belief that the elements for invoking Article XXI exist, for example with regard to Article XXI(b)(iii), that there is an "essential security interest", that the action taken is necessary and relates to the protection of this essential security interest, and that the action is "taken in a time of war or other emergency in international relations". The threshold required for substantiation would be low and appropriate to the factual situation but would need to be more than

a simple assertion that Article XXI is invoked. A complete lack of substantiation would be grounds for finding that use of the Article is not justified.

6. Information required to substantiate the good faith belief of a Member invoking Article XXI that the action was "taken in a time of war or other emergency in international relations", will depend on the case. If the situation is self-evident and there is a general awareness among a broad number of States of the "emergency in international relations", it is possible a reference or brief description will suffice. A strong indication of such awareness would be consideration of the situation by relevant multilateral fora, notably the United Nations Security Council. In other cases the invoking Member may need to provide more information. The panel would be able to act pursuant to DSU Article 13 to seek information. However, in so doing the panel should exercise caution appropriate to the subject matter and be cognizant of the high level deference to be accorded to the Member invoking Article XXI.

7. Depending on the case, evidence that could be considered with regard to the requirement that the invoking Member believes in good faith that the action taken was necessary for the protection of its essential security interests includes, in no particular order, and is not limited to: records of consideration in the invoking Members' legislature, speeches from the leader or other high-ranking government members of the invoking Member, language contained in the measure that indicates the measure's purpose, documents that accompany the measure that were produced as part of the invoking Member's legal processes to institute the measure, decisions of courts in the invoking Member's territory, decisions of international courts or international dispute settlement mechanisms, documentation from other relevant international fora, and news reports from media outlets.

D. Articles XXI(a) and (b) must be interpreted in good faith and read harmoniously so as to give effect to both paragraphs

8. It is very difficult to foresee a circumstance where reliance on Article XXI(a) could be used to nullify the requirement to provide substantiation of any sort under Article XXI(b). It is equally difficult to foresee a situation where a Member would have no information whatsoever that falls outside the scope of paragraph (a) that could be presented as substantiation with regard to paragraph (b). At the very least a Member would be able to offer information that is in the public domain. The precise interplay of paragraphs (a) and (b) will depend on the case but the simultaneous existence of a requirement to substantiate under paragraph (b) and a requirement not to provide sensitive information under paragraph (a) demonstrates that the threshold for substantiation under paragraph (b) is low but not non-existent.

II. ARTICLE V OF THE GATT 1994

9. Article V generally, and the notion of freedom of transit specifically, is an important element of the WTO trade regime, but the right to freedom of transit is not absolute. While Article V:2, first sentence, declares that there shall be freedom of transit, the remainder of Article V, including the rest of Article V:2, sets out the limits that WTO Members may impose on this freedom without thereby violating the obligation it entails. The ordinary meaning of the term "freedom" must be interpreted in the context in which the term appears. That context indicates that it is in fact subject to limitations, both within Article V:2 itself, and on the basis of the other paragraphs in Article V.

10. A measure that violates one of the other paragraphs of Article V would entail a consequential violation of the right set out in the first sentence of Article V:2. The corollary to that conclusion, however, is that measures restricting traffic in transit that comply with the requirements of those paragraphs would not constitute a violation of the first sentence of Article V:2, even though they may have the effect of impeding traffic in transit in some way.

11. The panel in *Colombia – Ports of Entry* referred to second element of the first sentence of Article V:2 as imposing a "limiting condition on the obligation". According to that panel, "a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones 'most convenient' for transport through its territory". However, the panel did not address who determines whether a given route is "most convenient", or what criteria are to be used in making such a determination.

12. The WTO Member through whose territory the traffic in transit wishes to pass cannot be the sole arbiter of which routes are "most convenient". Granting such discretion solely to the transit state would render the freedom illusory. However, it cannot be left entirely to the discretion of the owner/shipper or carrier of the traffic in transit. Governmental authorities have legitimate interests that should be taken into account when determining whether any particular route is "most convenient". Whether a given route is "most convenient" can therefore only be determined having regard to all of the circumstances relevant to the traffic in transit, including, for example, the "conditions of the traffic".

13. The obligation in Article V:2, second sentence, is more stringent than a MFN obligation. The use of the term "no distinction" – as compared to the phrases, "treatment no less favourable" or "any advantage, favour, privilege or immunity granted…shall be accorded immediately and unconditionally…" – must be given proper meaning.

14. The closed list in Article V:2 and the existence of the less stringent MFN obligation in Article V:5 suggest that the drafters intended for the two provisions to cover two different classes of measures: those that differentiated on the basis of the criteria set out in the second sentence of Article V:2; and, those that differentiated on the basis of other criteria. The drafters realized that drawing distinctions on the basis of the criteria enumerated in Article V:2 would be antithetical to the very notion of freedom of transit. They were also aware that WTO Members can have legitimate reasons for drawing distinctions between traffic in transit. Imposing a "no distinction" legal standard on measures other than those captured by the list in the second sentence of Article V:2 would represent an undue limitation on Members' sovereignty and right to regulate.

15. The reference to "applicable customs laws and regulations" in Article V:3 should not be read to indicate that only measures that fall within the scope of this phrase can constitute legitimate constraints on traffic in transit in the sense of giving rise to "necessary" delays or restrictions. A purposive reading suggests that Article V:3 provides a right for WTO Members to require that traffic in transit be registered with their customs authorities but that the exercise of that right must not result in any unnecessary delays or restrictions. Necessary delays or restrictions would appear to include the consequences arising from a failure on the part of the traffic in transit to comply with "applicable customs laws and regulations". At the same time, there is nothing in Article V:3 that expressly limits permissible delays or restrictions to the application of customs laws and regulations.

16. Canada disagrees with Ukraine that Article V:3 creates a limited and conditional exception to the obligation in Article V:2 to provide freedom of transit. Canada would also oppose any suggestion that the initial burden of proof with respect to whether a given delay or restriction was consistent with the stipulations in Article V:3, and therefore also consistent with the obligation to provide freedom of transit, should fall on the respondent Member in a dispute under Article V. In Canada's view, the text of the provision does not support a finding that Article V:3 sets out an exception. Apart from the word "except", there are no textual or contextual indicators that the provision is meant to be an exception to an obligation. In addition, Canada considers that characterizing a right as a "limited and conditional exception" gives undue weight to the notion of freedom of transit. In its view, Article V:3, and Article V more generally, reflects a carefully negotiated balance between the legitimate interests of WTO Members to be able to ship their goods across the territory of other WTO Members in order to reach third country markets, and the undoubted rights of WTO Members through which such traffic passes to regulate such traffic for legitimate reasons.

17. Ukraine points to Articles 11.6 and 11.7 of the Agreement on Trade Facilitation (TFA) to support its interpretation of Article V:3. Canada is of the view, however, that Article 11.7 of the TFA does not do so. Article V:3 refers to delays and restrictions arising from putting "traffic in transit under a transit procedure", which would include the formalities and documentation requirements that are part of entering the traffic at the proper customs house. Article 11.7, however, concerns itself with delays and restrictions arising after the "goods have been put under a transit procedure and have been authorized to proceed from the point of origination" in the Member whose territory is being transited. Nothing qualifies the reference to delays and restrictions in Article 11.7 to delays or restrictions arising specifically from the application of customs laws or regulations, and the reference to such delays or restrictions arising after the traffic in question has been put under a customs procedure suggests that such delays or restrictions could arise from causes other than customs requirements.

18. From an architectural standpoint, Ukraine argues that, for a measure to comply with Article V:4, it must also comply with Article V:3. Canada disagrees that compliance with Article V:3 is a *sine qua non* for compliance with Article V:4. The two provisions set out distinct obligations, dealing with distinct aspects of the regulation of traffic in transit. Both provisions also impose consequential limitations on the right to freedom of transit set out in Article V:2, first sentence.

19. Ukraine argues that the scope of the term "regulations" as used in Article V:4 must be understood in the context of Article V:3, and should therefore be limited to same subset of measures permissible under that provision. In other words, according to Ukraine, for a "regulation" to be "reasonable", it must pertain to compliance with "applicable customs laws and regulations", and must not result in "any unnecessary delays or restrictions".

20. Canada disagrees with the Ukraine's assertion that the reference to "regulations" in Article V:4 is limited to what is covered by the reference to "applicable customs laws and regulations" in Article V:3. First, it is far from conclusive that the reference in Article V:3 to delays and restrictions is itself limited to the application of customs laws and regulations. Second, Article V:4 itself refers to "all" regulations, without further qualifying the term. Had the drafters intended the term "regulations" to be limited to "applicable customs laws and regulations", they could have drawn an explicit link to Article V:3 or they could have repeated the phrase "customs laws and regulations" in Article V:4. They did not do so. Third, the drafters used different terms in the two provisions. The use of different language − the word "on" in Article V:4 and the words "in connection with" in Article V:5 − must be presumed to be deliberate, and to be intended to signal a difference in scope between the two provisions. Specifically, the use of different terms reflects a difference in the relationship between the enumerated measures and traffic in transit for the purposes of the two obligations. This intent should be given effect by the Panel in interpreting and applying the two provisions. Fourth, the phrase "shall be reasonable, having regard to the conditions of traffic" would be redundant if the term "regulations" in Article V:4 was limited to "applicable customs laws and regulations", since those measures are already subject to a necessity requirement. It seems highly unlikely that a regulation that results in an unnecessary delay or restriction could ever be considered reasonable. It seems equally unlikely that a regulation that results in a "necessary" delay or restriction would nevertheless be deemed unreasonable.

21. Canada also disagrees with Ukraine that compliance with Article V:3 is a necessary element to establish compliance with Article V:5. In Canada's view, the two provisions contain distinct obligations and non-compliance with one does not entail consequential non-compliance with the other.

22. In Canada's view, to demonstrate less favourable treatment under Article V:5, it would not suffice for a complaining party to show that the impugned measure draws a distinction between goods in transit based on place of origin, departure, entry/exit or destination. A long line of jurisprudence indicates that the phrase "treatment no less favourable" as used in Article III:4 of the GATT should be understood to require WTO Members to provide "equality of competitive conditions" or "effective equality of competitive opportunities" in their measures affecting trade. Canada believes that this interpretive approach also applies in the context of the regulation of traffic in transit.

23. In *Korea − Various Measures on Beef*, the Appellate Body rejected the panel's finding that any regulatory distinction that is based exclusively on criteria relating to the nationality or origin is incompatible with Article III, observing in paragraph 136 that "a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4". The Appellate Body said in paragraph 137, "[w]hether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of the imported products".

24. Canada considers that this guidance is equally relevant to the interpretation and application of the "treatment no less favourable" element in Article V:5. A panel confronted with a claim that a measure is inconsistent with Article V:5 is required, not only to determine whether the regulatory treatment of traffic in transit originating in different WTO Members differs or is the same, but also, and more importantly, whether that treatment modifies the conditions of competition in the relevant market to the detriment of traffic in transit from one WTO Member as compared to traffic in transit from another WTO Member.

III. ARTICLE X OF THE GATT 1994

25. Article X:1 covers measures subject to Article V insofar as such measures are "[l]aws, regulations, judicial decisions and administrative rulings of general application" and are measures "affecting" the "transportation" of "products". Article X:1 sets out two broad categories of measures. The second category comprises measures affecting "their" sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

26. Transportation is a key word in the second category. The definition of "traffic in transit" in Article V:1 makes it clear that such traffic, by definition, involves the transportation of goods or products. Thus, measures that affect traffic in transit would be measures affecting the transportation of goods or products. The second category also refers to measures affecting their transportation. In Canada's view, the possessive pronoun "their" in the first sentence of Article X:1 cannot refer to "imports or exports". It makes little sense, contextually, for the reference to "their… transportation" to cover only imports and exports. If "their" in Article X:1 were interpreted to be limited to imports and exports, it would mean that WTO Members are not under an obligation to publish measures regulating the transportation of domestic products, thus potentially frustrating other WTO Members' efforts to ensure that their exports are not treated in a manner that violates Article III:4.

27. More generally, Article X:1 is concerned with transparency and the prompt publication of trade measures of general application. It lists a broad range of measures that affect trade and are subject to the disciplines set out in other provisions of the GATT 1994. This broad scope is also reflected in the title of Article X, which refers to publication of trade regulations generally, rather than to the publication of measures affecting imports and exports. In Canada's view, it would be incongruous for the reference in Article X:1 to "their…transportation" to cover imports and exports only, when the coverage of the GATT as a whole, including Article V, goes well beyond this scope.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. China considers that this dispute raises significant issues regarding the invocation and interpretation of Article XXI and Article V of the General Agreement on Tariffs and Trade 1994 (the GATT 1994), as well as the rights and obligations of WTO Members. Therefore, without prejudice to any party's right and obligation under the covered agreements, China explains the fundamental question that whether a panel has jurisdiction to review a dispute invoking Article XXI of the GATT 1994, and offers comments to the Panel, in order to assist the latter to make objective assessment for the dispute invoking Article XXI of the GATT 1994. China also provides some clarifications for the interpretation of Article V of the GATT 1994.

I. PANEL'S JURISDICTION TO REVIEW THE DISPUTE INVOKING ARTICLE XXI OF THE GATT 1994

2. China observers that the Dispute Settlement Body (DSB) sets up the terms of reference of the Panel to this dispute[1], pursuant to Article 7.1 and 7.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). These terms of reference confirms the jurisdiction of the Panel to address the relevant provisions in the covered agreement cited by the parties to the dispute.

3. As Chine notes, the Russian Federation invokes Article XXI of the GATT 1994 to defend Ukraine's claims of violation in its First Writing Submission[2]. Therefore, in China's view, this Panel undoubtedly has the discretion to address Article XXI of the GATT 1994, and examine the relevant measures introduced by the Russian Federation.

4. China notes that certain WTO Member claims that '[the] Panel lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute'.[3]While China does not take any particular position on the factual aspects in this dispute, China respectfully disagrees with this view, referring to the observation hereinabove.

5. Furthermore, China opines that certain preparatory work of the GATT, including the discussions in Geneva in 1947 in connection with Article 94 (which was the relocation of the provisions now contained in Article XXI of the GATT 1994), and Decision concerning Article XXI adopted on 30 November 1982 by GATT contracting parties, support that the measures under Article XXI of the GATT 1994 could be reviewed by the dispute settlement mechanism.

II. THE GENERAL PRINCIPLE TO MAKE OBJECTIVE ASSESSMENT FOR THE DISPUTE INVOKING ARTICLE XXI OF THE GATT 1994

6. China understands that Article 11 of the DSU requests the Panel to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'.

7. China has no intention to identify any specific methodology for the objective assessment of the dispute invoking Article XXI of the GATT 1994, but rather to offers comments for the general principle to make such assessment, in order to assist the Panel to accomplish its task.

8. As China notes, this is the first time a Panel is requested to rule on a defense based on Article XXI of the GATT 1994. Despite the lack of jurisprudence from previous disputes, the preparatory work of the GATT demonstrates that, Article XXI of the GATT 1994 is a sensitive provision relating to the sovereignty and security interests of WTO Members, and potentially has a very broad scope

[1] Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.
[2] First Written Submission of the Russian Federation, para. 5.
[3] U.S. letter in Russia − Measures Concerning Traffic in Transit (DS512), November 7, 2017.

of application which allows Members to derogate from any other provision of the covered agreements. [4]

9. Therefore, China opines that the Panel should keep extreme caution during the assessment, by maintaining the delicate balance for the following aspects. On the one hand, any abuse of Article XXI of the GATT 1994, which leads to the evading of the obligation in bad faith under the covered agreements, shall be prevented. On the other hand, Member's rights to protect its essential security interests shall not be nullified or impaired, and Member's discretion relating to its own security issue, which is authorized by the covered agreement, shall not be prejudiced.

10. China also views 'Good Faith' as another fundamental issue for the objective assessment. China opines that, should a WTO member intend to take any action, which *it considers necessary for protection of its essential security interests*[5], in according to Article XXI of the GATT 1994, it should adhere to the principle of good faith sustainedly. In China's view, the faithful fulfillment of its obligations and commitments under the covered agreements by WTO Member constitutes a legitimate foundation for the invocation of Article XXI of the GATT 1994.

III. INTERPRETATION OF THE ARTICLE V:2 OF THE GATT 1994, FIRST SENTENCE

11. China notes that the previous jurisprudence provides a full explanation of Article V:2 of the GATT 1994, first sentence.[6]Such interpretation identifies that the substantive obligation of the Article V:2 of the GATT 1994, first sentence is 'freedom of transit', and the 'via the routes most convenient' imposes a limiting condition of the substantive obligation. Former Panel further interprets 'freedom of transit' as

> 'extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport'.[7]

In other words, pursuant to Article V:2 of the GATT 1994, first sentence, WTO Member across whose territory goods are transiting is obliged to facilitate convenience to traffic in transit to other WTO Members, in order to expand the trade of goods.

12. China opines that, 'the routes most convenient' should be interpreted from two aspects. On the one hand, the route is convenient for relevant interested parties (such as owner/shipper or carrier of the goods) to facilitate the traffic in transit. On the other hand, the route is also convenient for the WTO Member across whose territory goods are transiting to maintain its legitimate rights, since this issue is highly related to the sovereignty of the latter, which has legitimate authorization to control the specific trajectory for transit with in its territory. Hence, Panel is advised to take deliberative consideration of this issue as an ex ante approach to make the interpretation of the Article V:2 of the GATT 1994, first sentence.

13. Regarding 'routes most convenient', China does not agree with Japan that 'Article V:2 of the GATT 1994, first sentence requires that a complainant first make a *prima facie* case that there is a more convenient route than the designated one'.

14. In China's view, if a complainant alleges that a WTO Member does not facilitate freedom of transit via the routes most convenient pursuant to Article V:2 of the GATT 1994, first sentence, it might imply the existence of another more convenient route to accomplish such traffic in transit. Nevertheless, in order to make a *prima facie* case, the complainant is neither required to identify such 'most convenient route for traffic in transit', nor to make comparison between the route which has been challenged and the route which is more convenient.

15. This understanding is also supported by the previous jurisprudence.[8] According to such finding, former Panel recognized that the key measure which constitutes the inconsistency of Article V:2 of the GATT 1994, first sentence, is that Colombia limited the modes of transport for the traffic

[4] EPCT/A/PV/33, p. 20-21 and Corr.3; see also EPCT/A/SR/33, p. 3.
[5] .GATT 1994, Article XXI (b) chapeau.
[6] Panel Report, *Colombia – Ports of Entry*, para. 7.399-400.
[7] Panel Report, *Colombia – Ports of Entry*, para. 7.401.
[8] Panel Report, *Colombia – Ports of Entry*, para. 7.423.

in transit into trans-shipment, but not that Colombia did not facilitate the traffic in transit via routes most convenient. In this regard, the limitation of the mode of transport could be understood as a substantive violation of the 'extending unrestricted access via the most convenient routes for the passage of goods in international transit'.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union makes these third party submissions because of its systemic interest in the correct and consistent interpretation and application of the GATT 1994.

II. THE EU'S SUBSTANTIVE COMMENTS

A. Ukraine has made a *prima facie* case that the measures at issue are inconsistent with various provisions of the GATT 1994

2. The European Union considers that Ukraine has shown in a compelling way that the various measures at issue are inconsistent with the various provisions of the GATT 1994 cited by Ukraine, including, in particular, Article V of GATT 1994.

3. The European Union notes that Russia does not appear to contest that the four measures at issue are inconsistent, in principle, with the provisions cited by Ukraine. The European Union would observe, in relation to the first issue, that the mere fact that the product scope of the second measure encompasses that of the first measure does not have the necessary implication that the second measure has superseded the first measure and that this measure therefore ceased to exist. It is not uncommon that the importation or entry of a category of products be subject simultaneously to various restrictions based on different grounds. Russia has not explained on which legal base, or through which legal mechanism, the second measure at issue would have superseded the first measure.

B. Russia's invocation of the security exceptions

Justiciability of Article XXI of GATT 1994

4. Russia, with the support of the United States, alleges that Article XXI is not a justiciable provision. The EU disagrees. Article XXI is an affirmative defence. It may be invoked to justify an otherwise WTO inconsistent measure. It does not provide for an exception to the rules of jurisdiction laid down in the DSU. Interpreting Article XXI as a non-justiciable provision would make it impossible for the Panel to fulfil its task under Article 11 of DSU. The "matter" before the panel includes Article XXI as raised by Russia.

5. If Article XXI was interpreted as a non-justiciable provision, a WTO Member, rather than the DSB, would be deciding the outcome of a dispute unilaterally. This would question the "rules-based" approach to international trade. Non-justiciability of an international dispute amounts to a lack of jurisdiction. In the rules-based framework of the WTO, the legal operability of Article XXI of GATT 1994 rather revolves around the concepts of standard of review and discretion.

6. Therefore, the concept of justiciability and the concept of discretion (linked to the Panel's standard of review) need to be distinguished. The rules of the GATT, including Article XXI are justiciable with the DSB being the ultimate arbiter. Some rules may grant WTO Members discretion. Article XX (a) as interpreted by the Appellate Body in *EC – Seal Products* is a ready example. Article XXI is another example. Yet, the jurisdiction over the question whether a Member remained within its discretion unequivocally rests with the DSB.

Burden of proof

7. A WTO Member that invokes Article XXI (b) (iii) bears the burden of proof. Russia has failed to meet its burden of making even a *prima facie* case. Neither has it explained the legal test that it deems appropriate, nor has it adduced any facts which would allow the Panel to make findings. Russia limits itself to citing various unilateral statements from Contracting Parties to the GATT 1947 but fails to shed light on the relevance of these statements under Articles 31 and 32 of VCLT.

8. A party invoking an affirmative defence Russia has the *onus probandi*. Russia's vague allusion to unspecified events in 2014 is not sufficient to meet its burden of proof under

Article XXI(b)(iii). It is not the Panel's role to second guess and specify the events to which Russia refers to as the emergency in international relations that occurred in 2014, notably because some of the measures were adopted after 2014. Article 13 of DSU gives the Panel the right to seek information from any relevant source. However, a panel is not entitled to make the case for the party failing to satisfy its burden of proof.

9. The required degree of specificity in identifying the essential security interests is linked to the standard of review applicable in respect of each of the elements of Article XXI(b). The invoking Member is required to identify the invoked interest with the degree of specificity that is necessary for the Panel to ascertain whether it is plausible that the invoked interest is one of security as opposed to purely economic and whether it is important enough to qualify as essential.

10. Several third parties have expressed views that the Panel should review whether a Member invoking Article XXI(b) honestly considers, or believes in good faith, that the action taken was necessary for the protection of its essential security interests. It remained unclear in the respective third party submissions how the Panel should assess such an elusive requirement. Subjective intent is not only difficult to establish, the object of Article XXI is not the punishment of a WTO Member lack of honesty. Rather, Panels must review whether the invoking Member can plausibly consider that the measure is necessary in order to prevent abuses. To this end, it is necessary to examine objective factors. According to the Appellate Body in *EC − Seal Products* a panel must take account of all evidence put before it in this regard, including the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue. While made in the context of Article XX, the underlying idea of this statement can be transposed to Article XXI. At any rate, the characterisation of a Member's measure under municipal law is not dispositive as the Appellate Body confirmed in *US — Large Civil Aircraft (2nd complaint)* and *Canada — Renewable Energy / Canada — Feed-in Tariff Program*.

11. The Panel cannot determine whether Russia's assertion that the action it took was necessary for the protection of its essential security interests was reasonable or plausible without Russia having indicated what its "essential security interests" are.

12. Contrary to what Russia maintains, the EU fails to understand how Article XXI(a) can exempt Russia from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Discretion accorded under it is not unlimited.

13. The EU acknowledges that information relating to essential security interests is of a highly sensitive nature, but the complainant is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if Russia was justified in not providing certain information pursuant to Article XXI(a), that would not discharge Russia from its burden of proof in relation to Article XXI(b).

Legal standard for the interpretation and application of Article XXI(b)(iii) of GATT 1994

14. The analytical framework developed by the Appellate Body for applying Article XX provides useful guidance for interpreting and applying Article XXI. Article XX of GATT requires a "two-tiered analysis". Since Article XXI does not contain a *chapeau*, the analysis is limited to the first tier. Under Article XX, this analysis requires, first, that the measures "addresses the particular interest specified in [the sub]paragraph" and, second, that "there [is] a sufficient nexus between the measure and the interest protected." The analysis under Article XXI should address these very elements keeping in mind the general principle of good faith enshrined in Article 26 of VCLT.

The first element of the analysis under Article XXI(b)(iii)

15. Under the first element, the defending party has the burden of demonstrating that the measure is taken "in time of war or other emergency in international relations", that it has "essential security interests" with respect to the war or other emergency in international relations, and that the measure is designed "for" the protection of the relevant essential security interest. The panel has to ascertain whether a situation of "war" or of "other emergency in international relations" exists in a given case. Article XXI is different in this respect from, for example, Article 3 of OECD Code of Liberalisation of Capital Movements,

which refers to "the protection of [a Member's] essential security interests", without any further specification.

16. The terms "which it considers" in Article XXI do not qualify the terms "war or other emergency in international relations" but only the term "necessary". Subparagraphs (i) to (iii) refer to "action" and not to "it considers". A different reading would lead to the absurd result that a Member could unilaterally define pigs as fissionable materials in paragraph (i).

17. Hence, the existence of a "war or other emergency in international relations" refers to objective factual situations that can be fully reviewed by panels. Both terms should be interpreted taking into account relevant international law. "War" describes a situation when one or more States have used armed force against each other. The notion of "emergency in international relations" is broader than that of "war". War is one particular example of emergency. The latter thus has to be of significant intensity also in the absence of a war.

18. The terms "taken in time" require a sufficient nexus between the action taken by the invoking Member and an ongoing situation of war or emergency in international relations. A mere temporal coincidence between both does not suffice, as it would allow for the adoption of measures entirely unrelated to the war or emergency. This would also be inconsistent with the term "protection" included in the *chapeau* of Article XXI (b), which implies the existence of a threat to which the action of the invoking Member responds.

19. The terms "its essential security interests" should be interpreted in such a way as to allow Members to identify their own security interests and the desired level of protection without having the Panel second-guess the value judgment as to the legitimacy of the interest. At the same time, not any interest will qualify under this exception. The interest must relate genuinely to "security" and be "essential". Purely economic interests or security interests of minor importance would not qualify. Based on the reasons provided by the invoking Member, a panel should review whether the interests at stake can reasonably/plausibly be considered to be "essential security" interests, from that Member's perspective, so as to be able to detect abuses of this exception. Security interests may vary in time and space. Article XXI cannot be used to circumvent the requirements of Article XX.

20. Finally, the invoking Member must show that the action is "designed" to protect the relevant essential security interest from the threat posed by the situation of war or other emergency in international relations.

The second element of the analysis under Article XXI(b)(iii)

21. The second element in the analysis under Article XXI is whether the measure is "necessary". In the context of Article XX, the Appellate Body has explained that determining the "necessity" of a measure involves "a process of weighing and balancing [...] a series of factors" in particular the relative importance of the objective pursued by the measure, the contribution of the measure to that objective, and the restrictive effect of the measure on international trade. In general, a challenged measure should be compared with reasonably available alternative measures that are less trade restrictive, while making an equivalent contribution to achieving the desired level of protection of the relevant objective.

22. The term "necessary" in Article XXI(b) must be given the same meaning as in Article XX. However, the terms "which it considers" imply that, in principle, it is for each Member to assess by itself whether a measure is "necessary". Again, this does not give the Member unfettered discretion. However, a panel's review should give deference to the invoking Member. The review should be limited to assessing whether the invoking Member can plausibly consider the measure necessary and whether the measure is applied in good faith. Since the invoking Member bears the burden of proof, it must provide the panel with an explanation of why it has considered the measure necessary in light of the factors mentioned above.

23. This "plausibility test" finds support in the decisions reached by the adjudicators in other contexts. For example, when the arbitrators had to interpret Articles 22.3(b) and 22.3(c) of DSU, which both start with the phrase "if that party considers"; or when the International Court of Justice interpreted the terms "if it considers" in Article 2 (c) of the Convention on Mutual Assistance in Criminal Matters between the Djiboutian Government and the French Government of 27 September 1986 they did not consider those provisions as giving absolute discretion to the party invoking them, because the exercise of discretion remained subject to the principle of good faith.

24. Notably, the Panel should ascertain whether the interests of third parties who may be affected were properly taken into consideration, as required by the preamble of the Decision of 30 November 1982.

C. Certain aspects relating to transit

25. Article V:2, first sentence, is not confined to a single route that is deemed "the most convenient" for international transit. This understanding can be derived from the use of the plural (routes) as opposed to the singular (route) and several other considerations.

26. *First*, for Members with large territories and long common borders departure points A and B on the territory of the Member of origin may be thousands of kilometers apart, as well as the points of arrival on the territory of the Member of destination. In between there may be a transited Member sharing hundreds (if not thousands) of kilometers of borders with both the Member of origin and the Member of destination. For instance, were Kazakhstan to require Russian carriers to take only one route that is deemed *the* most convenient for international transit through Kazakh territory towards Tajikistan, carriers from both Volgograd and Novosibirsk would be restricted to taking this route. The ensuing necessity for detours on Russian territory would clearly amount to a barrier to trade. Moreover, the restriction of individual market actors to one single transit route hardly aligns with the concept of "freedom" embodied in Article V:2.

27. *Second*, other factors may also play a role in determining "the most convenient routes": the mode of transport (by road, by rail, by water, by air, pipelines) and the specificity of different types of goods that are in transit.

28. The "routes most convenient for international transit" should be determined on a case by case basis, taking into account objective factors. Otherwise, a WTO Member could undermine the freedom of transit through the designation of what it itself deems the most convenient routes. In objective terms, the determination may depend upon the total number of transit routes, their varying convenience for international transit from the perspective of a reasonable trader, taking into account criteria such as distance, time, safety, road and infrastructure quality.

29. Regarding the extent of freedom of transit, the Panel in *Colombia – Ports of Entry* noted that in "light of the ordinary meaning of freedom and the text of Article V:2 … the provision of 'freedom of transit' pursuant to Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit". Accordingly, Article V:2, first sentence not only requires the availability of the most convenient routes but also the absence of restrictions for using these routes.

30. Finally, with regard to the Panel's question concerning indirect transit routes the EU notes that in practice the absence of a direct transit route that figures among the "routes most convenient for international transit" is hardly conceivable. It requires a very unique geographical condition. The present case does not involve Members in such a condition. The EU does not see how the detour through Belarus of Ukrainian carriers having as countries of destination Kazakhstan, the Kyrgyz Republic and other third countries in the region may qualify as a route "most convenient for international transit."

31. While there may be some overlap between Article V:2, first sentence, and the remaining provisions of Article V, this does not allow the generic conclusion that a finding of violation of Article V:2, first sentence, will necessarily follow from a finding of violation of any of the other paragraphs of Article V. Article V:2, first sentence, requires extending unrestricted access via the most convenient routes for the passage of goods in international transit. The panel in *Colombia – Ports of Entry* found that Article V:2, second sentence complements and expands upon the obligation to extent freedom of transit in Article V:2, first sentence. Article V:6 has a different scope of application. Unlike Article V:2, first sentence, it also applies to imports to the country of final destination. In any event, the Panel need not, and should not decide in the abstract this question.

32. Article V:2, second sentence, outlaws distinctions based on criteria such as the flag of vessels or the place of origin. It adds to the discipline of Article V:2, first sentence.

33. The requirement in Article V:3 that traffic in transit "shall not be subject to any unnecessary delays or restrictions" applies specifically with regard to delays or restrictions resulting from customs laws or regulations. It is introduced by the conjunction "but" and thus appears to qualify the opening sentence of Article V:3, which provides that a Member may require that

traffic in transit "be entered at the proper customs house". Moreover, it is subject to just one exception relating to the "cases of failure to comply with applicable customs laws and regulations".

34. The regulations addressed in Article V are subject to Article X under the same conditions as other types of trade regulations. It would be surprising indeed, if transit regulations (alone among all trade regulations) could be adopted without being published promptly in such a manner as to enable governments and traders to become acquainted with them, or if they could be administered in a selective, partial and unreasonable manner without any domestic legal recourse. The lacking express reference to transit in Article X is not conclusive. The terms "Trade Regulations" in the title of Article X cover transit measures. The extensive enumeration of measures in the first sentence of Article X:1 reflects the drafters' intention to include a wide range of measures that potentially affect trade. Article X:1 refers to "requirements … affecting their transportation" with "their" relating to "products" as the French text makes clear: "le transport de ces produits". Moreover, in the specific context of Article X the terms "imports" can be reasonably interpreted as covering any goods that enter physically into the territory of the Member concerned, whether or not they are released for free circulation after being cleared through customs. Article X is in the nature of a horizontal provision laying down certain general requirements which apply always in addition to those stipulated elsewhere in the GATT with regard to the various types of trade measures mentioned in Article X(1). The cumulative application of Article V and X to regulations governing traffic in transit does not create any conflicts.

III. CONCLUSIONS

35. The EU hopes that these contributions will be helpful to the Panel.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ARTICLE V OF THE GATT 1994

1. Article V:2, First Sentence: "Freedom of Transit"

1. Article V:2, first sentence establishes freedom of transit for WTO Members. Japan understands Ukraine's ultimate claim to be that a measure that completely prohibits traffic in transit through the territory of a WTO Member will be *prima facie* inconsistent with the Article V:2 obligation to ensure freedom of transit via the routes most convenient for international transit.[1] Japan understands that a measure that blocks all access into the territory of a WTO Member would likely be inconsistent with Article V:2 unless the measure is justified on a basis other than Article V of the *General Agreement on Tariffs and Trade* ("GATT 1994").

2. Japan cautions, however, against an overly expansive view of the freedoms provided in Article V:2. Ukraine argues that the "passage [of goods and means of transport across a WTO Member's territory] must…be *free of any restriction or constraint.*"[2] Ukraine also argues that Article V:2 "precludes WTO Members from banning traffic in transit via the most convenient routes *or from otherwise restricting such traffic.*"[3] In this regard, Japan would like to clarify that Article V:2 of GATT 1994 does not imply unqualified, unrestricted access, but only ensures freedom of transit in traffic via the routes *most convenient* for international transit.[4] So long as a WTO Member ensures access through the "most convenient" routes through its territory, Article V:2 does not prohibit a WTO Member from otherwise restricting access with respect to traffic in transit.

2. Article V:2, First Sentence : "Routes Most Convenient"

3. Japan provides several observations on the interpretation of Article V:2, first sentence. First, as Ukraine recognizes, "[t]he requirement to ensure freedom of transit as regards traffic in transit … is qualified by the phrase 'via the routes most convenient for international transit'."[5] Japan agrees that the term "for" in the phrase "the routes most convenient for international transit" indicates that the routes must be most convenient in order for international transit to occur.[6]

4. Second, Japan notes that the text of Article V:2 providing for "*routes* most convenient," implies that there may be more than one route that must be made available for traffic in transit. However, even when there are more than one routes that are considered "most convenient," Japan does not agree with Ukraine that the first sentence of Article V:2 guarantees the transiting WTO Member a *choice* between such routes.[7]

5. Third, as regards the burden of proof, the general rule in WTO dispute settlement procedures is that the complainant is required to first make a *prima facie* case of its claim.[8] In this situation, the complainant is required to first make a *prima facie* case that the freedom of transit ensured under Article V:2, first sentence is violated by another Member's measure that fails to provide access to transit "via the routes most convenient for international transit." As part of making this *prima facie* case, it is Japan's view that the complainant must show that there is a more convenient route to which the complainant does not have access. A mere assertion that there is a "more convenient" route will not suffice to make this *prima facie* case. Once the complainant has identified other routes that it believes to be more convenient that the one(s) available to it, it is the WTO Members through

[1] Ukraine's First Written Submission, paras. 239-240.
[2] Ukraine's First Written Submission, paras. 207-210. (emphasis added.)
[3] Ukraine's First Written Submission, para. 222. (emphasis added.)
[4] *See, for example*, Panel Report, *Colombia – Ports of Entry,* para 7.401 and 7.414; Ukraine's First Written Submission, para. 211.
[5] Ukraine's First Written Submission, para. 211.
[6] Ukraine's First Written Submission, para. 213.
[7] *See* Ukraine's First Written Submission, para. 213.
[8] *See for example,* Appellate Body Reports, *US – Wool Shirts and Blouses,* pp. 13-14, and *EC – Hormones*, para 98.

whose territories transit occurs that are in the best position to provide an explanation as to why the routes proposed by the complainant are not "the routes most convenient for international transit."

6. Fourth, Japan notes that Article V:2 envisions *some* access through the territory of each WTO Member. Therefore, if a WTO Member does not allow freedom of transit through any routes in its territory, it is Japan's view that by establishing that the measure at issue does, in fact, block all access to the territory of a WTO Member including access "via the routes most convenient for international transit," the complaining Member would have met its *prima facie* burden. It is then up to the WTO Member whose territory the complaining Member seeks access to explain why its measure complies with its obligation under Article V:2.

7. Finally, the determination of whether a specific route is "most convenient" should take account of such objective factors as the means of transit, available routes, distances or costs. To that extent, Japan agrees that the WTO Member through whose territories transit occurs cannot decide the most convenient routes for international transit "unilaterally and subjectively."[9] In this regard, Japan agrees that a "[WTO] Member does not enjoy absolute discretion to decide what is the most convenient route for certain international transit."[10] Similarly, the question as to whether a Member across whose territory goods are transiting may require that transit from a neighbouring Member not proceed directly across their mutual border, but through another country, without violating Article V:2, first sentence, should be addressed on a case-by-case basis, taking into account these objective factors.

3. Article V:2, Second Sentence

8. In Japan's view, Ukraine errs to the extent it considers that the first sentence of Article V:2 articulates an overarching principle that is supported by the second sentence of Article V:2, such that a measure inconsistent with the second sentence entails a violation of the first sentence.[11] In Japan's view, the second sentence of Article V:2 of GATT 1994 has its own function and meaning independent from the first sentence of Article V:2.

9. As the panel in *Colombia—Ports of Entry* noted, "the second sentence [of Article V:2] complements and expands upon the obligation to extend freedom of transit[.]"[12] Article V:2, second sentence sets out WTO Members' obligation to accord freedom of transit "via the routes most convenient for international transit", regardless of the flag of vessels; the place of origin, departure, entry, exit or destination; or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

10. Japan agrees that what should be compared under Article V:2, second sentence is not limited to distinctions made in the treatment of traffic in transit based on the origins of the goods transiting, but also distinctions based on (i) the flag of vessels, (ii) the place of origin, departure, entry, exit or destination, or (iii) any circumstances relating to the ownership of goods, vessels or other means of transport.[13] In addition, it is the objective structure, design and operation of the measure, and not the subjective judgment of the Member imposing the measure at issue, which shall be examined to conclude whether there is any distinction made. Japan respectfully requests that the Panel carefully examine whether any comparison made under Article V:2, second sentence, accurately compares the treatment of traffic in transit based on the same criterion (*e.g.*, place of origin, departure, entry, exit or destination, etc.).

4. Relationship between Article V:2 and Other Paragraphs of Article V

11. Japan does not agree with Ukraine that paragraphs 3, 4, 5 and 6 of Article V of the GATT 1994 are a specific application of the basic obligation to guarantee freedom of transit in the first sentence of Article V:2 of the GATT 1994.[14] Specifically, Ukraine errs in arguing that "if a measure is found to be inconsistent with [paragraphs 3, 4, 5, 6 or 7 of Article V], by implication, that conclusion entails

[9] Ukraine's First Written Submission, para. 215.
[10] Ukraine's First Written Submission, para. 215.
[11] *See* Ukraine's First Written Submission, para. 262.
[12] Panel Report, *Colombia – Ports of Entry*, para. 7.397.
[13] Ukraine's First Written Submission, para. 269.
[14] *See* Ukraine's First Written Submission, para. 196.

that the measure is also inconsistent with the obligation to guarantee freedom of transit laid down in the first sentence of Article V:2."[15] In Japan's view, there is no basis to conclude that a violation of paragraphs 3-7 of Article V is sufficient "to conclude that there is also a violation of the first sentence of Article V:2."[16]

12. As the panel in *Colombia – Ports of Entry* stated, "Article V of the GATT 1994 … generally addresses matters related to 'freedom of transit' of goods. This includes protection from unnecessary restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4), and the extension of Most-Favoured-Nation (MFN) treatment to Members' goods which are 'traffic in transit' (via paragraphs 2 and 5) or 'have been in transit' (via paragraph 6)."[17] Thus, each paragraph includes separate transit requirements and obligations that must be met by each WTO Member, and a finding of non-conformity with any other paragraph of Article V does not necessarily result in non-conformity with Article V:2, first sentence.

II. ARTICLE XXI OF THE GATT 1994

13. Article XXI, paragraph (b) of the GATT 1994 allows WTO Members to derogate from their obligations under other provisions of the GATT 1994 when they consider it necessary to adopt measures to protect their essential security interests. Along with similar security exceptions clauses in the GATS and TRIPS Agreement,[18] GATT Article XXI is an extraordinary provision in that it recognizes the vital importance of WTO Members' essential security interests, and the fundamental nature of a Member's sovereign right to pursue such vital interests. This is reflected in the deferential language of Article XXI.

14. As an initial matter, Japan believes that consideration of Russia's Article XXI defense is within the Panel's terms of reference in this dispute. This is in contrast to the case involving the United States' trade embargo against Nicaragua in 1985, where the GATT panel was precluded from examining the validity of the United States' invocation of Article XXI of the General Agreement by its terms of reference.[19] The terms of reference adopted in that dispute placed strict limits on the panel's activities, stipulating that the panel could not examine or judge the validity of, or the motivation for, the invocation of Article XXI(b)(iii) by the United States.[20] The standard terms of reference, which were adopted by the Panel in the present dispute, contain no such restrictions.[21]

15. A proper interpretation of Article XXI of the GATT 1994 must begin with the ordinary meaning given to the terms of the treaty, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"). In this respect, Japan notes that Article XXI of the GATT 1994 does not contain qualifiers that expressly limit a Member's consideration in determining what actions are necessary to defend its essential security interests in the circumstances set out in the Article. This is clear from the use of the phrase "which it considers necessary" in the text of the Article, as well as the absence of any qualifying language limiting a Member's consideration, such as that found in the chapeau of Article XX.

16. That said, Japan also notes that Article 31 of the Vienna Convention requires treaties to be interpreted "in their context and in the light of its object and purpose." Therefore, the rights afforded to Members under Article XXI of the GATT 1994 must be viewed in light of the object and purpose of the GATT 1994, which is "the substantial reduction of tariffs and other barriers to trade" and "the elimination of discriminatory treatment in international commerce" as enshrined in its preamble. Japan's view is that the object and purpose of the GATT 1994, logically prohibits the invocation of Article XXI in a manner that frustrates the objective of the GATT 1994, including trade liberalization, without a justifiable reason. To interpret otherwise would defeat the object and purpose of the GATT 1994.

17. This view is bolstered by the preparatory work of the original Draft Charter in accordance with

[15] *See* Ukraine's First Written Submission, para. 198.
[16] *See* Ukraine's First Written Submission, para. 224.
[17] Panel Report, *Colombia – Ports of Entry*, para. 7.387.
[18] GATS Article XIV *bis*; TRIPS Agreement Article 73.
[19] L/6053 (unadopted), paras. 5.1-5.3.
[20] *Ibid.*
[21] WT/DS512/4 and WT/DS512/3.

Article 32 of the Vienna Convention, which provides for recourse to preparatory work of a treaty as a supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. Drafters noted the need to permit "measure which are needed purely for security reasons," but recognized the risk that, "under the guise of security, countries will put on measures which really have a commercial purpose."[22]

18. Indeed, the risk of abuse of Article XXI of the GATT 1994 has been widely acknowledged throughout the years of the GATT and WTO. This acknowledgement has been embodied by the Ministerial Declaration of November 1982, in which Members undertook "individually and jointly:… to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."[23] In addition, the Decision Concerning Article XXI of the General Agreement of 30 November 1982 established the procedural guidelines for the application of Article XXI of the GATT 1994 pending a decision on a formal interpretation of Article XXI.[24]

19. In Japan's view, in light of the object and purpose of the GATT 1994 and preparatory work of the Draft Charter as discussed above, the discretion accorded to the WTO Members in deciding the actions that they consider necessary to protect its essential security interests is not unbounded.

20. Despite these guiding principles, Japan is mindful of the disagreement among WTO Members on the interpretation of Article XXI of the GATT 1994 due to its far-reaching implications to the balance between the rights and obligations of WTO Members. As such, each instance in which Article XXI is invoked would impose undue burdens on the WTO dispute settlement system. Moreover, an invocation of Article XXI of the GATT 1994 would import non-economic matters into the WTO, for which the WTO was not designed.

21. Therefore, Japan considers that WTO Members should exercise considerable prudence in resorting to Article XXI of the GATT 1994. Before bringing a case or making a claim under Article XXI, Members should consider whether its action under the WTO dispute settlement procedures would be "fruitful" and contribute to "a positive solution to a dispute" pursuant to Article 7 of the DSU. It is also Japan's hope that the parties will exert every effort to seek a solution mutually acceptable to the parties in order to maintain the effective functioning of the WTO.

22. In the following, Japan presents its views on several principles which may guide the Panel in interpreting and applying Article XXI. First, in reviewing Russia's defense, the Panel should pay due regard to the crucial importance of national security interests to WTO Members' sovereignty, and grant appropriate deference to the Members' judgement as to the necessity of taking actions to protect their essential security interests. Japan considers that a Member invoking Article XXI(b) bears the burden of showing why its measures are justified by the provision, but will be given a degree of deference with respect to its judgement that its action falls under Article XXI(b).

23. Second, it should also be noted that Article XXI of the GATT 1994, including its subparagraph (b)(iii), carefully circumscribes the situations that would allow WTO Members to invoke a defense based on each Member's "essential security interests." Taking also into consideration the object and purpose of the GATT 1994 and the preparatory work of the Draft Charter, the discretion accorded to WTO Members in deciding the actions that are necessary to protect their essential security interests is not unbounded.

24. Third, in order to justify a measure pursuant to Article XXI(b)(iii), it is not sufficient to merely invoke the article. In Japan's view, the invoking Member is required to identify its essential security interests and explain why it considers the action "necessary for the protection of its essential security interests" under the introductory paragraph of Article XXI(b), as well as how the requirements under Article XXI(b) as a whole are met. The identification of the essential security interests needs to be specific enough to allow the Panel to assess whether there is a reasonable link or connection between the invoking Member's decision to take the action and the essential security interests identified by that Member.

25. Fourth, Japan notes that what is to be protected by the challenged measure is "*its* essential security interests" and not unqualified "essential security interests." Thus, whether the security

[22] EPCT/A/PV/33, p.20-21 and Corr.3.
[23] L/5424.
[24] L/5426.

interests are "essential" should be examined from the viewpoint of the Member taking the measure at issue, rather than that of any other Member.

26. Finally, Japan notes that Article XXI(a) instructs that a Member is not obligated to furnish any information the disclosure of which it considers contrary to its essential security interests. Whereas the disclosure of *some* information related to a Member's motivation of taking the action under Article XXI(b) may be understandably contrary to its essential security interests, it is probable that the invoking Member could discharge its burden of proof to make its Article XXI(b) claim without compromising such information.

27. In this regard, the Decision Concerning Article XXI of the General Agreement of 30 November 1982 (the "Decision") affirms the will of the WTO Members to ensure that they are informed "*to the fullest extent possible* of trade measures taken under Article XXI," even though Members are not required to disclose information contrary to their essential security interests pursuant to Article XXI(a).

28. Were Article XXI(a) to be construed to effectively exempt Members from their burden of making its *prima facie* case under Article XXI(b), it would run counter to the interpretation of Article XXI in light of the object and purpose of the GATT 1994 and preparatory work of the Draft Charter in accordance with Articles 31 and 32 of the Vienna Convention.

III. ARTICLE X OF THE GATT 1994

29. Japan understands that "a measure covered by Article V," which is adopted by a Member and includes certain elements that would regulate traffic and prohibit, restrict, or otherwise affect goods originating in or destined to that Member, can be subject to Article X as "a requirement, prohibition or restriction on imports or exports."

30. The text of Article V indicates that a measure on "traffic in transit" covered by that article may involve, among others, "warehousing" (paragraph 1), "change in the mode of transport" (paragraph 1), "charges for transportation" (paragraph 3), or charges "commensurate with administrative expenses entailed by transit or with the cost of services rendered" (paragraph 3). Similarly, Article X covers "[l]aws, regulations, judicial decisions and administrative rulings of general application" which affect imports or exports with respect to, e.g. their "transportation" or "warehousing inspection."

31. Therefore, Japan considers that measures of general application relating to "traffic in transit" that are covered under Article V can constitute "requirements, restrictions or prohibitions on imports or exports," or measures affecting the "distribution" or "transportation" of such imports or exports. These measures would therefore be subject to the obligations contained in Article X.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF MOLDOVA

I. INTRODUCTION

1. The dispute *Russia – Measures Concerning Traffic in Transit (DS512)* raises significant issues regarding the invocation and interpretation of Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (the GATT 1994)

2. The package of agreements accepted at the end of the Uruguay Round provides a carefully calibrated balance of rights and obligations. The WTO Agreements fully recognize the right of all WTO Members to avail themselves of exceptions to the WTO rules but requires them to do so within certain limits and based on the principle of good faith.

3. In addition, in the Republic of Moldova's view, the measures at issue in this dispute are inconsistent with several WTO obligations of the Russian Federation. By finding that the respondent's measures at issue are both in breach of the GATT Article V, Articles X:1, X:2, X:3 and paragraphs 1426, 1427 and 1428 of the Working Party Report of the Russian Federation and that these measures cannot be justified under the GATT Article XXI, this Panel can help to ensure that the necessary balance for the invocation of the national security exception is preserved. The Panel is to conduct an "objective assessment of the matter" as prescribed by the Dispute Settlement Understanding (DSU) Article 11.

4. Solid evidence is presented by Ukraine in this dispute showing that at least the following two trade-restrictive measures are being applied by the Russian Federation on transit of goods through its territory: (i) the 2016 general transit ban and other transit restrictions; and (ii) the 2016 product-specific transit ban and other transit restrictions. With the evidence submitted by Ukraine in its First Written Submission and additional evidence which the Panel may obtain in the course of these proceedings, we look forward to the Panel to establish the precise legal acts concerned in the case and their continued application. This is part of the Panel's duty to conduct an "objective assessment of the matter" as prescribed by the Dispute Settlement Understanding (DSU) Article 11.

5. The Republic of Moldova has traditionally used the most economic and efficient transit routes in this region in order to allow Moldovan products to compete in the final markets to which the Russian Federation restricts transit. The Republic of Moldova has received signals from its exporters regarding such measures restricting the free transit of their goods through the Russian territory including towards Kazakhstan and Kyrgyzstan. Both export destinations are very important to the Republic of Moldova. To exemplify, the exports of Moldovan wines alone to Kazakhstan represent 8,34% of its total exports.

6. The Republic of Moldova fails to understand how the exports of the Moldovan products which traditionally have been transported through the disputed Russian transit routes pose a threat to that country. It is therefore very important for the Panel in these proceedings to offer clarifications as to whether such negative economic impact can be justified by the respondent by mere reference to the Security Exception of GATT Article XXI.

II. LEGAL ARGUMENTS, PANEL JURISDICTION IN RESPECT OF ARTICLE XXI AND INTERPRETATION OF ARTICLE XXI

A. The jurisdiction of the WTO Panels over GATT Article XXI measures

7. The Republic of Moldova is concerned with some points made by the Russian Federation in its First Written Submission in this dispute. In particular, the Russian Federation alleges that "neither this Panel nor the WTO as an institution has a jurisdiction over" the matter at issue in this case.[1]

8. The Republic of Moldova is of the view that this Panel has jurisdiction over the case and that it should take the opportunity to clarify the limits of the GATT Article XXI Security Exceptions in these proceedings.

[1] First Written Submission by the Russian Federation, 18 October 2017, para 7.

9. In this case the Panel also possesses the necessary legal methods (what we consider justiciability) to consider and interpret Art. XXI of GATT in this particular situation and the transit restrictions imposed by the Russian Federation.

10. Therefore, the Republic of Moldova considers that the Panel has the legal power to examine this dispute and is the legally competent authority (has the jurisdiction) to use the legal methods (justiciability) in accordance with the provisions of the DSU, as well as the legal framework GATT 1994 to legally interpret the provisions of Article XXI of the GATT 1994, as well as Art. V, X of GATT 1994 invoked by Ukraine.

11. The Russian Federation seems to believe that the mere invocation of the GATT Article XXI (b)(iii)[2] prevents WTO panels from reviewing trade issues which would otherwise be WTO-inconsistent. The Republic of Moldova disagrees with this approach.

12. It is undisputed that WTO panels have jurisdiction to decide on claims under WTO covered agreements. Under Article 1.1, the DSU applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU]", i.e., the so-called WTO covered agreements.[3] The GATT Article XXI is a provision found in one of the WTO covered agreements. There is nothing in the GATT 1994 or the DSU excluding that provision from the jurisdiction of panels and the Appellate Body.

13. This jurisdiction was recognised at the Dispute Settlement Body (DSB) meeting of 21 March 2017, in which the DSB established a panel with the following terms of reference: *To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.*[4]

14. While WTO Members have the right to self-define what their essential security interests are and declare the necessity of appropriate protection, the WTO panels reserve the right to review whether WTO Members apply such WTO-inconsistent measures in good faith and in accordance with the terms laid down in GATT Article XXI. This reading also finds support in the WTO Agreement Article XIII:1 which states that the DSU, the multilateral agreements on trade in goods, GATS, and TRIPS (the covered agreements) "shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application. "At the time of its accession, the Russian Federation did not avail itself of this possibility.

B. The limits of the GATT Article XXI Security Exception

15. While clearly of the view that this Panel does not have jurisdiction over the matter in the case, the Russian Federation nonetheless invokes GATT Article XXI (b) (iii) in order to justify the alleged inconsistency of all of the measures at issue with the different WTO rules under which Ukraine has made claims in these proceedings.[5]

16. All WTO Members, including the Russian Federation, have the right to take measures to protect national security issues. Thus, while the Republic of Moldova does not contest that the protection of national security falling within the scope of the GATT Article XXI is a valid exception from the WTO rules, the mere invocation of this provision does not provide absolute rights to those invoking the provision. The examination of GATT Article XXI(b)(iii) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) confirms that the security exception is not totally self-judging.

17. In our view, the task of this Panel is to examine the limits of this provision. According to the Republic of Moldova, the limits of the sovereign discretion arising from the GATT Article XXI is set by: i) the general principle of good faith and ii) the fact that the burden of proof to justify a violation of a WTO provision lies with the defendant − that is the Russian Federation.

[2] Ibid, para 5.

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement (DSU).

[4] Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.

[5] First Written Submission by the Russian Federation, 18 October 2017, para 7 and para 33.

C. The principle of good faith

18. DSU Article 3.2 explicitly confirms that WTO covered agreements must be clarified "in accordance with customary rules of interpretation of public international law". There is wide agreement and WTO jurisprudence supporting the fact that this interpretative exercise should be done with reference to the VCLT. Article 31(3) of the VCLT, part of the rules of interpretation thus referred to, directs the WTO adjudicating bodies to seek guidance not only from the WTO treaty itself, but also of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", as well as "any relevant rules of international law applicable in the relations between the parties".

19. The WTO treaty thereby explicitly frames itself in the wider context of public international law, including other non-WTO treaties, customary international law and general principles of law. In this sense, the principle of good faith is perhaps the most important general principle of law, as it underpins many international legal rules. [6]

20. What the principle of good faith does is to require a party to a treaty to refrain from acting in a manner that would defeat the object and purpose of the treaty as a whole or that would put the treaty provision into question.[7]

21. In the context of the GATT Article XX General Exception the WTO panels and the Appellate Body (AB) have stressed that the good faith principle controls the exercise of rights by States, prohibits the abusive exercise of a State's rights, and enjoins the assertion of a right.[8] An abuse of right is said to occur when a State exercises its rights in such a way as to encroach on the rights of another State, and that the exercise "... is unreasonable, and pursued in an arbitrary manner, without due consideration of the legitimate expectations of the other State."[9] The WTO Panel in *Peru-Agricultural Products* further indicated that treaty right 'must be exercised bona fide, that is to say, reasonably'.[10]

22. An abusive exercise by a WTO Member of its own treaty right results in a breach of the treaty rights of another WTO Member. An interpretation according to good faith seeks to determine whether the intentions of the WTO Members are genuine and in accordance with the principle of good faith, the task of this Panel is to determine if, by applying restrictions on free transit, the Russian Federation has refrained from unfair conduct through which it is taking undue advantage of other WTO Members.

23. According to the Republic of Moldova, the principle of good faith should guide the Panel's process of finding an "objective assessment of the matter" in this dispute. In order to understand if the Russian Federation has acted in good faith in imposing the measures at issue, the Republic of Moldova submits that the Panel should seek to clarify the phrase" necessary for the protection of its essential security interests "in GATT Article XXI(b) as follows:

"necessary"

24. This Panel needs to assess whether the invoking member 'genuinely believes' that the measure taken is 'necessary' in order to protect its national security interests. In this context, this Panel may refer to the jurisprudence from the 'necessity test' of Article XX(a), (b) and (d), and consider the relevant factors, particularly the importance of the essential security interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. This should be complemented with an analysis of whether the measures at issue in this case are 'apt to make a material contribution to the achievement of its objective'.[11]

[6] Hersch Lauterpacht, International Law Vol. 1, (ed Elihu Lauterpacht, CUP 1970) 68; Malcolm N. Shaw, International Law, (6th edn, CUP 2008) 98; James Crawford, Brownlie's Principles of Public International Law, (8th edn, OUP 2012) 134.

[7] Panel Report, *United States–Continued Dumping and Subsidy Offset Act of 2000 (US–Byrd Amendment)*, WT/DS217/R, adopted 27 January 2003, para 7.64.

[8] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp Products)*, WT/DS58/AB/R, adopted 6 November 1998, para 158.

[9] Hersch Lauterpacht, *Oppenheim's International Law*, (8th ed, Longmans 1955) 263.

[10] Panel Report, *Peru–Additional Duty on Imports of Certain Agricultural Products (Peru–Agricultural Products)*, WT/DS457/R, adopted 27 November 2014, para 7.94.

[11] Panel Report, *China–Rare Earths*, para 7.146; *China–Raw Materials*, paras 7.480-92.

"essential security interests"

25. This Panel should seek to clarify if the measures at issue in this dispute protect 'essential security interests' under the GATT Article XXI(b)(iii). The word 'essential' indicates that general security may not suffice. The Republic of Moldova believes that 'essential security interests' within the range of 'security interests' must meet a higher standard that can be distinguished from other 'non-essential security interests'.

26. In our view this Panel should ask the Russian Federation, in addition to establishing the objective prerequisites in Article XXI(b) (iii) regarding the existence of an essential security interest, to demonstrate that any measure it has taken pursuant to this provision does not intentionally serve protectionist purposes.

27. The weighing and balancing exercise under the necessity analysis contemplates a determination as to whether a WTO-consistent alternative measure is reasonably available to the WTO Member imposing the measure.[12] In this process the Panel should determine what the right approach is to compare a regime which severely restricts the free transit of goods with a less trade-restrictive alternative measure. The Russian Federation needs to show that it 'genuinely believes' that the taking of the measures at issue and the resulting restrictions are proportionate responses to the protection of its "essential security interests". This would entail a minimum degree of proportionality between the security interests as taken and the impact of the transit restrictions applicable to several WTO Members using the transit routes at issue in this dispute.

28. Under the WTO framework, the Member invoking the national security exception under GATT Article XXI(b)(iii) is entitled to a high level of deference, but this deference is not absolute. According to the Republic of Moldova, the Panel is to review the necessity of the measures at issue.

D. The burden of proof

29. It is well-established that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[13] In light of the foregoing, this Panel should establish an appropriate mechanism by which it can effectively allocate the duty to present the facts and arguments in this case. The Republic of Moldova believes that it is the Russian Federation that bears the burden of proof in this dispute of showing that it has a valid GATT Article XXI justification for violations of the GATT Article V and the other provisions of the WTO covered agreements under which Ukraine has made claims in these proceedings.

30. In a case where the security exception is invoked by one of the parties to the dispute, it may be impossible for the complaining party to provide evidence to demonstrate that the 'motive' of the responding party who invokes the GATT Article XXI is actually purely commercial. The Russian Federation therefore must prove their case to the Panel's satisfaction in particular as regards the question of whether it has acted in good faith in applying the GATT Article XXI exception.

31. DSU Article 13 accords to WTO Panels ample and extensive authority to undertake and to control the process by which it informs itself of the relevant facts of a dispute. Thus, the Republic of Moldova would like to urge this Panel to play an active role in fact-finding as has been explicitly mandated in Article 13.1 of the DSU, under which a panel is given an independent investigative function. Consideration should also be given to the finding of the Appellate Body that 'a refusal to provide information requested by the panel lead to inferences being drawn about the inculpatory character of the information withheld'.[14] We find it necessary in this dispute for the Panel to actively intervene by seeking information evaluating and weighing the evidence, and carefully balancing the rights and obligations constructed by the WTO Agreement.

[12] See Panel Report, *European Communities − Measures Prohibiting the Importation and Marketing of Seal Products (EC−Seal)*, WT/DS400/R, adopted 18 June 2014, paras 7.636-39. Appellate Body Reports, EC−Seal, WT/DS400, paras 5.260-64.

[13] Ibid.

[14] Appellate Body Report, *Canada−Measures Affecting the Export of Civilian Aircraft (Canada−Aircraft)*, WT/DS70/AB/R, adopted 20 August 1999, para 204.

III. CONCLUSION

32. The Republic of Moldova is of the view that this Panel has jurisdiction over the case. The Panel is empowered to examine the invocation of the Russian Federation of Art. XXI(b)(iii) of the GATT 1994, and is the legally competent authority (has the jurisdiction) to use the legal methods (justiciability) in accordance with the provisions of the DSU, as well as the legal framework GATT 1994 to legally interpret the provisions of Article XXI of the GATT 1994, as well as Art. V, X of GATT 1994 invoked by Ukraine.

33. The Republic of Moldova does not contest that the protection of national security falling within the scope of the GATT Article XXI is a valid exception from the WTO rules, but the mere invocation of this provision does not provide absolute rights to those invoking the provision. The examination of GATT Article XXI(b)(iii) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) confirms that the security exception is not totally self-judging.

34. The limits of the sovereign discretion arising from the GATT Article XXI is set by: i) the general principle of good faith and ii) the fact that the burden of proof to justify a violation of a WTO provision lies with the defendant − that is the Russian Federation.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

A. Introduction

1. This dispute raises novel issues regarding the interpretation of Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The decision on the interpretation of Article XXI of the GATT 1994 would have a direct impact on the interpretation of Article XIV*bis* of the General Agreement on Trade in Services as well as potentially broader implications for the multilateral trading system. As a WTO Member who attaches great importance to upholding an open and predictable trading environment, and as the world 's largest transhipment hub and second busiest port, Singapore has great interest in the interpretation and application of Article XXI.

2. From the outset, it is emphasized that Singapore is not commenting on the merits of the claims and the defences raised by the parties to this dispute. This issue fundamentally concerns the legal interpretation of GATT treaty language. Singapore 's third party intervention is thus strictly limited to the underlying approach and principles in the interpretation of Article XXI.

3. Singapore is concerned with maintaining a rules-based multilateral trading system and a disciplined application of the covered agreements. This entails the need to guard against any spurious reliance on Article XXI. At the same time, Singapore recognizes the fundamental and critical right of every WTO Member to protect itself in the face of threats to its essential security interests.

4. As such, the Panel must strike an appropriate balance between maintaining the integrity of a rules-based multilateral trading system on the one hand, and preserving the ability of Members to protect their essential security interests on the other. The appropriate balance that should be struck will be the subject of Singapore 's third party intervention.

5. Singapore will first address the issue of whether the Panel has *jurisdiction* in respect of Article XXI before turning next, to the *interpretation* of Article XXI(b), in particular Article XXI(b)(iii).

6. As this issue fundamentally involves an exercise in treaty interpretation, we are guided by the principles of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties[1]. This reflects a customary rule of treaty interpretation[2] that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

B. Whether the Panel has jurisdiction in respect of Article XXI

7. On the question of whether the Panel has jurisdiction to consider a WTO Member 's invocation of Article XXI, Singapore joins several other third parties to this dispute in responding in the affirmative[3].

8. The Panel 's terms of reference are set out in Article 7(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which provides for the Panel to "examine, in the light of the relevant provisions [of the agreement cited by the parties to the dispute] the matter referred to the DSB." [4] Further, Article 7(2) of the DSU provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The plain and ordinary meaning of the DSU 's provisions do not speak of any exceptions to the

[1] Article 31(1) The Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[2] Appellate Body Report, *EC – Chicken Cuts*, para. 192; International Court of Justice, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8.

[3] Australia 's third party submission, para. 10; the European Union 's third party submission, para. 21; Japan 's third party submission, para. 30; and Moldova 's third party submission, para. 16.

[4] Constitution of the Panel Established at the Request of Ukraine, WT/DS512/4.

application of Articles 7(1) and 7(2). If the intention of the negotiators was for the Panel to have no jurisdiction to examine a dispute once a Member invokes Article XXI, one would have expected such an important and significant matter to be expressly provided for.

9. This interpretation is supported by the jurisprudence of the Appellate Body. The Appellate Body has interpreted the phrase "shall address" in Article 7(2) of the DSU as indicating that panels are "required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[5] This means that the Panel must address the relevant provisions to the dispute at hand, including Article XXI(b).

10. It is therefore clear that the Panel does have jurisdiction over any Member 's invocation of Article XXI in WTO dispute proceedings, subject to certain parameters which are set out next.

C. The interpretation of Article XXI(b), in particular Article XXI(b)(iii) – the applicable test

11. As regards the test that the Panel should apply in the interpretation of Article XXI(b), in particular, Article XXI(b)(iii), Singapore wishes to highlight three points. Article XXI(b) provides as follows:

> 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;
> ...

12. First, the word "it" in the phrase "it considers necessary" in Article XXI(b) clearly and unambiguously refers to a "contracting party". On a plain and ordinary reading, the focus of any scrutiny therefore has to be whether the Member invoking the exception considers the action to be necessary. This key phrase has been deliberately drafted in this manner and must be given effect to.

13. This points to the self-judging nature of the assessment in Article XXI(b) and indicates that a WTO Member is allowed to determine with a significant degree of subjectivity what action "it considers necessary" to protect "its essential security interests". This would mean that a WTO Member has wide latitude to determine: (a) the action taken for the protection of its essential security interests, including the nature, scope and duration of the measure; and (b) the necessity of the measure.

14. This is to be contrasted with the text in Article XX of the GATT 1994, which does not contain the phrase "*it considers* necessary" (emphasis added). Unlike Article XXI(b), the necessity of the measure taken under Article XX is capable of objective determination. In light of the ordinary meaning of Article XXI(b), Singapore does not agree with an interpretation which seeks to apply the necessity test developed under Article XX to Article XXI(b). We also have doubts as to the applicability of the two-tiered analytical approach in the evaluation of an Article XX general exception to the Article XXI security exceptions.

15. Second, the nature of the matters addressed by Article XXI(b) and consequently the context of this exception cannot be overlooked. Every Member has the sovereign right to determine its own security interests and threats. Essential security interests are likely to vary depending on each Member 's unique circumstances. Following from this, we would caution against attempts to frame a prescriptive scope and content to the phrase "essential security interests". As for the assessment of threats to the essential security interests of a WTO Member and the necessary measures in response, this assessment involves judgement on the part of that Member and is dependent on the particular context and circumstances of the Member concerned. Further, the particular measure that a Member has to take to deal with the threat and to protect its essential security interests, may not be similar to the measure that needs to be taken by another Member in response to the same type of threat.

[5] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

16. Moreover, in arriving at this judgement, every Member, as the guardian and protector of its own essential security, has to a larger or lesser extent in every case, make determinations of the security threats, sometimes under the most urgent circumstances, relying on information the disclosure of which may itself prejudice the security interest of the Member or other Members and undermine the very purpose of Article XXI(b). Therefore, there is necessarily a degree of subjectivity in this exercise, and an accompanying diversity of assessments that has to be respected.

17. Third, there are many areas in the WTO regime where some margin of appreciation is incorporated. We observe that in applying the standard of review in Article 11 of the DSU, panels and the Appellate Body have granted considerable deference to the decisions of Members, particularly in a Member 's assessment of the appropriate level of protection and the chosen level of protection. For example, in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Appellate Body has recognized that "[t]he determination of the appropriate level of protection… is a *prerogative* of the Member concerned and not a panel or of the Appellate Body" (emphasis original)[6]. Additionally, in relation to the necessity of a measure taken for the protection of health, the Appellate Body has stated that "… it is undisputed that WTO Members have the right to determine the level of health that they consider appropriate in a given situation."[7]

18. None of these provisions come anywhere close to being as express and definitive with respect to self-judgment as Article XXI(b). It then follows that, *a fortiori*, a higher level of deference should be accorded to the WTO Member 's chosen level of protection, assessment of risk and of the necessity of a measure taken for the protection of its essential security interests. Accordingly, a significant margin of appreciation should be accorded to WTO Members in their assessment of the same.

19. Having laid out these three points, Singapore recognizes that Article XXI(b) should not be read as giving a WTO Member entirely unfettered discretion in invoking this exception. For Article XXI(b) to be meaningful, a Member is expected to act in accordance with the standard of good faith (*pacta sunt servanda*) as set out in Article 26 of the Vienna Convention on the Law of Treaties and with the general international law notion of abuse of rights (*abus de droit*). The principle of good faith and the doctrine of abuse of rights have been recognized by the Appellate Body, which has held that Members must abide by their treaty obligations in good faith[8] and that the doctrine of abuse of rights is an application of the general principle of good faith[9].

20. Singapore submits that in the context of Article XXI(b), this standard is met when a Member in good faith, albeit subjectively, considers based on the information available to that Member, that: (a) there is a threat to its essential security interest; and (b) its chosen action is necessary for the protection of that essential security interest (i.e. that there is a nexus between the measure taken and the essential security interests). Such an approach appropriately balances the subjective self-judging nature of Article XXI(b) with the need to ensure that Article XXI is not used spuriously to justify measures which are in reality motivated solely for economic or trade restrictive purposes or other purposes which are unrelated to the protection of its essential security interests. Such a lack of good faith may in turn, be inferred from the facts.

21. Even if the Panel is inclined to conduct a more intrusive examination of a Member 's invocation of Article XXI(b), we would urge the Panel to confine this to an examination of whether the disputed measure was implemented in a non-capricious manner, rather than conducting an examination that in reality approximates a substantive review.

22. In respect of Article XXI(b)(iii) in particular, the determination of whether an "emergency in international relations" exists is inherently subjective, and takes into account, among others, the invoking Member 's particular state of relations with other Member(s) and the wider international community, the pressing needs of the moment and the context in which such needs arise. Furthermore, the highly subjective nature of the sensitivities involved in the Members ' determinations of security threats which has been set out above, are equally applicable to a determination of whether an "emergency in international relations" exists.

[6] Appellate Body Report, *Australia − Salmon*, para. 199.
[7] Appellate Body Report, *EC − Asbestos*, para. 168.
[8] Appellate Body Report, *EC − Sardines*, para. 278; Appellate Body Report, *US − FSC*, para. 166.
[9] Appellate Body Report, *US − Shrimp*, para. 158.

D. Conclusion

23. In conclusion, Singapore accepts that the Panel has jurisdiction to consider a WTO Member 's invocation of Article XXI. We have sought to set out the policy, logic and textual basis underpinning the legal interpretation of Article XXI(b) as a provision that permits a WTO Member to take measures that it subjectively considers to be necessary to protect its essential security interests. In this process, a significant margin of appreciation should be accorded to WTO Members in their assessment of the same.

24. However, this does not mean that WTO Members have unfettered discretion to invoke this exception spuriously. A WTO Member is expected to act in accordance with the standard of good faith should it wish to invoke this exception. In Singapore 's view, this approach is what is required by the language of Article XXI(b) which reflects the balance that has been struck between maintaining the integrity of a rules-based multilateral trading system and preserving the ability of Members to protect their essential security interests.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY*

I. INTRODUCTION

Mr. Chairman, distinguished Members of the Panel,

1. Turkey appreciates the opportunity to present this Oral Statement as a Third Party in the current proceedings. Turkey would like to note that it will not present any opinion on the specific factual context of this dispute and takes no position whatsoever as to the allegations and defense presented by the parties on whether the specific measure at issue is consistent or inconsistent to the subject provisions of the WTO Agreements.

2. Turkey is aware of the Russian Federation's objection regarding the Panel's and the WTO's jurisdiction over the matter at issue in this dispute. Thus, in the followings, Turkey will briefly share its views with regard to Article XXI of the General Agreement on Tariffs and Trade (GATT 1994). It will then express its opinion on some systemic issues regarding the interpretation of the relevant paragraphs of Article V of the GATT 1994, to be taken into consideration in the event the Panel decides that it has jurisdiction over the matter before it.

II. ARTICLE XXI OF THE GATT

3. First and foremost, Turkey recognizes that "national security concerns" of the WTO Members are protected under Article XXI of the GATT, allowing them to take measures that would otherwise be in breach of their GATT obligations. Moreover, it is a fact that nearly almost all of the bilateral, regional or multilateral agreements provide provisions, generally structured based on Article XXI of the GATT, that allow governments to protect their national security interests that are in conflict with free trade rules. In fact, Article XIV bis of the GATS and Article 73 of the TRIPS Agreement contain similar provisions.

4. Nevertheless, as of yet, application and interpretation of the security exception stipulated in Article XXI of the GATT has not been addressed by a Panel and Appellate Body. Although Article GATT XXI of the GATT 1947 has been invoked several times by the Contracting Parties to justify some of their measures, and Panels were established for some of them, no clear answers have been given to the following two questions: "Does a Panel have jurisdiction to examine a case involving an Article XXI invocation?" and "Is the interpretation of Article XXI reserved entirely to the Member invoking it?" In this context, answers of the Panel of this dispute are vital and will have many systemic effects on WTO legal system.

5. Within the context of this dispute, Article XXI of the GATT, in relevant parts, states that "[n]othing 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" (emphasis added)

6. The wording of Article XXI (b), especially the use of "which it considers necessary", gives the impression that the subjective assessment of the country taking action for the protection of its essential security interests is in the foreground. Furthermore, Article XXI does not contain an expression that is similar to the *chapeau* of Article XX of the GATT 1994.

7. Therefore, in Turkey's view, to a very large extent, Article XXI leaves the determination of which measure is "necessary for the protection of its essential security interests" to the judgement of the country concerned. Nonetheless, Turkey also considers that judgement of the Member, taking action for the protection of its essential security interests, is not unqualified. Turkey would like to underline that the term "security interests" is qualified with the term "essential", which at

* Turkey requested that its oral statement serve as its executive summary.

least, in Turkey's view, intends to draw some boundary and prevent abuse of the power to take commercial measure by sheltering it behind the security exception.

8. With regard to the legal standard that should be applied to the examination of Article XXI invocation, Turkey is of the view that the Panel should take guidance in the steps that have been applied to other exception rules, such as the general exception rules contained in Article XX of the GATT. In this sense, in case of a dispute between two Members, the complainant Member should first prove that the measure is *prima facie* inconsistent with the relevant provisions of the GATT, then the defendant Member should put forward its arguments, including the argument that the measure it took can be justified under the security exception stipulated in Article XXI of the GATT. The Panel, however, in reviewing GATT Article XXI, should consider the large margin of discretion of the Member, invoking it.

III. ARTICLE V OF THE GATT 1994

Mr. Chairman, distinguished Members of the Panel,

9. From now on, Turkey would like to express its view with regard to the interpretation of relevant paragraphs of Article V.

10. Article V:1 defines the term of "traffic in transit" covering not only the goods but also vessels and other means of transport, whose journey begin and terminate beyond the frontier of the contracting party across whose territory the traffic passes. Turkey agrees with the Panel in *Colombia − Ports of Entry* that "the definition of "traffic in transit" provided in Article V:1 seems sufficiently clear on its face" .

11. Given the clear wording of the first paragraph and in light of Panel's understanding in *Colombia − Ports of Entry*, Turkey would like to emphasize four points with regard to the definition of the term "traffic in transit". First, Article V:1 defines journeys which begin outside the frontier of a WTO Member and terminate after crossing the country as "transit traffic". Accordingly, beginning or ending of a journey from or at the territory of a country that is a member or a non-member of the WTO, has no significance in the definition of "traffic in transit". Second, definition of "traffic in transit" covers not only the transported goods but also the vessels and other means of transport. Third, the conduct of procedures such as warehousing, change in the mode of transport and trans-shipment do not change the "transit" status of the good or the vehicle. Fourth, definition in the first paragraph of Article V informs the scope of obligations under the following paragraphs of Article V. Therefore, in interpreting the other paragraphs of the Article V, definition in the first paragraph should always to be taken into account.

12. Concerning freedom of transit, Article V:2 provides two substantive obligations in the first and second sentences, which are in support of each other. While first sentence requires transit traffic to be conducted freely via the routes most convenient for international transit, second sentence prohibits from making distinction based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

13. With regard to first sentence of Article V:2, Turkey notes that there is no definition of the key term "freedom of transit" in the text itself. Nevertheless, Turkey considers that qualification of the word "transit" with "freedom" necessitates a purposeful interpretation, subject only to the specific qualifications set out in Article V itself. Indeed the Panel in *Colombia − Ports of Entry* interpreted the first sentence of the Article V:2 requiring "unrestricted access" to the most convenient routes for the passage of goods in international transit.

14. It is worth noting that first sentence of Article V:2 also provides that transit passages should be achieved through the most appropriate routes. The text uses the term "routes" in plural form, which suggests that there can be more routes appropriate for international transit. Nevertheless, forcing the transporters to use of long and costly routes or use of a different mode of transport will constitute contradiction with Article V.

15. Regarding the second sentence of Article V:2; Turkey is of the view that, this sentence provides equal treatment obligation, which has a wider scope of application compared to MFN obligation.

Thus, in Turkey's understanding, the transit WTO Member should provide equal access to transit traffic for the internationally transported goods as well as the vessels of the other WTO Members. In other words, any kind of distinction not only among the WTO Members, but also between a WTO Member and the transit WTO Member would be inconsistent with this sentence. For greater clarity, Turkey would like to emphasize that obligation in this sentence applies only to the goods and vessels in transit, i.e. journeys beginning and terminating beyond the transit country. However, whereas vessels carrying domestic and imported goods within the country are out of the scope of this sentence, vessels registered in the transit country, but taking its load from a different country and transiting the country, are in the scope of this sentence.

16. With regard to Article V:3, Turkey notes that this provision brings an important limitation on freedom of transit. Indeed, Article V:3 gives permission to the transit WTO Member to require the transit vehicles to enter from the proper customs house. However, this right is not unfettered and should be read together with second paragraph of Article V. In fact, Article V:3 limits the right to require the transit vehicles to enter from the proper custom house in the event where it causes unnecessary delays. In other words, if the right to request transit vehicles to enter from the proper customs house is used in way to prolong or restrict the free transit passages of the goods and the vessels, this measure would be inconsistent with Article V.

17. Another limitation stated in Article V:3 relates to fees. Naturally, transit country incurs some expenses because of the transit traffic, such as maintenance and repair costs of roads, highways, railways and ports etc. Thus, in Turkey's view, Article V:3 allows transit country to require the users of those facilities to meet some costs associated with those expenses. However right to collect fees and charges from the transit traffic is not unlimited.

18. First, as Article V:3 clearly states, transit vehicles and their load cannot be subject to any kind of financial obligation which can be regarded as a customs duty or a transit duty. Second, as the Trade Facilitation Agreement, which constitutes a relevant context, explains in detail, traffic in transit shall also not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered. In other words, any administrative expense and service fee regarding the services rendered for transit vehicles and their loads should commensurate with the expenses and the services rendered. Thus, fees and charges that are not related or proportional with the expenses and the services rendered would be inconsistent with Article V:3.

19. In addition Article V:4 requires that charges and regulations must be reasonable. According to Article V:4, all charges and other restrictive regulations that are allowed to be implemented within the scope of Article V:3 shall be reasonable, taking the conditions of traffic into consideration. Turkey believes that provided that they are applied in an objective and impartial manner, regulations restricting passages in residential areas or in weekends, which are applied to local and foreign carriers similarly would be reasonable. However, Turkey believes that rate discrimination or passage restrictions that are not applied in an objective and impartial manner fall aside from these reasonable charges and regulations.

20. Lastly, Article V:5 provides an MFN obligation, with respect to all charges, regulations and formalities in connection with transit. Ad Note to paragraph 5 further states that "with regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions". Turkey considers that Article V:5 provides equal conditions of competition between like products being transported on the same route under like conditions. Thus, Turkey believes that in interpreting this paragraph, the Panel should consider the interpretation of Article I of the GATT, as it provides a useful shed lights.

IV. CONCLUSION

Mr. Chairman, distinguished Members of the Panel,

21. This concludes Turkey's oral statement. Turkey thanks once again the Panel for the time and attention and stands ready to answer any questions that you might have.

ANNEX D-10

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY ORAL STATEMENT

I. INVOCATION OF ARTICLE XXI IS SELF-JUDGING AND NOT SUBJECT TO REVIEW

1. Article XXI of the GATT 1994, in relevant part, states that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations[.]" On its face, the text establishes two crucial points: first, nothing in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest; and second, the action necessary for the protection of its essential security interests is that "which it considers necessary for" such protection. That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens.

2. The self-judging nature of Article XXI is established through use of the crucial phrase: "which it considers necessary for the protection of its essential security interests." The ordinary meaning of "considers" is "regard (someone or something) as having a specified quality" or "believe; think". The "specified quality" for the action is that it is "necessary for" the protection of a Member's essential security. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("considers") an action as having the quality of being necessary.

3. The context of Article XXI(b)(iii) supports this understanding. First, the phrase "which it considers" is present in Article XXI(a) but not in Article XXI(c). Its use in Articles XXI(a) and XXI(b) highlights that, under these two provisions, it is the judgment of the Member that controls. The use of "which it considers" in Article XXI(b) should be given meaning and should not be reduced to inutility.

4. Second, the context provided by Article XX supports this understanding. This Article sets out "general exceptions", and a number of subparagraphs relate to whether an action is "necessary" for some listed objective. In none of these subparagraphs is the phrase "which it considers" used to introduce "necessary". It is also notable that the chapeau of Article XX subjects application of a measure qualifying as "necessary" under a subparagraph to a further requirement of, essentially, non-discrimination. No such qualification, which requires review of a Member's action, is present in Article XXI.

5. Third, the use of the phrase "it considers" in the GATT 1994 and other provisions of the WTO Agreement is used when the judgment resides in the named actor. Such provisions envision that a Member, a panel, the Appellate Body, or another entity takes an action where it "considers" that a situation arises. In each of these provisions, the judgment of whether a situation arises is left to the discretion of the named actor.

6. By way of contrast, and further context, we note at least two WTO provisions in which the judgment of the named actor is expressly subject to review through dispute settlement. Article 26.1 of the DSU permits non-violation complaints to be brought under the DSU, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party: "Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following …". Thus, in this provision, Members explicitly agreed that "where … [a] party considers … that" is not enough, and they subjected the non-violation complaint to the additional check that "a panel or the Appellate Body determines that" the case is in fact a non-violation situation described in GATT 1994 Article XXIII:1(b). A similar limitation – that a "party considers and a panel determines that" – was agreed in DSU Article 26.2 for situation complaints described in GATT 1994 Article XXIII:1(c).

7. This context is highly instructive. No such review of a Member's judgment is set out in Article XXI, which only states "which it [a Member] considers necessary for the protection of its essential security interests". In agreeing to GATT 1994, Members could have subjected a Member's essential security judgment to an additional check through a similar phrase as in DSU Articles 26.1 and 26.2 – "and a panel [or the Appellate Body] determines that". But Members did not agree to this language in Article XXI. Accordingly, they did not agree to subject a Member's essential security judgment to review.

8. Russia's invocation of Article XXI did not occur in the DSB or prior to establishment of this Panel. The DSB established this Panel with standard terms of reference to examine the matter raised by Ukraine. However, the dispute is non-justiciable in the sense that the Panel cannot make findings on Russia's invocation, other than to conclude that Article XXI has been invoked.

9. This outcome is fully consistent with the Panel's terms of reference and the DSU. To recall, under Article 7.1, the Panel is charged with examining the matter raised by Ukraine "and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Similarly, DSU Article 11 calls for the Panel to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." But, were the Panel to make findings on Ukraine's claims in this dispute, that would be contrary to its terms of reference and Article 11. This is because such findings "will [not] assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements." No recommendation under DSU Article 19.1 is possible in this dispute because no antecedent finding that a measure is inconsistent with a covered agreement is possible, given the invocation of Article XXI.

10. In this way, the Panel will have "address[ed] the relevant provisions in any covered agreements cited by the parties to the disputes," consistently with DSU Article 7.2. It is erroneous to consider that to "address" a provision means that it is necessary for a Panel or the Appellate Body to make "findings" under that provision. Were this not so, each exercise of judicial economy by a panel or the Appellate Body would breach either DSU Article 7.2 or DSU Article 17.12.

II. THIS INTERPRETATION IS CONSISTENT WITH MEMBERS' HISTORICAL UNDERSTANDING OF ESSENTIAL SECURITY

11. Shortly after the GATT 1947 was concluded, a dispute arose between Czechoslovakia and the United States concerning export licenses that Czechoslovakia claimed the United States was withholding with respect to certain goods in a discriminatory manner. Czechoslovakia requested a decision under Article XXIII whether the United States had failed to carry out its obligations under Article I of the GATT 1947. The United States responded by invoking Article XXI.

12. In addressing the request from Czechoslovakia, it was commented that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security" and that "the Chairman … was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Article[] XXI which embodied exceptions to the general rule contained in Article I."

13. Based on this shared view, and upon a vote with only Czechoslovakia dissenting, the CONTRACTING PARTIES held that the United States had not failed to carry out its obligations under the Agreement. This early GATT action confirms the understanding of Article XXI as a self-judging exception to the general applicability of the other articles in the GATT.

14. In 1982, the European Communities and its member states, Canada, and Australia, spoke in the GATT Council to justify their application of trade restrictions for non-economic reasons against certain imports. The representative of the European Communities stated that it and its member states took these measures "on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights."

15. In the same Council discussion, the representative of Canada stated that "Canada's sovereign action was to be seen as a political response to a political issue" and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.

16. Expressing the same view, the representative of Australia stated that "the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification."

17. In that same Council discussion, the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment." Thus, the U.S. understanding of the security exemption in Article XXI has been consistent.

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

18. General U.S. Answer to Questions from the Panel: As the Panel is aware, the United States considers that the text and negotiating history of GATT 1994 Article XXI, as well as its place within the broader WTO framework, indicate that this provision is non-justiciable. That is, the text leaves its invocation to the judgment of a Member through the phrase "that it considers essential". A Member's judgment as to any element of this invocation is therefore not capable of findings by a panel. This being the case, the Panel would carry out its mandate, consistent with the terms of reference and the DSU, by acknowledging that Russia has invoked Article XXI and, on this basis, concluding that it cannot make findings as to whether Russia's measures are consistent with its WTO obligations.

19. In December 1945, the United States proposed the establishment of an International Trade Organization of the United Nations for the purpose of administering commercial relations between trading partners in accordance with rules set forth in a Charter for the Organization. The Draft Charter proposed by the United States the following year included two articles containing exceptions to certain provisions of the Charter. The articles, respectively and in relevant part, read as follows:

> Article 32 (General Exceptions to Chapter IV):
>
> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures …
>
> (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.
>
> Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):
>
> None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

20. Notably, these provisions as originally drafted do not appear to be self-judging. First, they lacked the key phrase that appears in the current text of Article XXI regarding action by a Member that "it considers necessary for" the protection of its essential security interests. Second, the essential security exception set out in Article 32 was one of twelve exceptions, several of which later formed the basis for GATT 1994 Article XX.

21. In March 1947, a general exception to Chapter V of the Draft Charter was put forward in Article XX (cf. Article 37 of the Charter). The proposed text read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

> international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …
>
> (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.

22. The chapeau of this provision on general exceptions and a number of the subparagraphs are identical to what would become Article XX in the GATT 1994. With its proviso, the chapeau contemplated review by a panel so that the exceptions would not be applied to discriminate unfairly. As the subparagraphs corresponding to essential security were included here together with other exceptions, and therefore were also subject to the proviso in the chapeau, this too suggests that the drafters did not, at this time, view the essential security exception in subparagraph (e) as self-judging.

23. On July 4, 1947, the United States proposed suggestions regarding the arrangement of the Charter as a whole, including the addition of a new Chapter VIII, entitled "Miscellaneous," and the placement in this new chapter of the proposed General Exceptions to the Charter as a whole. In this proposal, the United States also proposed additional text to make the self-judging nature of these exceptions apparent. Draft Article 94 stated:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of *which it considers contrary to* its essential security interests, or to prevent any Member from taking any action *which it may consider to be necessary to* such interests: …
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;

24. For the first time in the drafting of the general exceptions, the text now referenced what a Member considered to be necessary − but this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interest. The drafting history thus shows a deliberate textual distinction drawn between the self-judging nature of general exceptions pertaining to essential security and those related to other interests that, unlike the removal of the security-based exceptions referenced above, were retained in Article 37.

25. Regarding the scope of application of the exception, at a meeting of the negotiating committee in 1947, the delegate from the Netherlands requested clarification on the meaning of the "essential security interests" of a Member, which the delegate suggested could represent "a very big loophole in the whole Charter." Responding to these concerns, the delegate from the United States explained that the exception would not "permit anything under the sun" and that the limitation on actions not consistent with the Charter related to the time in which such actions would be taken − *i.e.*, "in time of war or other emergency in international relations." The delegate suggested that there must be some latitude for security measures, and that it was a question of balance. In situations such as times of war, however, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

26. Moreover, "in defence of the text," the Chairman recalled the context of the exception as part of the Charter of the ITO, and that in that context "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by the Netherlands delegate. Therefore, the delegates and the Chairman recognized that the security exceptions would be self-judging and that no formal review of a Member's invocation of the exceptions could be requested.

27. During the same meeting, the Chairman noted that the question arose whether "we are in agreement that these clauses [on national security] should not provide for any means of redress". In response, the U.S. delegate noted that "[i]t is true that *an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter*; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article

35 to this or any other article." The U.S. delegate noted that Article 35(2) permitted recourse to its procedure "whether or not [a measure] conflicts with the terms of this Charter." Therefore, the negotiating history again demonstrates the negotiators understood that the essential security exception was "so wide in its coverage" that it was not justiciable; and that while the delegates considered that a claim for nullification or impairment "whether or not a measure conflicts" with the agreement might be available, they were clear that a Member could not claim that another Member had violated the security exception and therefore unsuccessfully invoked that exception.

28. The drafting history outlined above shows that the self-judging nature of the security exception in what was to become Article XXI was an intentional choice of the CONTRACTING PARTIES. In the course of the negotiation, the drafters continued to revise the general exception applicable to essential security, and agreed to separate it from the other exceptions so as to apply more broadly to the Charter as a whole. In so doing, they also agreed to the current formulation of the chapeau of Article XXI, which states that the exception would apply when a Member is taking "any action which it considers necessary for" the protection of its essential security interests. Therefore, both the text, in context, and the drafting history of Article XXI of the GATT 1994, confirm that a Member's invocation of its essential security interests in defence of an action "taken in time of war or other emergency in international relations" is self-judging and not justiciable by a dispute settlement panel.

29. Response to Question 1: We have used the term "jurisdiction" to refer to the ability of a Panel or the Appellate Body, under the terms of reference set by the DSB pursuant to the DSU, to organize and hear a dispute from a Member, including receiving submissions from the parties and third-parties. We have used the term "justiciability" to refer to the ability of the Panel or Appellate Body to make findings and provide a recommendation to the DSB.

_____

ANNEX E

INTERIM REVIEW SECTION

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the arguments made at the interim review stage. The Panel has modified certain aspects of the Report in the light of the parties' comments where the Panel considered it appropriate, as explained below. In addition, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report, or to correct typographical and other non-substantive errors, including but not limited to those identified by the parties.

1.2. As a result of the changes, the numbering of the footnotes in the final Report has changed from the Interim Report. References to Section headings, paragraphs numbers and footnotes in this Annex relate to the Final Report, unless otherwise specified.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 General exchange between the parties regarding the characterization of the events of 2014 and subsequently

2.1. Russia requests the Panel to refrain from taking any position regarding certain events that occurred in 2014 by "qualifying" them using terms such as "annexation" or "temporary occupation". Russia strongly opposes the use of these terms by the Panel, as the Panel's qualification of the relevant events, and considers that such terms are used by Ukraine. Russia sets forth, in four paragraphs of its comments on interim review, Russia's own characterization of those events.[1] Russia then requests specific changes to paragraphs 7.122, 7.137 and 7.144 of the Report.[2]

2.2. Ukraine strongly objects to what it alleges is Russia's use of the interim review stage of these proceedings to challenge the territorial integrity of Ukraine within its internationally recognized borders and to promote Russia's territorial claims over the Autonomous Republic of Crimea and the City of Sevastopol. In particular, Ukraine considers that paragraphs 5-10 of Russia's request for review of the interim report in essence ask the Panel to modify its interim report because certain actions invoked by Russia in its request were alleged by Russia to have been "carried out in full compliance with international law" and because "the situation in question cannot be qualified as 'internationally recognized armed conflict'".[3] Ukraine requests that, in light of these observations, and in particular UN General Assembly Resolution No. 68/262 of 27 March 2014 (Exhibit UKR-89), the Panel not give any effect to paragraphs 5-10 of Russia's request for review of the interim report.

2.3. The Panel notes that Russia has not pointed to any places in the interim report where the Panel has in fact characterized the events of 2014 using terms such as "annexation" or "temporary occupation". Such terms appear in the Report in quotation marks to clearly signify attribution to a specific speaker (e.g. the UN General Assembly, or the Government of Ukraine) rather than to the Panel. The Panel recalls, moreover, that the third sentence of paragraph 7.5 of the Report clearly states that it is not the Panel's function to pass upon the parties' respective legal characterizations of the events of 2014, or to assign responsibility for them. The Panel therefore considers it unnecessary to further comment in general terms on the above exchange between the parties. The Panel has, however, made certain modifications to paragraphs 7.122, 7.137 and 7.144 of the Report, which are discussed further in paragraphs 2.64-2.66, 2.71-2.74 and 2.80-2.81 below.

2.2 Section 7.1 of the Report - Overview of Ukraine's complaints

2.4. Ukraine requests a number of revisions to the Panel's general summary of Ukraine's main complaints in paragraph 7.1. More specifically, Ukraine requests that paragraph 7.1(a) be revised to reflect Ukraine's arguments that: (i) the 2016 Belarus Transit Requirements affect "all goods";

[1] See Russia's request for review of the interim report, dated 14 February 2019, paras. 5-8.

[2] Russia's requests regarding these changes are discussed below in paragraphs 2.64-2.66, 2.71-2.74 and 2.80-2.81 of this Annex.

[3] Ukraine's comments on Russia's request for review of the interim report, dated 28 February 2019, para. 11 (quoting from Russia's request for review, paras. 8 and 10).

(ii) transit from Ukraine of goods destined for the Kyrgyz Republic, unlike transit from Ukraine of goods destined for Kazakhstan, was only affected by the 2016 Belarus Transit Requirements as of 1 July 2016; and (iii) the 2016 Belarus Transit Requirements also require goods to exit the territory of Russia at specified control points on the border between Russia and Kazakhstan. Ukraine considers that these changes are necessary for the sake of completeness and clarity. Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" is an adequate reflection of Ukraine's complaints.

2.5. The Panel has decided to modify paragraph 7.1(a) to reflect these additional details of the 2016 Belarus Transit Requirements, as requested by Ukraine. However, the Panel has modified the language proposed by Ukraine in order to maintain consistency with other paragraphs of the Report.

2.6. Ukraine also requests the Panel to revise paragraph 7.1(c) to reflect that Ukraine referred, throughout its submissions, to the 2016 Belarus Transit Requirements as the 2016 general "transit bans". Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" is an adequate reflection of Ukraine's complaints. Moreover, Russia argues that Ukraine's choice of the term "ban" to describe the 2016 Belarus Transit Requirements is factually inaccurate because a "ban" should be understood as a total prohibition, while a restriction is a limiting condition.

2.7. Throughout its submissions in these proceedings, Ukraine has referred to Russia's prohibition on all traffic in transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia directly from the Ukraine-Russia border (requiring instead that it detour via Belarus) as a "general transit *ban*" or a "ban on direct and indirect transit" applying to all goods in transit by road or rail transport. Ukraine has also stated that there are no exceptions to the "direct" ban and that there exists one "derogation" for "indirect" transit, namely, the so-called "Belarus route requirement".[4] The Panel considers that the term "ban" in such a context, and in the light of the nature of the transit bans that are part of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, is potentially confusing. Unlike the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, the prohibition on all road and rail transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia directly from the Ukraine-Russia border does not ban transit across Russia outright. Rather, it restricts transit from Ukraine by requiring that such transit enter Russia from Belarus rather than crossing the Ukraine-Russia border. In order to avoid the potential for confusion with the outright transit bans that are an inherent feature of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and to accurately reflect the essence of Ukraine's complaints, the Panel refers to the Belarus route requirement that is an inherent aspect of the 2016 Belarus Transit Requirements (which Ukraine refers to as the 2016 "general transit ban" or as a derogation from a "general transit ban" on direct and indirect traffic in transit[5]) as a "requirement". Subparagraph (c) of paragraph 7.1 makes clear that the scope of Ukraine's complaint regarding the *de facto* application of certain written measures is that both the actual bans referred to in subparagraph (b) and the requirements that all other traffic in transit from Ukraine destined for Kazakhstan or the Kyrgyz Republic transit Russia via Belarus, referred to in subparagraph (a), are also being *de facto* applied to traffic in transit destined for other destinations. The Panel therefore considers that its description of the measures at issue for purposes of the overview of Ukraine's complaints in Section 7.1 of the Report is clear and accurate as is. The Panel has decided, however, to add a footnote reference to the end of paragraph 7.1 of the Report, cross-referencing to paragraphs 7.264-7.275 of the Report, where the Panel sets forth the measures described by Ukraine in its panel request, Ukraine's subsequent explanation of how the measures described in its first written submission relate to those described in its panel request, and the Panel's terminology referring to the same measures.

2.8. Ukraine further requests the Panel to revise paragraph 7.1(d) to reflect the difference between the specific legal instruments implementing the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as they apply to veterinary goods (Instruction No. FS-NV-7/22886), and to plant goods (Instruction No. FS-AS-3/22903). Ukraine considers that this change is necessary

[4] See Ukraine's first written submission, paras. 32-34. Ukraine concedes at paragraph 64 of its first written submission that the Belarus route requirement means that "indirect" traffic in transit "through that specific route is not banned", while at the same time referring to the Belarus route requirement as the "sole derogation to the ban" and referring in the next paragraph of its first written submission once again to the "general ban on direct and indirect traffic in transit." (Ibid. paras. 64-65.)

[5] See ibid.

to highlight that veterinary goods and plant goods are subject to "distinct measures". Russia responds generally that the Panel's description of the measures for purposes of a "succinct overview" of Ukraine's complaints is an adequate reflection of Ukraine's complaints.

2.9. The Panel notes that its description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods in paragraph 7.1(d) is nearly identical to Ukraine's own description of these measures in section III.A. of its panel request. In particular, Ukraine's panel request does not distinguish between the measures as they affect veterinary goods listed in Resolution No. 778 as opposed to plant goods listed in Resolution No. 778. Moreover, Ukraine's panel request refers to the above-referenced legal instruments as among the "documents" through which the measures in question are imposed, rather than as the measures themselves. That said, the Panel considers that it will improve the accuracy and clarity of the Report to note the different ways in which the two Instructions affect the transit of the covered veterinary goods, and of the covered plant goods. The Panel has therefore decided to modify paragraph 7.1(d) to reflect these additional details of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as requested by Ukraine. This issue also arises in relation to Ukraine's request for review of paragraph 7.106(c) of the Report, discussed at paragraphs 2.51-2.52 of this Annex.

2.3 Section 7.2 of the Report - Russia's response

2.10. Russia requests the Panel to delete from paragraph 7.3 the statement that "Russia does not respond specifically to Ukraine's claims of WTO-inconsistency in relation to any of the challenged measures", because it has repeatedly claimed throughout these proceedings that all measures challenged by Ukraine are in full conformity with the WTO Agreement, including the GATT 1994 and Russia's Accession Protocol.

2.11. Ukraine opposes Russia's request, noting that the first sentence of paragraph 7.3 refers to the fact that Russia did not respond to Ukraine's claims, while paragraph 7.4 describes Russia's invocation of Article XXI(b)(iii), which is the reason why Russia considers that all of the measures are fully in conformity with the WTO Agreement, the GATT 1994 and Russia's Accession Protocol. Ukraine suggests that, should the Panel decide to modify the first sentence of paragraph 7.3, it be reformulated to state that "Russia has not contested the arguments and evidence adduced by Ukraine in support of its claims under the GATT 1994 and Russia's Accession Protocol in relation to any of the challenged measures." Ukraine considers that it must clearly be stated in the Report that Russia did not contest the arguments and evidence adduced by Ukraine in support of its claims, and instead, Russia alleged that certain claims and measures fell outside of the Panel's terms of reference and that the measures were justified under Article XXI(b)(iii) of the GATT 1994.

2.12. In its submissions in these proceedings, Russia did not contest the factual evidence or legal arguments adduced by Ukraine in support of its substantive claims that certain measures imposed by Russia were inconsistent with various provisions of the GATT 1994 and Russia's Working Party Report, as incorporated into its Accession Protocol by reference. The Panel agrees with Ukraine that it is important that this be conveyed clearly in the Report. Therefore, rather than delete the first sentence, as requested by Russia, the Panel has decided to modify the first sentence of paragraph 7.3 to clarify this in a manner similar to that suggested by Ukraine.

2.13. Ukraine requests the Panel to revise its description of Russia's argument in paragraph 7.4 to more accurately reflect Russia's statement at paragraph 16 of its first written submission. Ukraine observes that the footnote to paragraph 7.4 of the Report only refers to paragraph 16 of the Russian Federation's first written submission. Ukraine notes that in paragraph 17, Russia referred to "the measures challenged by Ukraine those introduced by Decrees No. 1, No. 319, No. 560 and Resolutions No. 1, No. 147, No. 276." Ukraine considers that the first sentence of paragraph 7.4 therefore incorrectly implies that the statement in paragraph 16 of Russia's first written submission was made with respect to "the measures" included in paragraph 7.1 without any further qualification. Russia opposes Ukraine's request, arguing that Ukraine substantially modifies and misrepresents the position that Russia has repeatedly expressed throughout these proceedings, namely, that *all* of the measures that Ukraine challenges in this dispute are among those that Russia took in response to the emergency in international relations that occurred in 2014.

2.14. The Panel considers that Russia has clearly stated that its invocation of Article XXI(b)(iii) applies to all of the challenged measures in this dispute. The Panel has modified footnote 18 to paragraph 7.4 to refer to the places throughout Russia's submissions where it has asserted that all of the measures at issue in these proceedings, including the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, are justified under Article XXI(b)(iii) of the GATT 1994.

2.4 Section 7.3 of the Report - Factual background

2.15. Ukraine requests the Panel to remove the reference in paragraph 7.7 to the "*Euromaidan* events" and to the fact that, "following on" the Euromaidan events, Ukraine decided not to join the EaEU Treaty. Ukraine argues that neither party referred to these specific facts and that there is no basis for such facts in the arguments and evidence before the Panel. Russia opposes Ukraine's request on the basis that the "*Euromaidan* events" are a fact of common (public) knowledge and "objective historic and factual background" which were publicly available and confirmed by information provided by Ukraine in its first written submission.

2.16. The Panel uses the term "*Euromaidan* events", in quotation marks, as a legally neutral and widely used term to refer to significant and well-known events in recent world history, for which Ukraine and Russia have radically different legal characterizations.[6] The Panel considers that the chronology of events outlined in paragraph 7.7 is factually accurate and therefore declines Ukraine's request.

2.17. Russia requests the Panel to reflect in the text of paragraph 7.8 that: (i) Russia was among the countries that voted against UN General Assembly Resolution No. 68/262 of 27 March 2014 and UN General Assembly Resolution No. 71/205 of 19 December 2016, and (ii) the information concerning the voting record for each resolution, contained in footnotes 28 and 30 to paragraph 7.8. Ukraine considers that the Panel should reject Russia's request, as Russia has offered no explanation as to why such information should be moved from footnotes to the main text of paragraph 7.8. Ukraine notes that Russia asks for the Panel "to provide proper balance of factual background set out in the Interim Panel Report", but Ukraine considers that this request relates to a part of the factual background that does not concern facts invoked by Russia.

2.18. The Panel sees no reason why the information on the voting records for the two UN General Assembly Resolutions, which is reflected in footnotes 28 and 30 to paragraph 7.8, or the fact that Russia was among the countries that voted against both resolutions, should be moved to the main text of that paragraph. The Panel therefore declines to make the requested modifications.

2.19. Ukraine requests the Panel to modify footnote 28 to paragraph 7.8 in a different respect, i.e. to clarify that Russia has not referred to or relied on either of the UN General Assembly Resolutions. Russia opposes Ukraine's request on the ground that this Section of the Report merely provides the factual background. In that context, Russia considers that the existence and content of the UN General Assembly Resolutions, as well as the parties' respective positions on those resolutions, are relevant to the discussion at hand, but the parties' specific reliance on those resolutions *in these proceedings* is not.

2.20. Section 7.3 of the Report is entitled "Factual background". Its purpose is to provide the relevant factual context for the serious deterioration of relations between Ukraine and Russia that occurred following a change of government in Ukraine in 2014. The existence of the two UN General Assembly Resolutions, their content, and whether Ukraine and Russia voted in support of them is part of this factual context. However, the fact that Russia did not seek to rely on the UN General Assembly Resolutions referred to in paragraph 7.8 *in these proceedings* is not part of, or relevant to, this factual context. The Panel therefore declines Ukraine's request.

2.21. Ukraine requests the Panel to delete the statement in paragraph 7.9 that "[t]he events in Ukraine in 2014 led to the imposition of economic sanctions against Russian entities and persons by certain countries" on the basis that no support is given for this statement. Russia opposes Ukraine's request on the grounds that the statement in question is based on common knowledge, objective facts and publicly available information, in addition to being supported by

[6] See e.g. Russia's request for review of the interim report, dated 14 February 2019, para. 5.

paragraphs 20-30 of Russia's second written submission. Alternatively, Russia suggests that the Panel consider replacing the words "led to" with "were followed by" in paragraph 7.9.

2.22. Russia, for its part, requests a modification of paragraph 7.9 to delete the phrase "by certain countries".

2.23. The Panel agrees that it is factually correct to state that the events in Ukraine of 2014 were "followed by" the imposition of economic sanctions against Russian entities and persons, as suggested by Russia, because this chronology is evident from the respective dates of the events in Ukraine and the date of Resolution No. 778. The Panel has therefore decided to make this modification to paragraph 7.9. The Panel sees nothing inaccurate in stating that such economic sanctions against Russia were imposed by "certain countries" and thus declines to make this requested modification.

2.24. Ukraine requests the Panel to remove the phrase "Russia responded" at the beginning of paragraph 7.10. Ukraine considers that this phrase implies that the 2014 transit restrictions were measures taken by Russia in response to the imposition of economic sanctions against Russian entities and persons. However, Ukraine argues that Russia has never made this allegation in these proceedings, nor is the link between the 2014 transit restrictions and the imposition of economic sanctions supported by the text of the measures introducing the 2014 transit restrictions or evidence before the Panel of statements regarding those measures.

2.25. Russia confirms that the 2014 transit restrictions referred to in paragraph 7.10 *were* indeed a response by Russia to the sanctions adopted by certain countries against Russia, or the decision by certain countries to adhere to such sanctions. Russia also considers that the text of paragraph 7.10 is supported by evidence on the record, referring to the text of Decree No. 560 and Resolution No. 778, and paragraphs 20-21 of Russia's second written submission. Finally, Russia considers that there is an explicit link between the 2014 transit restrictions and the imposition of economic sanctions because the *Rosselkhoznadzor* Instructions refer to Resolution No. 778, which itself refers to Decree No. 560, which in turn refers to Federal Law No. 281-FZ and Federal Law No. 390-FZ.

2.26. Since Section 7.3 of the Report is confined to stating the factual events, the Panel has decided to modify the introductory part of the first sentence of paragraph 7.10 to read "[o]n 7 August 2014, Russia imposed import bans …".

2.27. Ukraine and Russia each additionally advise that, since the filing of the parties' final submissions in these proceedings, Decree No. 560 has been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

2.28. Although Decree No. 420 of 12 July 2018 has not been submitted as an exhibit in these proceedings, the Panel has revised the references to Decree No. 560 (in footnotes 32, 205 and 383) to reflect the fact that both parties indicate that Decree No. 560 has been further extended until 31 December 2019 by Decree No. 420.

2.29. Ukraine requests the Panel to modify the text of paragraph 7.12 to reflect that Resolution No. 842, dated 13 August 2015, stated that the import ban under Resolution No. 778 would apply "with respect to Ukraine … from the effective date of paragraph 1 of Resolution … No. 959 …". Furthermore, Ukraine asks that the language of paragraph 7.12 reflect that Resolution No. 959 refers to "the economic part of the EU-Ukraine Association Agreement" and not to the "DCFTA". Ukraine also proposes that the same change be made to paragraph 7.13 given the wording used in Exhibit UKR-84. Russia objects to the modification on the grounds that it misleadingly suggests that this dispute is "merely an ordinary trade dispute", when Russia has noted on numerous occasions that "this is beyond simple trade relations." Russia also asserts that Resolution No. 842 "set out a fork on the road which, *inter alia*, includes Resolution No. 959 but is not limited thereto."

2.30. Resolution No. 959 is dated 19 September 2014. On 13 August 2015, the Russian Government adopted Resolution No. 842, which refers specifically to Resolution No. 778 and Decree No. 560. Among other things, Resolution No. 842 amended Resolution No. 778 to add further countries to the

list of countries whose exports are subject to the import bans under Resolution No. 778, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provided that the Resolution No. 778 import bans would be applied from the effective date of paragraph 1 of Resolution No. 959, but no later than 1 January 2016. The effective date referred to in Resolution No. 959 is 10 days from the Russian Government being notified that Ukraine has taken action to implement the economic part of the EU-Ukraine Association Agreement. The Panel has revised paragraphs 7.11-7.13 of the Report to more clearly reflect the chronology of these facts and events. The Panel also clarifies in paragraph 7.11 that the text of Resolution No. 959 refers to the "economic part of the EU-Ukraine Association Agreement", rather than the "DCFTA". The Panel notes, however, that Ukraine itself has explained, at paragraph 60 of its opening statement at the second meeting of the Panel, that the "economic part" of the EU-Ukraine Association Agreement contains a "free trade agreement establishing the Deep and Comprehensive Free Trade Area (DCFTA)". The Panel has therefore decided to clarify, in footnote 27 to paragraph 7.7, that the "economic part" of the EU-Ukraine Association Agreement contains a free trade agreement establishing the DCFTA.

2.31. Ukraine also requests the Panel to delete the statement in the third sentence of paragraph 7.12 that negotiations were "aimed at achieving practical solutions to Russia's concerns about the DCFTA". Ukraine considers that the evidence cited in support (Exhibit UKR-80) offers no support for this statement. Russia does not respond specifically to this request.

2.32. Exhibit UKR-80 is an RBK news article which reports, among other things, Russia's concerns with the possibility that Ukraine would be in simultaneous free trade zones with the European Union and with Russia. In particular, the RBK news article refers to Russia's concerns that the EU-Ukraine Association Agreement would involve the threat of re-export of European goods under the guise of Ukrainian goods. Exhibit UKR-80 reports that the Ukrainian Minister of Foreign Affairs announced (on 1 December 2015) the "failure of negotiations on the risks of the association of Kiev with the European Union. The head of the foreign affairs agency called the terms suggested by Moscow 'unacceptable'." The Russian Minister of Economic Development is also reported to have stated that he expected the parties would be able to reach an agreement on the Russian proposals later in December 2015, with the news article noting that the next round of negotiations was scheduled for 21 December 2015. A subsequent UNIAN news agency article of 30 December 2015 (Exhibit UKR-78) reported that on 22 December 2015, the Russian State *Duma* had unanimously passed a law to suspend the FTA with Ukraine, effective 1 January 2016, citing alleged conflicts between Ukraine's obligations under the EU-Ukraine Association Agreement and the provisions of its FTA with Russia regarding duty-free trade. The Panel considers that it is logical to infer that the negotiations that were scheduled for 21 December 2015 ultimately did not succeed in finding solutions to Russia's concerns regarding the EU-Ukraine Association Agreement in a manner that was acceptable to all parties, and that accordingly, the Russian State *Duma* took action purporting to suspend Russia's obligations under the CIS-FTA as regards Ukraine. The Panel therefore considers that there is a sufficient basis in the evidence to support the factual statement in the third sentence of paragraph 7.12 of the Report. The Panel has, however, modified the sentence by deleting the word "practical" and changing footnote 37 to reflect that this sentence, as modified, is supported by Exhibit UKR-80 read in conjunction with Exhibit UKR-78. The Panel has also moved what was previously paragraph 7.14 to paragraph 7.13 because of the relationship between this paragraph and the discussion in paragraphs 7.9-7.12 of the Report.

2.33. Ukraine requests the Panel to delete the references to the consultations requests in WT/DS532/1 and WT/DS525/1 in paragraphs 7.14, 7.15 and 7.18(a). Ukraine considers that, notwithstanding the clarifications provided in footnotes 42 and 49, the inclusion of the references to these disputes "in essence implies a connection" between the measures at issue in those disputes and the facts in paragraphs 7.5 through 7.19 of the factual background for this dispute. Ukraine argues that there is no basis in any of the submissions before the Panel for such a connection, nor does the Panel have any jurisdiction to refer to those measures given that its terms of reference do not include the matters in DS532 or DS525. Ukraine also suggests that the statement "since 2014" in the first sentence of paragraph 7.14 is incorrect, as made clear in subparagraph (c) of that paragraph, which states that certain measures are alleged to have been in place since 2013. Russia objects to the requested modifications, noting that the references to WT/DS532/1 and WT/DS525/1 are made as part of the factual background and that the Panel does not provide any evaluation of the measures at issue in those disputes. Russia also requests that, should the Panel make the requested modifications, it nevertheless reflect in the factual background section the evidence on the record regarding the measures adopted by Ukraine as set forth in paragraphs 24-30 of

Russia's second written submission, containing information that Russia states is "highly important for establishing the factual background for the developments after 2014."

2.34. The Panel has stated explicitly in footnotes 42 and 49 of its Report that the references to the alleged measures that are the subject of the consultations requests in WT/DS532/1 and WT/DS525/1 are made solely as factual background and that the Panel does not link the consultations requests in those disputes to the present proceedings. The Panel does not engage in any evaluation or further discussion of the measures described in those consultations requests. The Panel therefore rejects Ukraine's request. The Panel has, however, modified the introductory sentence to paragraph 7.14 to clarify that Russia is alleged by Ukraine to have banned imports of various Ukrainian goods since 2013, rather than 2014.

2.35. Ukraine additionally requests that, should the Panel decide to retain the references to the measures at issue in WT/DS525/1, it add a new paragraph reflecting Ukraine's argument that the measures challenged by Ukraine in the present dispute were taken "before Ukraine allegedly adopted any of the measures to which the Russian Federation referred in these proceedings". Ukraine also requests that the Panel add a footnote to paragraph 7.18, referring to paragraph 55 of Ukraine's opening statement at the second meeting of the panel.

2.36. Paragraph 7.18 already sets forth, in the description of the alleged measures challenged by Russia in its consultations request in WT/DS525/1, the dates on which Russia alleges such measures were adopted by Ukraine. There is no basis for the Panel to make any other statement regarding such measures, which as Ukraine has previously noted, are not before this Panel. The Panel therefore declines to add the new paragraph requested by Ukraine.

2.37. Ukraine requests the Panel to change the reference in paragraph 7.13 to Federal Law No. 410-FZ "purporting to suspend" the CIS-FTA with respect to Ukraine and instead use the term "suspending". Ukraine considers that the use of the verb "purport" implies that the law merely intended to suspend the CIS-FTA, whereas the law expressly states that the State *Duma* decided to "suspend" the CIS-FTA. Ukraine also requests that the Panel add to the same paragraph that the Russian State Legal Department "stated" (rather than "indicated") that "such an act constitutes a fundamental change of circumstances, which were essential for Russia at the conclusion of the [CIS-FTA]". Ukraine considers this is necessary to reflect the "entire explanation" given by the Russian State Legal Department as to the suspension of the CIS-FTA. Russia does not respond specifically to these requests.

2.38. The Panel does not take a position on whether Federal Law No. 410-FZ did effectively suspend the CIS-FTA with respect to Ukraine. For this reason, the Panel considers it accurate to state that Federal Law No. 410-FZ *purports* to suspend the CIS-FTA with respect to Ukraine. Accordingly, the Panel declines this aspect of Ukraine's request. The Panel has decided to grant the second aspect of Ukraine's request, and accordingly has modified the second sentence of paragraph 7.13 to include the entire statement of the Russian State Legal Department in Exhibit UKR-84.

2.39. Ukraine requests the Panel to: (i) modify paragraph 7.16(a) to add a footnote reference to Resolution No. 959 in order to provide authority for this statement, (ii) modify the description of the measures in paragraph 7.16(c) to clarify that the 2016 Belarus Transit Requirements also specify that the traffic in transit in question may only leave the territory of Russia from specific points on the Russia-Kazakhstan border, and (iii) remove the term "temporary" from the description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods (as well as from the descriptions in paragraphs 7.346 and 7.347 and footnotes 461 and 487). Russia refers only to the last of these requests, opposing the request on the ground that the text of the instrument adopting the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods refers to the bans in question as "temporary" and has an expiry date.

2.40. The Panel has decided to add the requested footnote reference to paragraph 7.16(a) and to modify paragraph 7.16(c) to reflect the additional details of the 2016 Belarus Transit Requirements, as requested by Ukraine, because these modifications enhance the clarity and accuracy of the Report. As regards Ukraine's third requested modification, the Panel notes that the text of Decree No. 319 describes the bans in question as "temporary". The Panel therefore has decided to place the term "temporary" in quotation marks where Decree No. 319 is referred to for the first time.

2.41. Finally, with respect to Section 7.3 of the Report more generally, Ukraine requests that the Panel remove from this section any reference to facts for which there is no basis in the parties' submissions or the evidence before it.

2.42. Aside from the specific comments that have been addressed by the Panel above (in paragraphs 2.15-2.40 of this Annex), Ukraine does not identify any other "facts" for which it alleges there is no basis in the parties' submissions or the evidence before the Panel. The Panel considers that Section 7.3 of the Report sets forth facts that are common knowledge, in the sense that they cannot reasonably be disputed, and moreover, are supported directly or indirectly (or both) by evidence submitted in these proceedings. The Panel therefore declines to make any additional modifications to the Report in response to this general request of Ukraine.

2.5 Section 7.5 of the Report - Russia's invocation of Article XXI(b)(iii) of the GATT 1994

Ukraine's main arguments

2.43. Ukraine requests numerous changes to the summary of Ukraine's arguments in paragraphs 7.31-7.34. Russia objects to certain of Ukraine's proposed modifications on the basis that the proposed wording was nowhere reflected in Ukraine's submissions in these proceedings and requests that Ukraine's assertions regarding established facts be qualified to signify that these are assertions made by Ukraine and not factual statements by the Panel.

2.44. The Panel has made a number of modifications to the summary of Ukraine's arguments in paragraphs 7.31-7.34 of the Report, in response to Ukraine's requests. The summary has been modified to commence with Ukraine's jurisdictional arguments, before describing Ukraine's main arguments concerning the burden of proof, and then the standard of review under the chapeau of Article XXI(b). The Panel has based its revisions of the summary of Ukraine's main arguments on Ukraine's drafting suggestions, but in certain places uses the language from Ukraine's submissions, rather than the language that Ukraine proposes in its comments on interim review. Moreover, the Panel notes that the summary of arguments in Section 7.5.1 is expressly confined to the "main" arguments of the parties. Where relevant to the analysis, the Panel refers to the more specific arguments advanced by the parties as part of the Panel's analysis.

The measures at issue and their existence

2.45. Ukraine requests a number of modifications to the description of the measures at issue in paragraph 7.106.

2.46. First, as concerns paragraph 7.106(a), Ukraine argues that the Panel has failed to refer to what Ukraine calls the "2016 general transit ban prohibiting traffic in transit of all goods from the territory of Ukraine, destined for the territory of Kazakhstan and the Kyrgyz Republic, from entering and passing through the territory of the Russian Federation at the border between Ukraine and the Russian Federation". Ukraine argues that the Panel's description of the "2016 general transit ban" fails to reflect that such a "ban" has a wider product scope than the "2016 product specific transit bans". Ukraine also argues that the Panel's description of the so-called "Belarus route requirement" aspect of the 2016 Belarus Transit Requirements does not mention that entry to Russia via Belarus is permitted only via two entry control points at the Belarus-Russia border, and that exit from Russia to Kazakhstan is permitted only at three exit control points on the Russia-Kazakhstan border, or provide specific details regarding the conditions attached to the identification and registration card components of the measures. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications.

2.47. The Panel has previously observed (in paragraph 2.7 of this Annex) that throughout its submissions, Ukraine has referred to Russia's prohibition on all traffic in transit destined for Kazakhstan or the Kyrgyz Republic from transiting across Russia *directly from the Ukraine-Russia border* (requiring instead that it detour via Belarus and be subject to a number of other additional requirements) as a "general transit ban", or a "ban on direct and indirect transit" applying to all goods in transit by road or rail transport, for which there are no exceptions to the "direct" ban and for which there exists one "derogation" for "indirect" transit, namely, the so-called "Belarus route

requirement".[7] The Panel considers that use of the term "ban" on direct and indirect transit with a derogation for indirect transit through the Belarus route is an unclear way to describe the basic import of the 2016 Belarus Transit Requirements. The measures themselves do not prohibit outright all traffic in transit from Ukraine, but require (among other things) that such traffic may transit across the territory of Russia only from specific control points on the Belarus-Russia border. Accordingly, the Panel has decided to refer to these measures as "requirements" rather than "bans". The Panel's description of the operation of the Belarus route requirement component of the 2016 Belarus Transit Requirements is clearly stated in subparagraphs 7.106(a) and 7.357(a) of the Report.[8] The Panel also considers that the use of the term "requirements" to refer to the 2016 Belarus Transit Requirements, and "ban" to refer to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods also makes clear that the "requirements" apply generally to *all* traffic in transit, while the "bans" apply to *specific* goods in transit. The Panel therefore considers that there is no basis for Ukraine's assertion that the Panel has neglected to refer to the so-called "ban" aspect of the 2016 Belarus Transit Requirements.

2.48. On the other hand, the Panel considers that the requested modifications to the description of the 2016 Belarus Transit Requirements, to provide certain additional details will improve the overall clarity and accuracy of the Report. These additional details concern: (i) the scope of the 2016 Belarus Transit Requirements, as applying to *all* international cargo transit by road and rail, (ii) the content of the conditions related to identification seals and registration cards, and (iii) the permissible control points for procuring these identification seals and registration cards, at specific entry points on the Belarus-Russia border and exit points on the Russia-Kazakhstan border, all of which are part of the 2016 Belarus Transit Requirements. The Panel has therefore decided to modify the relevant paragraphs of the Report to reflect these additional details of the 2016 Belarus Transit Requirements, both in paragraph 7.106(a) and elsewhere.

2.49. Second, as concerns paragraph 7.106(b), Ukraine argues that the Panel's description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods fails to refer to the request and authorization requirements that apply for traffic in transit of non-zero duty and Resolution No. 778 goods to cross the Belarus-Russia border, and the transit restrictions that would apply, should a derogation be granted, to traffic in transit passing via the Belarus route. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications. However, Russia requests that, should the Panel modify paragraph 7.106(b), it note that traffic in transit subject to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods may only occur pursuant to a derogation from the bans, which must be authorized by Russia on the request of Kazakhstan and/or the Kyrgyz Republic.

2.50. The Panel notes that one of Ukraine's complaints (at paragraph 7.1(c) of the Report) is that, although there is a procedure which exceptionally permits transit of goods subject to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, it is unclear how this derogation procedure operates, and to date, no such derogations have been granted. Nonetheless, the Panel has decided to amend the description of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods to reflect the procedure for requesting a derogation, as well as the additional conditions that would apply, should such a derogation be granted, both in paragraph 7.106(b) and elsewhere.

2.51. Third, as concerns paragraph 7.106(c), Ukraine argues that the Panel's description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods fails to refer to (i) the distinct product scope of the measures introduced by *Rosselkhoznadzor* Instruction No. FS-NV-7/22886 of 21 November 2014 (concerning veterinary goods included in the list annexed to Resolution No. 778) and *Rosselkhoznadzor* Instruction No. FS-AS-3/22903 of 21 November 2014 (concerning plant goods included in the list annexed to Resolution No. 778); (ii) the distinct requirements that *Rosselkhoznadzor* Instruction No. FS-AS-3/22903 imposes on traffic in transit of

[7] See Ukraine's first written submission, paras. 32-34. Ukraine concedes at paragraph 64 of its first written submission that the Belarus route requirement means that "indirect" traffic in transit "through that specific route is not banned", while at the same time referring to the Belarus route requirement as the "sole derogation to the ban" and referring in the next paragraph of its first written submission once again to the "general ban on direct and indirect traffic in transit."

[8] The Panel also examines these measures based on a close analysis of the text of Ukraine's panel request (and the differences between the presentation of the measures in Ukraine's panel request and first written submissions) in paras. 7.265-7.266 and 7.272-7.273 of the Report.

plant goods included in the list annexed to Resolution No. 778; and (iii) the fact that the requirements applicable to plant goods included in the list annexed to Resolution No. 778 apply, by virtue of *Rosselkhoznadzor* Instruction No. FS-AS-3/22903, as of 24 November 2014. Russia considers that Ukraine's comments are an attempt to modify the scope of the measures at issue from that provided in Ukraine's panel request, and thus opposes these requests for modifications.

2.52. The Panel has already referred (in paragraph 2.9 of this Annex) to Ukraine's conflation, in its submissions and in its request for review of the interim report, of the measures at issue with the legal instruments implementing those measures. However, the Panel has no objection to providing greater detail concerning the different ways in which the two *Rosselkhoznadzor* Instructions affect the transit of veterinary goods, and of plant goods. The Panel has therefore decided to modify the description of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods to this effect, both in paragraph 7.106(c) of the Report and elsewhere.

Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

2.53. Ukraine requests two modifications to the description of Russia's position on whether the measures were "taken in time of war or other emergency in international relations" in paragraph 7.112. First, Ukraine requests that the phrase "imposing measures at issue" in the sentence "Russia … refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue" be replaced with "the measures introduced by Decrees No. 1, No. 319, No. 560, and Resolutions No. 1, No. 147, and No. 276". Ukraine considers that the statement made by Russia had no bearing on the "2014 transit ban and other transit restrictions" or the "de facto application of the 2016 general and product-specific bans in Decree No. 1, as amended".

2.54. Second, Ukraine requests that the Panel modify, in the second sentence of paragraph 7.112, its reference to Russia's statement at paragraph 6 of its closing statement at the first meeting of the Panel. Ukraine requests that the Panel remove the phrase "the dispute raises" and replace it with "the WTO has no competence over [the issues concerning politics, national security and international peace and security]".

2.55. Russia objects to Ukraine's proposed modifications to Russia's arguments, stating that paragraph 7.112 correctly summarizes Russia's position, in particular as reflected in paragraph 6 of Russia's closing statement at the first meeting of the Panel.

2.56. The Panel considers that the first sentence of paragraph 7.112 accurately states Russia's position in these proceedings. By way of support, the Panel notes that in paragraph 16 of Russia's first written submission, Russia states that it "took a number of actions which the Russian Federation considered necessary for the protection of essential security interests, including those that Ukraine challenges in the present dispute". This is a general reference to the challenged measures, including the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as well as the so-called "de facto measure". In paragraph 17 of Russia's first written submission, Russia does refer specifically to "the measures introduced by Decrees No. 1, No. 319, No. 560, and Resolutions No. 1, No. 147, and No. 276", but only to state that these measures were "adopted in accordance with the Federal Law of 30 December 2006 No. 281-FZ 'On the Special Economic Measures'". Subsequently, in paragraph 19, Russia states that "*the measures adopted*, in particular Decrees No. 1, No. 319, No. 560 and Resolutions No. 1, No. 147, No. 276 … *were introduced by the Russian Federation at the time of emergency in international relations as actions that are necessary for the protection of essential security interests of the Russian Federation, as provided for in the GATT Article XXI*." Finally, in paragraphs 33 and 74 of Russia's first written submission, Russia states that the "2014 transit ban and other transit restrictions" and the "de facto application of the 2016 general and product-specific bans in Decree No. 1, as amended", respectively, should they be found to exist, are covered by Article XXI(b)(iii) of the GATT 1994.

2.57. As for the requested modification to the second sentence of paragraph 7.112, the Panel considers that the sentence accurately reflects Russia's position. The Panel has added a footnote reference to the third paragraph of Russia's closing statement at the second meeting of the Panel to clarify this.

2.58. Ukraine requests the Panel to modify the description of Ukraine's position regarding whether the measures were "taken in time of war or other emergency in international relations" in paragraph 7.113 to reflect Ukraine's argument that Russia has "not satisfied its burden of proof by failing to … adequately identify and establish[] what specific emergency in international relations, [] causing … the adoption of each measure at issue, occurred in 2014 and continued to exist during these panel proceedings." Russia responds that it does not agree with Ukraine's reasoning in requesting these modifications but does not oppose such modifications.

2.59. The Panel does not consider that Ukraine's proposed modification to paragraph 7.113 changes the meaning of that sentence in a way that improves the accuracy of the Report or improves the clarity of the sentence. The Panel has therefore decided to decline Ukraine's request.

2.60. Additionally, Ukraine requests the Panel to adjust footnote 192 to paragraph 7.113 to remove the text stating that Ukraine "professes not to know what Russia means when it refers to an emergency in international relations that arose in 2014". According to Ukraine, when the text of paragraph 142 of Ukraine's second written submission and paragraph 64 of Ukraine's opening statement at the second meeting of the Panel are considered, Ukraine's position was "in essence" that there was no evidence or argumentation before the Panel to show the existence of the particular emergency in international relations.

2.61. The Panel notes that the text of the provisions of Ukraine's submissions referred to above clearly distinguish between: (i) the question of the identity of the emergency in international relations, and (ii) the evidence and argumentation to establish the existence of any such emergency. This was also Russia's understanding of Ukraine's position, for example, in paragraph 4 of Russia's closing statement at the second meeting of the Panel. The Panel therefore considers that the text of footnote 192 accurately describes Ukraine's position and declines to make the requested modification.

2.62. As regards the references to Ukraine's 2016 Trade Policy Review Report in paragraphs 7.115 and 7.118 and footnote 198, Ukraine requests the Panel to confirm that, during the second substantive meeting, Russia referred specifically to paragraph 1.13 of that document, and if it did not, to modify references to remove the citation specifically to paragraph 1.13. Russia does not respond specifically to this request.

2.63. The Panel confirms that, in response to a question from the Chair posed to Russia during the second substantive meeting, Russia referred specifically to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report.

2.64. Both parties request modifications to paragraph 7.122. Russia requests that the Panel state that, by December 2016, the situation between Ukraine and Russia was recognized by "certain countries" as involving armed conflict, rather than being "recognized internationally as involving armed conflict." Russia argues that the Panel should take into account the number of countries (including Russia) that voted against UN General Assembly Resolution No. 71/205 of 19 December 2016 and that, in the light of this factor, the situation cannot be considered to be "internationally recognized armed conflict". Russia also asserts that it is not a party to any armed conflict that Ukraine is involved in, "including the military conflict in the east of Ukraine, that among other factors pose a threat, in particular, to the security of the Russian State border."

2.65. Ukraine does not comment specifically on Russia's request; rather, Ukraine requests the Panel to remove from footnote 204 to paragraph 7.122 the statement that UN General Assembly Resolution No. 71/2015 "makes explicit reference" to the Geneva Conventions of 1949, "which apply in cases of *declared war or other armed conflict* between High Contracting Parties".

2.66. As previously explained in paragraph 7.8 of the Report, in UN General Assembly Resolution No. 71/205 of 19 December 2016, the UN General Assembly condemned what is referred to in the Resolution as the "temporary occupation of part of the territory of Ukraine" by Russia. This Resolution refers to Russia as an "occupying Power", and to the prohibition under the Geneva Conventions of 12 August 1949 for the occupying Power to compel a protected person to serve in its armed or auxiliary forces. Moreover, as noted previously in footnote 30 of the Report, UN General Assembly Resolution No. 71/205 of 19 December 2016 received 70 votes in favour, 26 against (including Russia) and 77 abstentions. The Panel considers that, as the resolution was adopted by the UN

General Assembly with the constitutionally required majority, it constitutes the position of the UN General Assembly. Moreover, the fact that the Resolution makes express reference to the Geneva Conventions of 12 August 1949 (which by their terms apply in cases of declared war or other armed conflict between High Contracting Parties), means that it is accurate to state that by December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. The Panel therefore declines both parties' requested modifications to paragraph 7.122. However, in order to improve the precision of this aspect of the Panel's analysis, the Panel has decided to replace the term "internationally" with the phrase "by the UN General Assembly".

Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

2.67. Ukraine expresses concern that, in paragraph 7.128, the description of Ukraine's position regarding the scope of a Member's discretion to determine its own level of protection of its essential security interests, juxtaposed with its argument that this does not mean that a Member may unilaterally define what its essential security interests are, "incorrectly suggests that Ukraine argued that there is no discretion in Member States' definition of its essential security interests". Ukraine requests the Panel to modify the third sentence of paragraph 7.128 to incorporate Ukraine's observation in paragraph 142 of its opening statement at the first meeting of the Panel that, because the phrase "essential security interests" forms part of the covered agreements, it is to be interpreted in accordance with customary rules of interpretation of public international law. Russia does not respond specifically to this request.

2.68. The Panel agrees that the requested modification accurately reflects Ukraine's arguments and thus has decided to make the modification to paragraph 7.128 of the Report.

2.69. With respect to the last sentence of paragraph 7.128, which refers to Ukraine's argument that Russia cannot invoke Article XXI(a) of the GATT 1994 to evade its burden of proof, Russia notes that the Panel has not referred to Russia's arguments regarding Article XXI(a) or examined those arguments. Russia requests the Panel to rectify this omission. Ukraine requests only that, should the Panel include a sentence explaining Russia's reliance on Article XXI(a) of the GATT 1994, it note that Russia did not invoke this provision in relation to Ukraine's claims under Articles X:1 and X:2 of the GATT 1994, or paragraphs 1426, 1427 or 1428 of Russia's Working Party Report.

2.70. The Panel agrees to modify paragraph 7.128 by adding to the last sentence of that paragraph, a reference to Russia's arguments regarding Article XXI(a). The Panel disagrees with Ukraine that Russia did not invoke Article XXI(a) in relation to Ukraine's claims under Articles X:1 and X:2 of the GATT 1994 or its claims under Russia's Accession Protocol, based on its reading of the references to Russia's submissions in footnote 210 of the Report with Russia's arguments at paragraph 37 of its first written submission. The Panel does not consider that it is necessary for the resolution of this dispute for it to further address the parties' arguments concerning Article XXI(a) and therefore declines Russia's request that the Panel examine the arguments pertaining to Article XXI(a) of the GATT 1994.

2.71. Russia asserts that it is not a party to any armed conflict that Ukraine is involved in, including military conflict in the east of Ukraine. Russia therefore requests the Panel to modify the first sentence of paragraph 7.137 to remove the description of the 2014 emergency as "one involving armed conflict with a neighbouring country and exhibiting the other features identified by Russia". Ukraine does not respond specifically to this request.

2.72. The Panel does not take a position on Russia's involvement in any armed conflict with Ukraine. It is not necessary for the Panel to make any such assessment for purposes of the point that the Panel makes in paragraph 7.137 of the Report. The Panel has therefore decided to modify the first sentence of paragraph 7.137 so that it conforms to the Panel's description of the nature of the 2014 emergency in paragraph 7.143.

2.73. Russia also requests the Panel to elaborate upon the last sentence of paragraph 7.137 by providing guidance as to what might be an indication of invocation of Article XXI of the GATT 1994 that is used "simply as a means to circumvent" one's obligations under the GATT 1994. Ukraine

considers that the Panel need not respond to Russia's request, as Russia has not explained why such guidance is required for the positive resolution of this dispute.

2.74. The Panel does not consider that any elaboration of the last sentence of paragraph 7.136 would improve the clarity or coherence of the Panel's reasoning, and therefore declines this request.

2.75. Ukraine objects to the inclusion of the second sentence of paragraph 7.141 (which states that Ukraine does not indicate whether it considers Ukraine's decision to pursue economic integration with the European Union rather than with Russia, and consequently the 2016 measures, to be related also to the emergency in international relations that had arisen between Ukraine and Russia in early 2014). Ukraine requests that the Panel refer instead to paragraphs 60 through 63 of Ukraine's opening statement at the second meeting of the Panel, in which Ukraine considers that it "argued and showed" that its decision to pursue economic integration with the European Union was taken well before 2014 or 2016. Russia does not respond specifically to this request.

2.76. The Panel disagrees that Ukraine has argued or demonstrated that its decision to pursue economic integration with the European Union was taken "well before" 2014 or 2016. While negotiations on the EU-Ukraine Association Agreement may have begun in 2008, as Ukraine states in paragraph 60 of its opening statement at the second meeting of the Panel, the political part of the EU-Ukraine Association Agreement was signed on 21 March 2014, while the economic part, including the DCFTA, was signed on 27 June 2014. The news reports of Russia's reaction to Ukraine's decision to enter into a free trade area with the European Union, discussed in Exhibits UKR-78, UKR-79 and UKR-80, also support the inference that the operative decision was made by Ukraine in 2014, through its signing of the EU-Ukraine Association Agreement, and not in 2008, when Ukraine began discussions with the European Union. The Panel notes that Ukraine states (at paragraph 24 of its first written submission) that "[i]nstead of becoming a party to the EaEU Treaty, Ukraine concluded, *in 2014*, an Association Agreement with the European Union", indicating that, from the perspective of Ukraine-Russia relations, the definitive decision on the political and economic direction of Ukraine was taken in 2014.[9] In sum, the Panel sees nothing in paragraphs 60 through 63 of Ukraine's opening statement at the second meeting of the Panel that renders inaccurate or misleading the second sentence of paragraph 7.141. The Panel therefore declines to make the requested modifications.

2.77. Russia requests that the Panel refrain from stating, in paragraph 7.143 and elsewhere in the Report (i.e. paragraphs 7.9, 7.119, 7.122 and 7.142) that sanctions applied by other countries against Russia from 2014 were responses to the 2014 emergency in international relations. Rather, Russia requests the Panel to confine itself to stating that sanctions were imposed against Russia, and to abstain from any further evaluation of such sanctions. Ukraine responds by noting that it has requested that paragraph 7.9 be deleted. Ukraine also notes that Russia does not propose that the phrase "that other countries had imposed" in the final sentence of paragraph 7.143 be deleted, and in the light of the above, the Panel need not give effect to Russia's request with respect to paragraphs 7.119, 7.122 and 7.142.

2.78. The Panel notes that, despite Russia's request above, in its comments on Ukraine's requests for interim review, Russia opposed Ukraine's request that the Panel delete paragraph 7.9 (see paragraph 2.21 of this Annex), arguing that the statement in paragraph 7.9 that the events in Ukraine in 2014 led to the imposition of economic sanctions against Russian entities and persons "comes from common knowledge, objective facts and publicly available information as well as paragraphs 20 to 30 of the Second Written Submission of the Russian Federation."[10] Moreover, in its second written submission, Russia refers to the decision of certain states or unions of states that have decided to apply economic sanctions in respect of Russian legal and natural persons, before referring specifically to the European Union, which Russia accuses of attempting to "shift focus from such unilateral actions that are applied in respect of Russia, in particular by the EU and Ukraine in violation of the UN Charter and that are impairing the authority of the UN Security Council."[11] Russia refers specifically in a footnote to two paragraphs from the European Union's response to Panel Question No. 2 to the third parties, where the European Union discusses the unspecified events of

[9] Emphasis added.

[10] Russia's comments on Ukraine's request for review of the interim report, dated 28 February 2019, para. 12.

[11] Russia's second written submission, paras. 20-21.

2014, before referring to the "events in 2014 in the Crimean peninsula and in Eastern Ukraine".[12] Russia then states, with respect to this portion of the European Union's submission, that Russia considers the measures at issue to be a reaction to an internationally wrongful act and/or to an unfriendly act of a foreign state or its bodies and officials which poses a threat to the interests and security of Russia and/or violates the rights and freedoms of its citizens.[13] Finally, in its opening statement at the second meeting of the Panel, Russia again refers to "[u]nilateral measures, sanctions, imposed by [a neighbouring country that had lost control of its side of the border] or by other countries … especially when such measures are taken without an authorization from the United Nations", referring back to the discussion in paragraphs 20 and 25-29 of Russia's second written submission.

2.79. Although Russia's references to the events of 2014 were somewhat cryptic, it is reasonable to infer, based on the evidence before the Panel and facts that are common knowledge and which cannot reasonably be disputed, that the sanctions applied by certain other countries against Russia from 2014 were responses to the emergency in international relations, and that this is also the view of Russia, as reflected in paragraphs 20-30 of its second written submission and in its response to Ukraine's request that the Panel delete paragraph 7.9 of the interim report. The Panel therefore declines to make the requested modifications to paragraph 7.143 and paragraphs 7.9, 7.119, 7.122 and 7.142. The Panel emphasizes, however, that in stating that the sanctions applied by certain other countries against Russia from 2014 were responses to the emergency in international relations, the Panel does not make any evaluation of the legality of those sanctions.

2.80. In paragraph 7.144, Russia requests the Panel to replace the reference to "the international community" with the reference to "certain countries".

2.81. The Panel has already explained, in response to Russia's request for modifications to paragraph 7.122 (see paragraph 2.66 of this Annex), that the fact that UN General Assembly Resolution No. 71/205 was adopted by the constitutionally required majority of UN Member States, constitutes the position of the UN General Assembly on the matter, and the fact that the Resolution makes express reference to the Geneva Conventions of 12 August 1949 (which by their terms apply in cases of declared war or other armed conflict between High Contracting Parties), means that it is accurate to state that by December 2016, the situation referred to in the UN General Assembly resolution was recognized by the UN General Assembly as involving armed conflict. However, for the same reasons discussed above (at paragraph 2.66 of this Annex, in relation to requested modifications to paragraph 7.122), the Panel has decided to replace the phrase by "the international community" with the phrase "by the UN General Assembly" in paragraph 7.144.

2.6 Section 7.6 of the Report - Ukraine's claims of WTO-inconsistency of the measures at issue

The Panel's conditional conclusions, factual findings and exercises of judicial economy

2.82. Russia considers that the Panel's analysis in Section 7.6 contradicts the Panel's previous reference, in paragraph 7.152, to the Appellate Body's statements in *US – Wool Shirts and Blouses*, concerning the incompatibility with Article 3.7 of the DSU of panels considering or deciding issues that are not "absolutely necessary to dispose of the particular dispute" between the parties. Russia argues that the Panel has fulfilled the requirements of Article 19.1 of the DSU by concluding that Russia has not acted inconsistently with its obligations under the GATT 1994 or with Russia's commitments in its Accession Protocol, and that any further analysis does not serve the purpose of prompt settlement. Russia therefore considers that Section 7.6 should be confined to a description of the relevant facts, without engaging in any legal analysis or further conclusions.

2.83. Ukraine strongly objects to Russia's request, which it interprets as a request for the Panel to exercise judicial economy by foregoing altogether a consideration of Ukraine's claims. Ukraine argues that giving effect to such a request would mean that, should the Appellate Body reverse the Panel's findings regarding Article XXI(b)(iii) of the GATT 1994 with regard to some or all of the measures at issue, there would be "a severe risk of no resolution whatsoever of the dispute". This follows, in Ukraine's view, from the fact that Article XXI of the GATT 1994 is an affirmative defence

[12] European Union's response to Panel question No. 3, paras. 4-5.
[13] Russia's second written submission, para. 22.

in justification of measures that are otherwise inconsistent with the GATT 1994. According to Ukraine, without a prior finding of violation, there is no cause to apply an affirmative defence such as Article XXI of the GATT 1994. Ukraine therefore requests the Panel to reject Russia's request.

2.84. For the reasons already explained in paragraphs 7.152-7.154 of the Report, the Panel disagrees with Russia that the Panel's discussion of Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and commitments in Russia's Working Party Report, contained in Section 7.6, is at odds with the Appellate Body's very clear statement of the proper role of panels at page 339 of the Appellate Body Report in *US − Wool Shirts and Blouses*. The Panel therefore declines Russia's request.

2.85. Ukraine requests the Panel to modify the first sentence of paragraph 7.157 by changing the reference from "three measures" to "the measures at issue", in order to avoid giving the impression that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are three measures, when in fact these terms collectively describe the measures at issue. Ukraine also requests the Panel to refer, in the last sentence of paragraph 7.156, to the "cost of using a transit route" in the summary of the factors relevant to the determination of what routes are most convenient for international transit, as this factor was listed in paragraph 78 of Ukraine's opening statement at the first meeting of the Panel. Russia does not make any specific comments on these requests.

2.86. The Panel considers that the requested modifications would improve the clarity of the Report and has therefore decided to make the modifications.

2.87. Ukraine requests the Panel to modify the text of paragraph 7.160 to reflect that Ukraine's interpretative argument that a finding of inconsistency with any other paragraph of Article V will be sufficient to establish an inconsistency with the first sentence of Article V:2 was qualified to apply to cases where "a measure is applied to goods transiting via the most convenient routes of passage". Russia does not comment specifically in this request.

2.88. The Panel has reviewed paragraph 72 of Ukraine's opening statement at the first meeting of the Panel and disagrees with Ukraine that, in that paragraph, Ukraine qualified its interpretive argument to apply only to the situation where a measure is applied to goods transiting via the most convenient routes of passage. Rather, the Panel reads the last sentence of paragraph 72 as providing an example of where the general interpretive position applies, i.e. "[t]hat is the case where …". However, the Panel notes that at paragraph 32 of Ukraine's second written submission, Ukraine recasts its interpretive argument so as to qualify it as applying only in the situation where a measure is applied to goods transiting via the most convenient routes of passage. This being so, the Panel has decided to modify paragraph 7.160 as requested by Ukraine, in order to reflect the evolution of Ukraine's interpretive argument throughout the proceedings.

2.89. Ukraine also requests that, in relation to paragraph 7.160, the Panel include a specific reference to the second sentence of Article V:2 as one of the paragraphs of that provision to which Ukraine's interpretive argument applies, and that the reference to "establish an inconsistency of the first sentence of Article V:2" be changed to "establish that such a measure is also inconsistent with the obligation of a WTO Member to guarantee freedom of transit via the most convenient routes pursuant to the first sentence of Article V:2." Russia does not comment specifically on these requests.

2.90. The Panel considers that these proposals accurately reflect Ukraine's arguments and that the requested modifications would improve the accuracy and clarity of the Report. It has therefore decided to make these modifications.

2.91. Ukraine requests, with respect to Sections 7.6.2.1.3 and 7.6.2.1.4, that the Panel make factual findings under the first sentence of Article V:2 of the GATT 1994 in relation to "all of the measures" with respect to which Ukraine has brought claims. Ukraine argues that it is not contested that it has brought claims in relation to the following measures found to fall within the Panel's terms of reference:

a. the 2014 transit ban in Instruction No. FS-NV-7/22886, as amended by Instruction No. FS-EN-7/19132;

b. the 2014 transit restriction, as set out in the same instruments, restricting traffic in transit of veterinary Resolution No. 778 goods, through the territory of the Russian Federation, destined for third countries by requiring that such goods enter that territory "only through the checkpoints located at the Russian part of the external border of the Customs Union" listed in Instruction No. FS-NV-7/22886;

c. the 2016 general and product-specific transit bans in Decree No. 1, as amended by Decree No. 319 and Decree No. 643; and

d. the 2016 general and product-specific transit restrictions, as set out in the same instruments as well as in Resolutions Nos. 1, 147 and 276 (as amended) and PJSC Russian Railways Order No. 529r, requiring that traffic in transit of all goods by road and rail transport from the territory of Ukraine, through the territory of the Russian Federation, to the territory of Kazakhstan and the Kyrgyz Republic passes via the Belarus route (which includes the entry and exit control point requirement) and satisfy the identification and registration card requirements, as well as such requirements as applying to traffic in transit of Resolution No. 778 goods.

2.92. However, Ukraine considers that the Panel's analysis in Sections 7.6.2.1.3 and 7.6.2.1.4 is limited to "measures that prohibit traffic in transit". Ukraine considers that this is not consistent with the Panel's conclusion that "had the measures had been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994" in paragraph 7.199.

2.93. The Panel disagrees with Ukraine's characterization of its factual findings in Sections 7.6.2.1.3 and 7.6.2.1.4 as omitting to cover some of the measures at issue, namely, the aspects of the measures that Ukraine refers to as the "transit restrictions" (as opposed to "transit bans").

2.94. With respect to the measures that comprise the 2016 Belarus Transit Requirements, the Panel has clearly stated throughout the Report that these measures comprise *both*: (i) requirements that international cargo transit by road and rail from Ukraine destined for Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus (which Ukraine refers to as the "2016 general transit ban") *and* (ii) additional conditions relating to identification seals and registration cards, which must be obtained and removed at particular permanent and mobile checkpoints on the Belarus-Russia border and the Russia-Kazakhstan border respectively (which Ukraine refers to as the "2016 general transit restrictions").

2.95. The Panel uses the term 2016 Belarus Transit Requirements to describe these measures collectively and notes that: (i) both the Belarus route requirement and additional conditions are set forth in the same legal instrument, namely Decree No. 1 (and amendments and implementing instruments); (ii) the additional conditions relating to identification seals and registration cards, which must be obtained and removed at particular permanent and mobile checkpoints on the Belarus-Russia border and the Russia-Kazakhstan border, respectively, apply only to road and rail transit which is subject to the Belarus route requirement; and (iii) the clear function of these additional conditions is to verify and ensure that covered goods comply with the Belarus route requirement. Finally, these additional conditions are also directly addressed in paragraph 7.190 of the Report.

2.96. The same logic applies to the 2016 Transit Bans on Non-Zero Duty Goods and Resolution No.778 Goods, which Ukraine also refers to as two separate measures (the "2016 product-specific transit ban" and the "2016 product-specific transit restrictions"). The Report clearly states that these measures comprise: (i) bans on all road and rail transit from Ukraine or goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, as well as goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic (which Ukraine refers to as the "2016 product-specific transit ban") and (ii) a derogation procedure under which goods exceptionally authorized by Russian authorities upon request by Kazakhstan or the Kyrgyz Republic would be subject to the 2016 Belarus Transit Requirements (which Ukraine refers to as the "2016 product-specific transit restrictions").

The Panel uses the term 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods to describe these measures collectively and notes that both the transit bans and the derogation procedure are set forth in the same legal instrument, namely Decree No. 1, as amended by Decree No. 319.

2.97. With respect to the measures that comprise the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, the Report also clearly states (e.g. at paragraphs 7.1(d), 7.106(c), and 7.357(c)) that these measures comprise *both*: (i) prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of plant and veterinary goods which are subject to the import bans implemented by Resolution No. 778 (which Ukraine refers to as "the 2014 transit ban") *and* (ii) related requirements that such goods enter Russia through designated Russian checkpoints and be subject to clearance by the appropriate Kazakh or Russian veterinary and phytosanitary surveillance authorities (which Ukraine refers to as "the 2014 transit restrictions").

2.98. The Panel uses the term 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods to describe these measures collectively because: (i) both the transit bans and related requirements are set forth in the same legal instruments, namely Instruction No. FS-NV-7/22886 (and amendments) and Instruction No. FS-AS-3/22903; (ii) the related requirements to enter through designated checkpoints and to receive clearance from the appropriate Kazakh or Russian authorities apply only to goods subject to the prohibitions on transit through Belarus; and (iii) the clear function of these related requirements is to verify and ensure that the covered goods are complying with the prohibition on transit through Belarus. Finally, these related requirements are also directly addressed in paragraph 7.194 of the Report.

2.99. Accordingly, the Panel considers that its conclusions in Sections 7.6.2.1.3 and 7.6.2.1.4 cover all of the measures at issue, and therefore declines Ukraine's request. Moreover, the Panel considers that the discussion of the measures in Sections 7.6.2.1.3 and 7.6.2.1.4 is sufficient to explain the relevant factual aspects of the measures at issue, should the Appellate Body be required to assess Ukraine's respective claims under the first and second sentences of Article V:2.

2.100. Ukraine also requests that, with respect to Section 7.6.2.2.3, the Panel set out its "interpretive analysis of the second sentence of Article V:2 of the GATT 1994". Russia responds generally by reference to its request in paragraph 2.82 of this Annex.

2.101. In paragraph 7.153 of the Report, the Panel explains the rationale for, and scope of, its conditional conclusions on Ukraine's claims of WTO-inconsistency of the measures at issue. Ukraine does not explain why, consistent with the explanation in paragraph 7.153, the Panel should set out an "interpretive analysis" of the second sentence of Article V:2 of the GATT 1994. The Panel therefore declines Ukraine's request.

2.102. Ukraine further requests that, as concerns the Panel's exercise of judicial economy in relation to Ukraine's claims under Articles V:3, V:4 and V:5 (Section 7.6.3), the Panel address Ukraine's claims, or alternatively, at least make factual findings regarding those claims. Ukraine considers that the Panel's exercise of judicial economy over these claims and the lack of any factual findings in the context of such claims means that, in essence, the dispute regarding whether the "transit bans" and, in particular, the other "transit requirements" at issue comply with Article V:3, V:4 and V:5 will remain unresolved.

2.103. The Panel notes that the conclusions in Sections 7.6.2.1.4 and 7.6.2.2.4 are conditional in nature and include an explanation of the operation of the measures at issue (which is apparent on the face of the instruments implementing the measures). Should the Appellate Body reverse the Panel's findings regarding the applicability of Article XXI(b)(iii) of the GATT 1994 to any of the measures at issue, the conditional conclusions in Sections 7.6.2.1.4 and 7.6.2.2.4, which cover all of the measures at issue, provide a sufficient basis for findings that every aspect of the measures at issue would, in different circumstances, be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. In those circumstances, the Panel considers that conditional conclusions on Ukraine's claims under Articles V:3, V:4 and V:5 would not be "absolutely necessary to dispose of the particular dispute" between the parties.[14]

[14] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1996:I, 323, p. 339.

2.104. As regards Ukraine's alternative request, the Panel notes that Ukraine has not pointed to any specific disputed factual issues which the Panel would need to resolve in order to permit the Appellate Body to complete the analysis of Ukraine's claims under Articles V:3, V:4 and V:5 of the GATT 1994. The Panel regards its explanation of the operation of the measures at issue in Sections 7.6.2.1.3 and 7.6.2.2.3, as well as in Section 7.7, of the Report to be sufficient.

2.105. Accordingly, the Panel declines both of Ukraine's requests.

2.106. Ukraine also requests that the Panel make the relevant factual findings regarding Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994 and under paragraphs 1426, 1427 and 1428 of the Working Party Report. Ukraine considers that such factual findings would ensure the ability of the Appellate Body to complete the analysis and would guarantee a positive resolution of the dispute.

2.107. The Panel notes that Ukraine has not pointed to any specific disputed factual issues which the Panel would need to resolve in order to permit the Appellate Body to complete the analysis of Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994, or under paragraphs 1426, 1427 or 1428 of Russia's Working Party Report. The Panel recalls that it has extensively explained the operation of the measures at issue in Sections 7.6.2.1.3 and 7.6.2.2.3, as well as in Section 7.7, of the Report. Accordingly, the Panel declines Ukraine's request.

2.108. Ukraine also argues that the Panel omitted to make making any reference, in Sections 7.6.2.1.3, 7.6.2.2.3, 7.6.2.1.4, and 7.6.2.2.4 to paragraph 1161 of Russia's Working Party Report, despite the fact that Ukraine also brought claims pursuant to that provision.

2.109. The Panel's analysis of paragraph 1161 of Russia's Working Party Report is contained in Section 7.6.4.2.2 and is also reflected in the Panel's findings in Section 8. The Panel therefore declines to make any changes on the basis of this comment.

2.110. Ukraine argues that Russia never sought to rely, as part of its affirmative defence under Article XXI(b)(iii) of the GATT 1994, on any aspects of paragraphs 1161, 1426, 1427 or 1428 of its Working Party Report. Ukraine therefore requests the Panel to remove Section 7.6.4, and instead to draw the necessary inferences from the fact that Russia has not relied on the provisions of its Working Party Report as part of its defence under Article XXI(b)(iii) of the GATT 1994. Russia refers the Panel to paragraph 76 of its first written submission, arguing that throughout the proceedings, Russia has coherently claimed that the measures at issue were adopted consistently with Article XXI of the GATT 1994, and therefore, that such measures are consistent with the provisions of the WTO Agreement, including the GATT 1994 and Russia's Accession Protocol.

2.111. The Panel understands Ukraine's comment to take issue with the fact that Russia did not explicitly advance any arguments regarding the text of the paragraphs 1161, 1426, 1427 and 1428 of its Working Party Report. Ukraine's appears to consider that, in the absence of such arguments, Russia is precluded from relying upon the specific phrases in each of paragraphs 1161, 1426, 1427 and 1428 as part of its "affirmative defence" under Article XXI(b)(iii). The Panel is mindful of its duty under Article 11 of the DSU to make an "objective assessment of the matter before it". While the Panel must not make a case for a party where that party has failed to do so[15], it remains within the competence of a panel to develop its own legal reasoning to support its own findings on the matter under consideration.[16] Moreover, a panel's interpretation of the text of the relevant WTO Agreement cannot be limited by the particular interpretations advanced by the parties, where such an interpretation is necessary to resolve the dispute.[17]

2.112. The Panel recalls that, in its first written submissions, Russia explicitly relied on Article XXI in relation to Ukraine's claims under both the GATT 1994 and paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference. For instance, in paragraph 37 of its first written submission, Russia noted that the measures contested

[15] See e.g. Appellate Body Report, *Japan − Agricultural Products II*, paras. 127-130

[16] See e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.116; and *US − Tuna II (Mexico) (Article 21.5 − Mexico)*, paras. 7.176-7.177.

[17] See e.g. Appellate Body Reports, *EC − Tariff Preferences,* para. 105; and *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 5.215.

by Ukraine were taken pursuant to Article XXI and were therefore "in full consistency with the WTO Agreement, including the GATT and the Accession Protocol".[18] Accordingly, Ukraine was afforded full opportunity to comment on this argument by Russia at any stage following receipt of Russia's first written submission. However, Ukraine at no point in the proceedings raised any arguments contesting the applicability of Article XXI(b)(iii) to any paragraphs of Russia's Working Party Report.

2.113. Given Russia's argument that Article XXI was applicable to commitments in its Working Party Report, the Panel proceeded to conduct a textual and purposive analysis of the relevant paragraphs in order to determine whether Russia could rely on Article XXI in relation these commitments. This analysis was conducted in accordance with customary principles of international law, as well as based on previous guidance by the Appellate Body on the relationship between Article XX of the GATT 1994 and obligations in a Member's Accession Protocol. The Panel concluded that a number of elements, including but not limited to the specific text of each of the provisions in Russia's Working Party Report, supported the conclusion that Russia could rely upon Article XXI(b)(iii) in relation to paragraphs 1161, 1426, 1427 and 1428 of its Working Party Report.

2.114. The Panel notes, moreover, that Russia's failure to advance any specific interpretive or textual arguments in relation to Ukraine's claims under Articles V or X of the GATT 1994, as well as paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report, was consistent with its overarching position that the Panel lacked jurisdiction to examine any of Ukraine's claims due to Russia's invocation of Article XXI. In the light of these circumstances, as well as the importance of Article XXI as a safeguard for the right of Members to take actions in pursuance of their essential security interests, the Panel considers that it was not precluded from analysing the applicability of Article XXI to provisions in Russia's Working Party Report, even in the absence of specific interpretive arguments by Russia or Ukraine on the relevant text of paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report. Accordingly, the Panel denies Ukraine's request.

2.7 Section 7.7 of the Report – Panel's terms of reference and the existence of the measures

Whether the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are within the Panel's terms of reference

2.115. Ukraine requests that, with respect to paragraph 7.330, the Panel reflect Ukraine's argument in its second written submissions that if neither of the instructions ever applied with respect to Ukraine, arguably, there would have been no need to adopt Instruction No. FS-EN-7/19132. Russia does not respond specifically to this request.

2.116. The Panel considers that the requested modification would improve the accuracy and clarity of the Report and therefore has decided to make the modification.

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[18] Russia's first written submission, para. 37. See also ibid. paras. 9 and 76; and Russia's closing statement at the first meeting of the Panel, para. 5