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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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**ANNEX A**

WORKING PROCEDURES OF THE PANEL

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## **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.<sup>1</sup>

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.

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<sup>1</sup> 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:

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- 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 Ganeriwai (\*\*\*\*\*@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

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**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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> Brazil and Singapore support the grant of "passive" enhanced third-party rights (i.e. to receive all submissions by the parties to the

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<sup>1</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 8.

<sup>2</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 4.

<sup>3</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 5.

<sup>4</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 7.

<sup>5</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, para. 6.

<sup>6</sup> Letter from Ukraine dated 1 December 2017, paras. 2 and 10.

<sup>7</sup> 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).<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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<sup>12</sup> 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.<sup>13</sup> All third parties in a panel proceeding may be presumed to have a "substantial interest" in the matter before the panel.<sup>14</sup> 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<sup>15</sup>, the importance of trade in the product at issue to certain third parties<sup>16</sup>, at least one of the parties agreeing that enhanced third-party rights should be granted<sup>17</sup>, claims that the measures at issue derived from an international treaty to which certain third parties were parties<sup>18</sup>, third parties having previously been granted enhanced rights in related panel proceedings<sup>19</sup>, and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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,

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<sup>8</sup> Letter from Brazil dated 1 December 2017, p. 2; and Letter from Singapore dated 1 December 2017, paras. 2-3.

<sup>9</sup> Letter from China dated 1 December 2017, p. 1; and Letter from Japan dated 1 December 2017, p. 1.

<sup>10</sup> Letter from China dated 1 December 2017, p. 2; and Letter from Japan dated 1 December 2017, p. 2.

<sup>11</sup> Letter from the United States dated 1 December 2017, para. 2.

<sup>12</sup> 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."

<sup>13</sup> Appellate Body Reports, *US – 1916 Act*, para. 150; *EC – Hormones*, para. 154; and *US – FSC (Article 21.5 – EC)*, para. 243.

<sup>14</sup> Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.16.

<sup>15</sup> Panel Reports, *EC – Bananas III*, para. 7.8; *EC – Tariff Preferences*, Annex A, para. 7; and *EU – Poultry Meat (China)*, para. 7.44.

<sup>16</sup> Panel Report, *EC – Export Subsidies on Sugar (Australia)*, para. 2.5.

<sup>17</sup> Panel Reports, *EC – Bananas III*, para. 7.8.

<sup>18</sup> Panel Reports, *EC – Bananas III*, para. 7.8.

<sup>19</sup> Panel Reports, *EC – Bananas III*, para. 7.8.

<sup>20</sup> Panel Report, *EC – Hormones (Canada)*, para. 8.17.

<sup>21</sup> See Panel Report, *China – Rare Earths*, para. 7.7.

<sup>22</sup> Panel Reports, *US – 1916 Act*, para. 6.33; and *EC – Export Subsidies on Sugar (Australia)*, para. 2.5.

<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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*.<sup>29</sup> 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.<sup>30</sup>

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

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<sup>24</sup> 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.

<sup>25</sup> Letter from Australia, Canada, and the European Union dated 10 November 2017, paras. 4 and 5.

<sup>26</sup> See Letter from Ukraine dated 1 December 2017, paras. 3 and 8.

<sup>27</sup> 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.

<sup>28</sup> Letter from the Russian Federation dated 1 December 2017, pp. 2-3.

<sup>29</sup> Letter from the Russian Federation dated 1 December 2017, fn 4, p. 3.

<sup>30</sup> 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.<sup>31</sup>

1.19. The Panel will shortly distribute a revised Timetable and Working Procedures to the parties and third parties to reflect the foregoing.

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<sup>31</sup> 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<sup>1</sup>, and Russia's defence under Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994)<sup>2</sup>, as well as aspects of other third parties' positions<sup>3</sup>;
- b. Disclosure of the contents of other procedural documents pertaining to the Panel's proceedings<sup>4</sup>;

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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<sup>5</sup>;
- 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<sup>6</sup>; and
- e. Disclosure of the contents of the first substantive meeting and details relating to the ongoing dispute *Russia – Pigs*.<sup>7</sup>

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.<sup>8</sup>

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

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<sup>5</sup> Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 38).

<sup>6</sup> Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

<sup>7</sup> Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 25).

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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

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<sup>9</sup> 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.

<sup>10</sup> The European Union points to analogous reasoning by the Appellate Body in *US – Continued Suspension*, Annex IV, para. 4.

<sup>11</sup> 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.<sup>12</sup> 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".<sup>13</sup> 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

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<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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<sup>16</sup> 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

<sup>14</sup> 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.

<sup>15</sup> 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)

<sup>16</sup> 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".

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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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.

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<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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*.<sup>23</sup> 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

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<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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<sup>24</sup>, 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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

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<sup>24</sup> 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.

<sup>25</sup> See Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 5.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> 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)

<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> Moreover, the Appellate Body has previously observed that questions of legal interpretation are not inherently confidential.<sup>33</sup> 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.<sup>34</sup> While a party disclosing a statement of its own positions to the public

<sup>30</sup> 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).

<sup>31</sup> Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 4.

<sup>32</sup> 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 (2<sup>nd</sup> 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).

<sup>33</sup> Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 9.

<sup>34</sup> 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.<sup>35</sup> 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".<sup>36</sup>

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 ...".<sup>37</sup>

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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.

<sup>35</sup> See fn 22 above.

<sup>36</sup> Russia's letter dated 14 March 2018, second paragraph on p. 2 (referring to the European Union's third-party statement, para. 2).

<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> In essence, the European Union has disclosed that, during the first substantive meeting, Russia referred to certain legal instruments implementing the measures at issue.

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<sup>38</sup> Russia's letter dated 14 March 2018, pp. 1-3.

<sup>39</sup> Ukraine's request for the establishment of a panel, p. 2.

<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

## 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<sup>43</sup>;
- 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<sup>44</sup> or with paragraph 2 of the Working Procedures<sup>45</sup>;
- 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<sup>46</sup>;
- 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<sup>47</sup>;
- 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<sup>48</sup>, the Panel need not rule on it;

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<sup>41</sup> See WT/DS475/15, WT/DS475/16, and WT/DS475/17.

<sup>42</sup> 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.

<sup>43</sup> See paragraphs 5.4 and 5.5 above.

<sup>44</sup> See paragraph 5.16 above.

<sup>45</sup> See paragraph 5.17 above.

<sup>46</sup> See paragraph 5.22 above.

<sup>47</sup> See paragraphs 5.25 and 5.26 above.

<sup>48</sup> 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<sup>49</sup>; 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.<sup>50</sup>

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.

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<sup>49</sup> See paragraphs 5.29, 5.32, and 5.33 above.

<sup>50</sup> 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> Letter of the Russian Federation dated 13 June 2018, pp. 1 and 3.

<sup>2</sup> Ukraine's comments on Russia's response to Panel question No. 8, para. 37.

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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".<sup>6</sup> Russia's answer was that Ukraine failed to prove that the measures were ever applied in respect of Ukraine.<sup>7</sup> 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.<sup>8</sup> But this does not make such evidence "necessary for purposes of rebuttal" within paragraph 7 of the Working Procedures.<sup>9</sup>

## 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.

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<sup>4</sup> 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).)

<sup>5</sup> Appellate Body Report, *US – Gambling*, para. 271 and fn 316 thereto (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.)

<sup>6</sup> In its opening statement at the first substantive meeting, Ukraine notes that, because *Rossetkhozradzor* 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.

<sup>7</sup> Russia's opening statement at the first meeting of the Panel, para. 6.

<sup>8</sup> 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.)

<sup>9</sup> 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*

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*RUSSIAN FEDERATION*

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**ANNEX C-1**

## FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

**I. INTRODUCTION**

1. The present dispute concerns various bans and other restrictions imposed by the Russian Federation on traffic in transit by road and rail transport from the 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 Rosselkhozadzor Nos. FS-NV-7/22886<sup>1</sup> 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. 12, 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 Federation at 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 by Decree No. 13, 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 restrictions continue 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 cause Instructions 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. 1 prevail over the provisions contained in Instruction No. FS-NV-7/22886 in certain defined cases.

<sup>1</sup> As amended by Instruction No. FS-EN-7/19132.

<sup>2</sup> 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.

<sup>3</sup> Ibid.

4. The de facto application of the 2016 general and product-specific transit bans is 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<sup>4</sup> 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 the Understanding 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 the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and, as a result, are subject 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<sup>5</sup>.

#### **A. Violation of Article V:2, first sentence, of the GATT 1994**

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<sup>4</sup> Russia – Measures Concerning Traffic in Transit – Request for the Establishment of a Panel by Ukraine, WT/DS512/3 (10 February 2017) ("Panel request").

<sup>5</sup> 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 1994 establishes 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 ban prohibits 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 prohibits 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 prohibits indirect traffic 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 bans prohibits 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, for Resolution No. 778 goods and non-zero duty goods, also prohibits indirect traffic 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 restrictions require 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 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
- the 2016 product-specific other transit restrictions require that 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 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.

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 ban and other transit restrictions distinguish (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 ban and 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 transit from 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 of the 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 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.

#### **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 restrictions require 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 Report and 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:1 vis-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 twenty measures 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 measures are 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 nineteen other resolutions and the decree of the Russian Federation prior 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 constitutes an 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 Federation has 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 interests does 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 issue are *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 protect its 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 1994 must 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 to provide arguments or evidence showing that the measures at issue were "taken in 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 evidence in order to put the Panel in 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 are genuinely 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 concludes that 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 order 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 essential 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<sup>1</sup>, 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"<sup>2</sup> 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)<sup>3</sup>, what is a common rationale 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.<sup>4</sup>

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

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<sup>1</sup> Appellate Body Report, *EC – Bananas III*, para. 142.; Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22; Appellate Body Report, *Korea – Dairy*, para. 127.

<sup>2</sup> WT/DS512/3, p. 1.

<sup>3</sup> See Panel Report and Appellate Body Report, *China – Raw Materials*.

<sup>4</sup> 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."<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

11. In accordance with the mentioned Letters of Rosselkhoznadzor 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.

<sup>5</sup> Panel Report, *China – Raw Materials*, paras. 11-13.

<sup>6</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168-169.

<sup>7</sup> First Written Submission of Ukraine, para. 55.

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> Contrary to the Appellate Body's pronouncements in previous disputes,<sup>13</sup> 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

<sup>9</sup> Appellate Body Report, *US – Gambling*, para. 125

<sup>10</sup> Appellate Body Report, *US – Upland Cotton*, para. 263

<sup>11</sup> 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)

<sup>12</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>13</sup> 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*,<sup>14</sup> 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<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.

<sup>14</sup> Appellate Body Report, *US – Zeroing*, paras. 196 – 198.

<sup>15</sup> Appellate Body Report, *US – Zeroing*, paras. 231 – 232.

<sup>16</sup> Panel Report, *Argentina – Import Measures*, para. 6.115.

<sup>17</sup> 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".<sup>18</sup>

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".<sup>19</sup>

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".<sup>20</sup>

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".<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

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

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<sup>18</sup> Summary Record of the Meeting, *United States – Restrictions on Exports to Czechoslovakia*, GATT/CP.3/SR.22, Corr. 1.

<sup>19</sup> Summary Record of the Session, SR.19/12, p. 196.

<sup>20</sup> Minutes of Meeting of Council, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, C/M/157, p. 10.

<sup>21</sup> Minutes of Meeting of Council, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, C/M/157, p. 8.

<sup>22</sup> Panel Report, *United States – Trade Measures Affecting Nicaragua*, para. 4.6, L/6053.

<sup>23</sup> 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.<sup>1</sup>

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'"<sup>2</sup>, in other words "which 'problem' is caused by which measure or group of measures".<sup>3</sup>

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"<sup>4</sup>, 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

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<sup>1</sup> Appellate Body Report, *EC – Fasteners*, para. 562.

<sup>2</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162, citing Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>3</sup> Appellate Body Report, *China – Raw Materials*, para. 220.

<sup>4</sup> 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<sup>5</sup> 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".<sup>6</sup> 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".

<sup>5</sup> Request for the establishment of a panel by Ukraine (WT/DS512/3), Section III.

<sup>6</sup> 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<sup>7</sup> 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<sup>8</sup> 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<sup>9</sup>, 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.

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<sup>7</sup> Exhibit RUS-9.

<sup>8</sup> Exhibit – RUS 7.

<sup>9</sup> 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.<sup>10</sup> Traffic through the checkpoint Izvaryne (E40) was suspended in May 2014 by the Ministry of Revenue and Duties of Ukraine.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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"<sup>14</sup> 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<sup>15</sup> 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)"<sup>16</sup> 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"<sup>17</sup> 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".<sup>18</sup> 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)".<sup>19</sup> 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

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<sup>10</sup> Exhibit RUS – 14.

<sup>11</sup> Exhibit RUS – 15.

<sup>12</sup> Exhibit RUS – 18.

<sup>13</sup> Exhibit RUS – 17.

<sup>14</sup> 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).

<sup>15</sup> Exhibit RUS – 16.

<sup>16</sup> Exhibit RUS – 20.

<sup>17</sup> Exhibit RUS – 21.

<sup>18</sup> Exhibit RUS – 22.

<sup>19</sup> Exhibit RUS – 23.

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cited by Russia in its First Written Submission<sup>20</sup> and Statements at First Substantive Meeting<sup>21</sup>, 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:*

...

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<sup>20</sup> First Written Submission by the Russian Federation, paras. 16 – 19.

<sup>21</sup> First Substantive Meeting Opening Statement by the Russian Federation, paras. 30-36.



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(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"<sup>22</sup>.

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.<sup>23</sup> 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.<sup>24</sup>

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 contained in 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

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<sup>22</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 222.

<sup>23</sup> Second Written Submission of Ukraine, para. 85.

<sup>24</sup> 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"<sup>25</sup>. 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<sup>26</sup>. 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*<sup>27</sup>. 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.

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<sup>25</sup> ICJ, *Oil Platforms*, para.73.

<sup>26</sup> Para. 6 of Russia's Closing Statement at First Substantive Meeting.

<sup>27</sup> 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

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**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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

9. Russia submits that neither the Panel nor the WTO as an institution has jurisdiction over this *matter*<sup>4</sup> 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".<sup>5</sup>

(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

<sup>1</sup> EPCT/A/PV/33, p. 20-21 and Corr.3.

<sup>2</sup> GATT/CP.3/SR.22, Corr.1

<sup>3</sup> First Written Submission of the Russian Federation, para. 47.

<sup>4</sup> First Written Submission of the Russian Federation, para. 7. (emphasis added)

<sup>5</sup> First Written Submission of the Russian Federation, para. 5.

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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".<sup>6</sup>

12. The Panel in this dispute was established with these standard terms of reference.<sup>7</sup>

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".<sup>8</sup>

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".<sup>9</sup>

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<sup>6</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. (emphasis added)

<sup>7</sup> Dispute Settlement Body – Minutes of meeting held in the centre William Rappard on 21 March 2017 (WT/DSB/M/394).

<sup>8</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

<sup>9</sup> 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".<sup>10</sup>

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".<sup>11</sup>

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".<sup>12</sup>

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.<sup>13</sup> 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

<sup>10</sup> Appellate Body Report, *Mexico – Taxes on Soft Drink*, para. 51.

<sup>11</sup> Appellate Body Report, *Mexico – Taxes on Soft Drink*, para. 52. (emphasis original)

<sup>12</sup> 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.

<sup>13</sup> 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".<sup>14</sup> 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.<sup>15</sup> If the action taken by a Member is not "*capable of making ... some contribution*"<sup>16</sup> 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).<sup>17</sup>

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,<sup>18</sup> 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.

<sup>14</sup> *The New Shorter Oxford English Dictionary*, 4<sup>th</sup> edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 1, p. 996.

<sup>15</sup> European Union's third party submission, para. 56; Appellate Body Report, *EC – Seal Products*, para. 5.169.

<sup>16</sup> 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.

<sup>17</sup> European Union's third party submission, para. 53; Appellate Body Report, *Colombia-Textiles*, para. 5.68.

<sup>18</sup> *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"<sup>1</sup> 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.

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<sup>1</sup> 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 observes that the Dispute Settlement Body (DSB) sets up the terms of reference of the Panel to this dispute<sup>1</sup>, 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 China notes, the Russian Federation invokes Article XXI of the GATT 1994 to defend Ukraine's claims of violation in its First Writing Submission<sup>2</sup>. 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'.<sup>3</sup> 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 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

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<sup>1</sup> Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.

<sup>2</sup> First Written Submission of the Russian Federation, para. 5.

<sup>3</sup> 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.<sup>4</sup>

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*<sup>5</sup>, 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.<sup>6</sup> 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'.<sup>7</sup>

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.<sup>8</sup> 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

<sup>4</sup> EPCT/A/PV/33, p. 20-21 and Corr.3; see also EPCT/A/SR/33, p. 3.

<sup>5</sup> GATT 1994, Article XXI (b) chapeau.

<sup>6</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.399-400.

<sup>7</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.401.

<sup>8</sup> 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.

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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.<sup>1</sup> 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*."<sup>2</sup> 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*."<sup>3</sup> 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.<sup>4</sup> 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'."<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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 than the one(s) available to it, it is the WTO Members through

<sup>1</sup> Ukraine's First Written Submission, paras. 239-240.

<sup>2</sup> Ukraine's First Written Submission, paras. 207-210. (emphasis added.)

<sup>3</sup> Ukraine's First Written Submission, para. 222. (emphasis added.)

<sup>4</sup> See, for example, Panel Report, *Colombia – Ports of Entry*, para 7.401 and 7.414; Ukraine's First Written Submission, para. 211.

<sup>5</sup> Ukraine's First Written Submission, para. 211.

<sup>6</sup> Ukraine's First Written Submission, para. 213.

<sup>7</sup> See Ukraine's First Written Submission, para. 213.

<sup>8</sup> 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."<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup> 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[.]"<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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

<sup>9</sup> Ukraine's First Written Submission, para. 215.

<sup>10</sup> Ukraine's First Written Submission, para. 215.

<sup>11</sup> See Ukraine's First Written Submission, para. 262.

<sup>12</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.397.

<sup>13</sup> Ukraine's First Written Submission, para. 269.

<sup>14</sup> 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."<sup>15</sup> 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."<sup>16</sup>

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)."<sup>17</sup> 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,<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The standard terms of reference, which were adopted by the Panel in the present dispute, contain no such restrictions.<sup>21</sup>

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

<sup>15</sup> See Ukraine's First Written Submission, para. 198.

<sup>16</sup> See Ukraine's First Written Submission, para. 224.

<sup>17</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.387.

<sup>18</sup> GATS Article XIV *bis*; TRIPS Agreement Article 73.

<sup>19</sup> L/6053 (unadopted), paras. 5.1-5.3.

<sup>20</sup> *Ibid.*

<sup>21</sup> WT/DS512/4 and WT/DS512/3.

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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."<sup>22</sup>

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."<sup>23</sup> 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.<sup>24</sup>

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

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<sup>22</sup> EPCT/A/PV/33, p.20-21 and Corr.3.

<sup>23</sup> L/5424.

<sup>24</sup> 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.<sup>1</sup>

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.

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<sup>1</sup> 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)<sup>2</sup> 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.<sup>3</sup> 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.*<sup>4</sup>

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.<sup>5</sup>

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.

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<sup>2</sup> Ibid, para 5.

<sup>3</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement (DSU).

<sup>4</sup> Constitution of the Panel established at the request of Ukraine, WT/DS512/4, 7 June 2017.

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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."<sup>9</sup> The WTO Panel in *Peru-Agricultural Products* further indicated that treaty right 'must be exercised bona fide, that is to say, reasonably'.<sup>10</sup>

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'.<sup>11</sup>

<sup>6</sup> Hersch Lauterpacht, *International Law Vol. 1*, (ed Elihu Lauterpacht, CUP 1970) 68; Malcolm N. Shaw, *International Law*, (6<sup>th</sup> edn, CUP 2008) 98; James Crawford, *Brownlie's Principles of Public International Law*, (8<sup>th</sup> edn, OUP 2012) 134.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> Hersch Lauterpacht, *Oppenheim's International Law*, (8<sup>th</sup> ed, Longmans 1955) 263.

<sup>10</sup> Panel Report, *Peru-Additional Duty on Imports of Certain Agricultural Products (Peru-Agricultural Products)*, WT/DS457/R, adopted 27 November 2014, para 7.94.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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'.<sup>14</sup> 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.

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<sup>12</sup> 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.

<sup>13</sup> Ibid.

<sup>14</sup> 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 transshipment 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<sup>1</sup>. This reflects a customary rule of treaty interpretation<sup>2</sup> 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<sup>3</sup>.

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." <sup>4</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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."<sup>5</sup> 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.

<sup>5</sup> 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)<sup>6</sup>. 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."<sup>7</sup>

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<sup>8</sup> and that the doctrine of abuse of rights is an application of the general principle of good faith<sup>9</sup>.

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.

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<sup>6</sup> Appellate Body Report, *Australia – Salmon*, para. 199.

<sup>7</sup> Appellate Body Report, *EC – Asbestos*, para. 168.

<sup>8</sup> Appellate Body Report, *EC – Sardines*, para. 278; Appellate Body Report, *US – FSC*, para. 166.

<sup>9</sup> 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

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\* 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 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

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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

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## 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.<sup>1</sup> Russia then requests specific changes to paragraphs **7.122**, **7.137** and **7.144** of the Report.<sup>2</sup>

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'".<sup>3</sup> 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";

<sup>1</sup> See Russia's request for review of the interim report, dated 14 February 2019, paras. 5-8.

<sup>2</sup> 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.

<sup>3</sup> 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".<sup>4</sup> 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<sup>5</sup>) 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

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<sup>4</sup> 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.)

<sup>5</sup> 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.<sup>6</sup> 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

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<sup>6</sup> 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 *Rosselkhoz nadzor* 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".<sup>7</sup> 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.<sup>8</sup> 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

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<sup>7</sup> 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."

<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> 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."<sup>11</sup> 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

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<sup>9</sup> Emphasis added.

<sup>10</sup> Russia's comments on Ukraine's request for review of the interim report, dated 28 February 2019, para. 12.

<sup>11</sup> Russia's second written submission, paras. 20-21.

2014, before referring to the "events in 2014 in the Crimean peninsula and in Eastern Ukraine".<sup>12</sup> 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.<sup>13</sup> 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

<sup>12</sup> European Union's response to Panel question No. 3, paras. 4-5.

<sup>13</sup> 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:

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- 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.<sup>14</sup>

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<sup>14</sup> 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<sup>15</sup>, it remains within the competence of a panel to develop its own legal reasoning to support its own findings on the matter under consideration.<sup>16</sup> 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.<sup>17</sup>

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

<sup>15</sup> See e.g. Appellate Body Report, *Japan – Agricultural Products II*, paras. 127-130

<sup>16</sup> 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.

<sup>17</sup> 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".<sup>18</sup> 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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<sup>18</sup> 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