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RUSSIA — MEASURES CONCERNING TRAFFIC IN TRANSIT
(DS512)

Third Party Oral Statement
by the European Union

Geneva, 25 January 2018

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1. INTRODUCTION

Mr Chairman, distinguished Members of the Panel,

1. The European Union makes this third party oral statement because of its systemic interest in the correct and consistent interpretation and application of the GATT 1994. The EU thanks the Panel and the Secretariat for sending advance issues for discussion with the third parties, and will focus its oral statement on those aspects.

2. THE EU'S SUBSTANTIVE COMMENTS

2.1. RUSSIA'S INVOCATION OF THE SECURITY EXCEPTIONS

2. This is the very first case when a panel is requested to rule on a defence based on Article XXI of GATT 1994. As noted by the Panel, this proceeding presents "an exceptional situation" and raises issues of "vital systemic importance". Indeed, 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".[1]

3. Russia, with the support of the United States, alleges that Article XXI is not a justiciable provision.[2] Like most of the third parties, the EU disagrees with that position.

4. Article XXI of GATT 1994 is an affirmative defence, which may be invoked to justify a measure that would be otherwise inconsistent with any of the substantive obligations imposed by the GATT 1994. It does not provide for an exception to the rules of jurisdiction laid down in the DSU. Interpreting Article XXI of GATT 1994 as a non-justiciable provision would make it impossible for the Panel to "make an objective assessment of the matter before it" as required by Article 11 of DSU. The "matter" before the Panel in this case includes the defence under Article XXI of GATT 1994 raised by Russia, as the Panel does not have special terms of reference.[3]

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1 Panel's ruling on the joint request for enhanced third party rights, para. 1.13.

2 US letter to the Panel of 7 November 2017, paras. 2 – 4.

3 See GATT Panel Report, *US – Nicaraguan Trade*, para. 5.3 (unadopted).

5. If Article XXI of GATT 1994 was interpreted as a non-justiciable provision, a WTO Member, rather than the WTO dispute settlement institutions, would be deciding the outcome of a dispute, and this unilaterally. This would not only run counter to the objectives of the DSU enshrined in notably Articles 3.2, 23 of DSU, but it would also question the "rules-based" approach to international trade.

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 1994, including Article XXI, are justiciable in that panels, the Appellate Body and the DSB are the ultimate arbiter of their interpretation and application, and not individual WTO Members. Some rules, however, may grant WTO Members a broad degree of discretion in their application. Article XX (a) of GATT 1994 as interpreted by the Appellate Body in *EC – Seals* is a ready example.[4] Article XXI of GATT 1994 is, in the EU's view, another example. Yet, the jurisdiction over the question whether a Member remained within its discretion when applying Article XX (a) or XXI (b) (iii) of GATT 1994 unequivocally rests with the DSB.

7. A WTO Member that invokes Article XXI (b) (iii) of GATT 1994 bears the burden of showing that its requirements are fulfilled. The Appellate Body consistently places the burden of proof upon the Member invoking an exception.[5]

8. In the present case, Russia has failed to meet its burden of making a *prima facie* case with respect to its alleged defence under Article XXI(b)(iii) of GATT 1994. Russia has not explained in any way the legal test under Article XXI(b)(iii) of GATT 1994 that it deems appropriate. Nor has Russia adduced any facts which would allow the Panel to make findings with respect to the applicability of Article XXI(b)(iii) of GATT 1994. Russia limits itself to citing various unilateral statements from Contracting Parties to the GATT 1947 in support of its contention that Article XXI of GATT is an entirely self-judging clause. Russia fails, however, to shed light on the relevance of these statements under Article 31 and 32 of VCLT.

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4 Appellate Body Report, *EC – Seal Products*, para. 5.199.

5 Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

9. In the EU's view, the analytical framework developed by the Appellate Body for applying Article XX of GATT 1994 provides useful guidance for interpreting and applying Article XXI, given the structural as well as textual similarities between the two Articles.

10. Article XX of GATT requires a "two-tiered analysis". First, a panel must examine whether a measure is provisionally justified under at least one of the subparagraphs of Article XX; second, the panel must determine whether the measure is applied in a manner that satisfies the requirements of the chapeau of Article XX.

11. Since Article XXI of GATT 1994 does not contain a chapeau, the analysis is limited to the first tier of the above analysis. Under Article XX, this analysis requires, first, that the measure "addresses the particular interest specified in [the sub]paragraph" and, second, that "there [is] a sufficient nexus between the measure and the interest protected."[6] The analysis under Article XXI of GATT 1994 should address these very elements keeping in mind the general principle of good faith in the performance of every international treaty enshrined in Article 26 of VCLT.

12. The EU considers that, 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";
- it has "essential security interests" with respect to the war or other emergency in international relations; and
- the measure is designed "for" the protection of the relevant essential security interest.

13. There is nothing that prevents a panel from ascertaining 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 other provisions in international instruments (e.g. Article 3 of OECD Code of Liberalisation of Capital Movements and Article 3 of OECD Code of Liberalisation of Current Invisible Operations),

6 Appellate Body Report, *India – Solar Cells*, para. 5.57.

which refer to "the protection of [a Member's] essential security interests", without any further specification.[7] As noted by Brazil, "[i]n order to try to strike a balance and avoid excessive disruption of the multilateral system through the indiscriminate application of security exceptions, from the very beginning, there was an option to limit the circumstances in which Article XXI may be invoked".[8]

14. The terms "which it considers" do not qualify the terms "war or other emergency in international relations" but only the term "necessary". Hence, the existence of a "war or other emergency in international relations" refers to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels.

15. 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.[9] 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. Note also the French and Spanish versions, which qualify the situation with the attribute "grave".

16. 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) of GATT 1994, which implies the existence of a threat to which the action of the invoking Member responds.

17. 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

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7 See http://www.oecd.org/daf/inv/investment-policy/Code-Capital-Movements-EN.pdf and http://www.oecd.org/daf/fin/private-pensions/InvisibleOperations_WebEnglish.pdf.

8 Brazil's third party written submission, para. 6.

9 See the UN General Assembly Resolution 3314 (XXIX)(Definition of Aggression), 14 December 1974.

legitimacy of the interest.[10] 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.

18. 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. Accordingly, the invoking Member has to show that the measure is "capable" of protecting the relevant interest from a threat.[11]

19. The second element in the analysis under Article XXI of GATT 1994 is whether "there [is] a sufficient nexus between the measure and the interest protected"[12] as reflected in the term "necessary". In the context of Article XX of GATT 1994, 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.[13]

20. 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.[14]

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10 Appellate Body Report, *EC – Seal Products*, para. 5.200.

11 Appellate Body Report, *Colombia – Textiles*, para. 5.68.

12 Appellate Body Report, *EC – Seal Products*, para. 5.169.

13 See e.g. Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *Brazil- Retreaded Tyres*, paras. 156 and 178.

14 See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; and Appellate Body Report, *EC – Seal Products*, paras. 5.169 and 5.261.

21. The term "necessary" in Article XXI(b) of GATT 1994 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.

22. 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";[15] 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[16] 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.[17]

23. Finally, the EU considers that when assessing the necessity of the measure, and in particular the existence of reasonably available alternatives, the Panel should ascertain whether the interests of third parties which may be affected were properly taken into consideration, as required by the preamble of the Decision of 30 November 1982.[18]

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15 Decision by the arbitrators, *EC- Bananas III (Ecuador) – (Article 22.6 – EC) – Recourse to arbitration by the EC under article 22.6 DSU*, para.52.

16 The respective provision provided that:

"[T]he requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, . . . security, . . . ordre public or other . . . essential interests."

17 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, para. 145.

18 Recital 3 of Decision Concerning Article XXI of the General Agreement of 30 November 1982.

24. In addition, the EU has a few comments with regard to certain views expressed by Russia in its opening oral statement.

25. *First*, at paragraph 27 Russia refers to the amendments to Resolution 778 of 25 October 2017 by Resolution 1292. Among the listed goods the EU notes several pig products not covered initially by the ban of August 2014. The EU recalls that on 6 December 2017 the RPT expired in DS475 (*Russia - Pigs*). While Russia claimed full compliance with the recommendations and rulings of the DSB in that case, the EU notes the temporal and product scope coincidence between the extension of the 2014 measures to pig products such as lard and the expiry of the RPT. As a result, trade in the relevant pig products from the EU to Russia did not resume after the expiry of the RPT and the alleged compliance, and the same prohibitive effects were maintained. The EU is examining now these measures and reserves its rights with respect to their proper legal characterization.

26. *Second*, at paragraphs 29 – 35 Russia merely cites language included in the respective acts (most often in their titles), which refers generally to national security. However, it does not explain what are the security interests addressed by the specific measures at issue. For instance, on the basis of the Federal Law no 281 the President of Russia can also take measures on the basis of such broad grounds as the "[violation of] the rights and freedoms of its citizens". The only specific reference is to the suspension of the CIS FTA in paragraph 30. The EU does not believe that the suspension of such a trade agreement raises issues of essential security interests. In conclusion, the EU considers that Russia is far from having met its burden of proof as a party relying on an affirmative defence.

27. *Third*, certain examples given by Russia in paragraph 38 evidence why Members cannot be given complete discretion when invoking Article XXI(b). For Russia, virtually anything can be a matter of national security if a Member so alleges. The situations described by Russia do not bear an obvious link to any of the circumstances cited under Article XXI(b). Moreover, the interests cited by Russia are rather covered by the general exceptions in Article XX. Article XXI cannot be used to circumvent the requirements of Article XX.

28. *Fourth*, the EU fails to understand how Article XXI(a) can exempt Russia from meeting its burden of proof under Article XXI(b), as Russia maintains in

paragraphs 42 - 43. Like Article XXI(b), Article XXI(a) is also a justiciable provision. Like Article XXI(b), Article XXI(a) accords broad discretion to Members. But such discretion is not unlimited. Some of the limitations to the Members' discretion described by the EU in respect of letter (b) (e.g. those relating to the definition of its essential security interests and the existence of a plausible connection between the measures and those interests) apply *mutatis mutandis* to the analysis under letter (a).

29. 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. The EU recalls that for certain highly sensitive business information special procedures were adopted by panels in the past. 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.

30. 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). If Russia chooses not to provide certain information on the basis of Article XXI(a), it must accept that, as a possible consequence, it will be found not to have met its burden of proof under Article XXI(b).

2.2. CERTAIN ASPECTS RELATING TO TRANSIT

31. The EU starts by noting that there may be several factors informing the understanding of the notion of "the most convenient routes" for international transit.

32. *First*, one should take into account geography. For Members with relatively large territories and long common borders there may be different points of departure and different points of arrival for certain goods. 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, while 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.

33. The restriction of individual market actors to one single transit route hardly aligns with the concept of "freedom" embodied in Article V:2 of GATT 1994. 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.

34. *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.

35. Thus, Article V:2 GATT 1994, first sentence, is not confined to a single route that is deemed "the most convenient" for international transit. This understanding is confirmed by the use of the plural (routes) as opposed to the singular (route).

36. The "routes most convenient for international transit" should be determined on a case by case basis, taking into account objective factors. The EU agrees with Japan that "the WTO Member through whose territories transit occurs cannot decide the most convenient routes for international transit 'unilaterally and subjectively'."[19] 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.

37. The EU wishes to add that it does not agree with Japan's statement that as "long as a WTO Member ensures access through the 'most convenient' routes through its territory" it may "otherwise [restrict] access with respect to traffic in transit."[20] The Panel in *Colombia – Ports of Entry* noted that in "light of the ordinary meaning of

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19 Japan's third party written submission, para. 12.

20 Japan's third party written submission, para. 5.

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".[21] 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.

38. 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."

3. CONCLUSIONS

39. This concludes our third party oral statement. Mr Chairman, distinguished Members of the Panel, we thank you for your attention and we look forward to answering any questions that you may have.

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[21] Panel Report, *Colombia — Ports of Entry*, para. 7.401.