WORLD TRADE ORGANIZATION

WT/DS475/AB/R/Add.1

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(17-1108)

RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION

AB-2016-5

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS475/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

LIST OF ANNEXES

ANNEX A

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

RUSSIAN FEDERATION'S NOTICE OF APPEAL*

1. Pursuant to Article 16.4 and Article 17.1 of the

Poland, Latvia and Estonia that are ASF-free pursuant to Article 6.3[8], and that the European Union had provided the necessary evidence to objectively demonstrate to the Russian Federation that there are areas in Lithuania, Poland and Estonia that are likely to remain ASF-free pursuant to Article 6.3.[9] These findings are in error and are based on the Panel's erroneous findings of law and legal interpretations of Article 6.3. The Russian Federation respectfully requests that the Appellate Body reverse the Panel's findings.

6. The Russian Federation also seeks review of the Panel's legal interpretation of Article 6.3 of the SPS Agreement as not requiring a reasonable period of time for exporting Members to collect the necessary evidence, on the one hand, and for importing Members to review the necessary evidence, on the other hand.[10] As a consequence of the Panel's erroneous interpretation of Article 6.3 as not requiring the production, translation and review of the necessary evidence over a "reasonable period of time", the Panel erroneously found in paragraphs 7.963 and 7.1003 that the European Union had provided the necessary evidence to objectively demonstrate to the Russian Federation that parts of (Tnstr9(d)2l)-7ion ari133 TD-.000B

ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

Pursuant to Article 16.4 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report

ANNEX B-1

EXECUTIVE SUMMARY OF THE RUSSIAN FEDERATION'S APPELLANT'S SUBMISSION

I. INTRODUCTION

1. The Russian Federation appeals certain issues of law and legal interpretations in the Panel Report Russia Federation – Measures on the Importation of Live Pigs, Pork and other Pig Products

7. First, the Panel erroneously considered that the content of the bilateral veterinary certificates constitute national SPS measures attributable to the Russian Federation. Customs Union (CU) Decision 317 and Table 41 of the Working Party Report of the Russian Federation's Accession ("Working Party Report") establish, unambiguously, the Russian Federation's legitimate right to require valid veterinary certificates with respect to the import of a certain number of live pigs and pork products from any WTO Member. However, the exact content of the EU-Russia bilateral veterinary certificates is not established in the Russian Federation's national SPS framework. Indeed, nowhere does the Russian Federation's national SPS legislation establish the requirement that to export relevant pork products to the Russian Federation from the European Union, the entire European Union, with the exception of Sardinia, must be ASF-free for three years. Thus, the Panel erroneously considered the content of the EU-Russia bilateral veterinary certificates to be a national SPS measure of the Russian Federation.

8. Second, the Panel failed to give full legal effect to the validity and WTO-consistency of the valid EU-Russia bilateral veterinary certificates. In relevant part, paragraph 893 of the Russian Federation's Working Party Report provides that:

> [b]ilateral veterinary export certificates initialed by one of the CU Parties [e.g. the Russian Federation] before 1 July 2010 [e.g., in 2006] as well as any subsequent amendments to such certificates agreed with the authorised body of such CU Party, would remain valid for exports from the relevant country into the customs territory of the CU [e.g. the Russian Federation] until an export certificate was agreed with a CU Party based on the agreed positions of the other CU Parties.

9. The ordinary meaning, context, and object and purpose of the phrase "would remain valid" indicates that pursuant to the Russian Federation's accession to the WTO, all WTO Members agreed that the EU-Russia bilateral veterinary certificates are legally binding documents, which must be recognized as a legitimate veterinary certificate for export into the territory of a CU Member. This necessarily means that these bilateral veterinary certificates must be WTO-consistent.

10. Third, and alternatively, the Panel erred by failing to recognize an inherent "sequence of steps" that must be followed when ensuring the validity of the bilateral veterinary certificates. It is undisputed that the European Union veterinary services, not the Russian Federation, is responsible for issuing the bilateral veterinary certificates. Accordingly, as a pre-condition to exporting relevant meat products to the Russian Federation, veterinary officials in the European Union must certify the disease status with respect to relevant products originating in an EU Member State. While the Panel correctly found that after the first ASF outbreak in the European Union, European Union officials were no longer able to issue valid veterinary certificates for export of a number of products to the Russian Federation, it erroneously attributed the European Union's veterinary services' inability to comply with the terms of the certificates to the Russian Federation. Yet, there can be no legitimate finding of the Russian Federation's compliance or lack thereof, with the valid bilateral certificates because that would represent a contingent second step in the certification process. That step could occur only after the European Union veterinary officials have issued valid bilateral veterinary certificates.

11. Based on the above, the Russian Federation requests the Appellate Body to reverse the Panel's findings that the European Union's failure to issue bilateral veterinary certificates is an action attributable to the Russian Federation.

B. The Panel erred in its interpretation of Article 6.3 of the SPS Agreement by failing to find a requirement to take into account the importing Member's objective assessment of the necessary evidence

12. The Russian Federation appeals the Panel's failure to interpret Article 6.3 of the SPS Agreement, which requires panels to take into account science-based and technical evidence relied upon by the importing Member, in accordance with the importing Member's appropriate level of protection (ALOP), when assessing whether the exporting Member's regionalization request is

supported by the "necessary evidence".[6] The Russian Federation also appeals the Panel's conclusions – based on this interpretative error – that (a) the European Union has provided the necessary evidence to objectively demonstrate to the Russian Federation under Article 6.3 that areas in Lithuania, Poland, Latvia and Estonia, and the European Union as a whole, are African Swine Fever (ASF) free[7], and (b) that the European Union had provided sufficient evidence to

importance of intensified hunting as a wild boar control strategy, in addition to evidence concerning the risk of ASF-spread through the large number of backyard farms with low levels of biosecurity.

C. The Panel erred in its interpretation of Article 6.3 of the SPS Agreement by failing to find a requirement for a reasonable period of time to collect and assess the evidence by exporting and importing Members, respectively

18. The Russian Federation appeals the Panel's legal interpretation of Article 6.3 of the SPS Agreement as not requiring a reasonable period of time for the sequential process of an exporting Members to collect the necessary evidence followed by the review and assessment by an importing Member of the necessary evidence.[9] As a consequence of the Panel's erroneous legal interpretation of Article 6.3, the Panel incorrectly found that the European Union had provided the necessary evidence to objectively demonstrate to the Russian Federation that parts of Estonia are, and are likely to remain, disease-free based on a three-day window from the first ASF outbreak in Estonia.[10] Thus, the Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation[11], and the conclusion stated in paragraphs 7.963 and 7.1003.

19. In assessing whether the European Union had provided the necessary evidence under Article 6.3 of the SPS Agreement, the Panel did not identify a reasonable period of time for the overall process to collect and review that evidence. Rather, the Panel engaged in its assessment under Article 6.3 by applying the same, general cut-off date of 11 September 2014 with respect to all four infected EU Member States, even though the four infected EU Member States had experienced ASF infections – and established ASF zones – at quite different time intervals. In particular, the Panel's failure to assess the necessary evidence with respect to Estonia by employing a reasonable period of time led to the erroneous finding that the European Union had provided the necessary evidence to objectively demonstrate that parts of its territory are and are likely to remain disease-free within three days of the first ASF outbreak in Estonia. In essence, the Panel found that three days sufficed for the European Union to demonstrate that parts of Estonia would likely remain disease-free, and for the Russian Federation to translate, review, and assess the "necessary evidence" through conducting inspection visits.

20. In contrast to the Panel's interpretation, in assessing parties' rights and obligations under

reviewing evidence, requesting and providing additional evidence, and making inspection visits. Specifically, the Guidelines to Article 6 anticipate an average reasonable period of time of around 90 days to complete the information exchange. The disease-specific provisions of the OIE Terrestrial Code underscore that the extent of the reasonable period of time is informed by, and may be altered as a result of, continuing outbreaks taking place in formerly disease-free areas. Moreover, pursuant to Article 8 and Annex C of the SPS Agreement, not every lapse of time amounts to a delay. This further indicates the relevance of finding a requirement for a reasonable period of time when it comes to assessing the necessary evidence under Article 6.3. The risk assessment jurisprudence which demands sufficient time to collect and assess available scientific evidence further corroborates this interpretation.

22. The requirement of a reasonable period of time under Article 6.3 is also supported by the provision's object and purpose. A reasonable period of time safeguards the importing Member's right to protect its territory from animal diseases by giving meaning to their right to review the necessary evidence provided. Similarly, establishing limits on the amount of time an importing Member uses to assess necessary evidence of whether a region will remain disease free recognizes the exporting Member's right to continue to trade from parts of its territory after objectively demonstrating effective regionalization.

23. The Panel has assessed the necessary evidence provided with respect to Estonia over only a three-day period following Estonia's its first ASF outbreak. Accordingly, there are insufficient findings on the record that would allow for the completion of an assessment whether the European Union has provided the necessary evidence to objectively demonstrate to the Russian Federation the absence of ASF within a reasonable period of time from the first ASF outbreaks in Estonia.

D. The Panel erred in its interpretation of the relationship between Articles 6.1 and 6.3 of the SPS Agreement

24. The Russian Federation appeals the Panel's interpretation of the relationship between Articles 6.1 and 6.3 of the SPS Agreement.[12] The Panel found that, even in situations where, under Article 6.3, an exporting Member has failed to provide the necessary evidence to establish that a

trade purposes." This corroborates that an importing Member must adapt its measures to the SPS characteristics in its territory only if the exporting Member requesting for zone recognition has provided the importing Member with the necessary evidence. This is a logical sequencing, given

ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION[1]

A. Claims

1. The Panel erred in the interpretation and application of the first sentence of Article 6.2 of the SPS Agreement when finding that Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF, and therefore, the measures at issue are not inconsistent with Russia's obligations under that provision

1. A panel faced with an SPS measure adopted by a Member which has in place a regulatory framework that (only) formally recognizes the concepts described in the first sentence of Article 6.2 may still find an inconsistency of a challenged measure with the first sentence of Article 6.2.

2. A determination by a panel based solely on the text of the regulatory framework

ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION[1]

A. Claims

1. The Panel correctly found that the EU-wide ban is a measure at issue attributable to Russia

1. It is not in dispute that exports of the products at issue from the entire European Union to Russia have ceased. Russia has essentially only two points on appeal, which have no merit: (i) that the EU-wide ban is attributable to the European Union and not to Russia and (ii) that the European Union has agreed to this because of the bilateral veterinary certificates and Russia's terms of accession to the WTO.

2. Russia adduces three types of "creative" arguments.

3. First, Russia attempts to differentiate between "the requirement to present a valid veterinary certificate" and "the exact content of the EU-Russia bilateral veterinary certificates".

4. Russia misrepresents the Panel's findings. The Panel never mentions that the bilaterally negotiated certificates are the measure at issue. The measure at issue consists of different actions which amount to an EU-wide ban.

5. A "sanitary measure" is a defined term, as set out in Annex A(1). The definition "includes" "all relevant laws, decrees, regulations, requirements and procedures". The Panel has correctly found that the EU-wide ban is an SPS measure. Any act or omission may be a measure for the purposes of dispute settlement.

6. The European Union recalls the different actions attributable to the Russian government, which taken together clearly denote the existence of a composite measure – the EU-wide ban –, referred to by Russia as Russia's "provisional compliance with the terms / language of the veterinary certificates": the letter FS-SA-8/1277, the FSVPS Instructions FS-SA-7/1275, the letter F-12-26/1650, a press clipping on the FSVPS webpage and the rejection of several consignments by the Russian authorities after 25 January 2014. As a matter of fact, the effect of the above actions was the practical absence of new attempts by exporters to ship the products at issue to Russia.

7. Second, Russia claims that because the validity of the bilateral veterinary certificates is a term of Russia's accession to the WTO, the bilateral certificates are "frozen in time".

8. Russia's interpretation is contrary to the terms of its WTO accession. The text of paragraph 893 clearly refers to "any subsequent amendments" of bilateral certificates, in line with the continuing obligation in Article 6.1.

9. The Panel could not find that the provision relied on by Russia has clear and unambiguous language to the effect that Russia's Protocol of Accession would allow it to depart from other obligations enshrined in the Multilateral Trade Agreements.

10. To the contrary, a reading of the provisions at issue in good faith, in accordance with the ordinary meaning to be given to the terms in their context and in light of their object and purpose reveals that Members were concerned with respect to Russia's compliance with its WTO obligations, in particular with respect to regionalization. (paragraph 892).

[1] Total number of words (including footnotes but excluding executive summary) = 23380; total number of words of the executive summary = 2176.

11. In fact, Russia confirms that the position of the Panel and the European Union on this point

Russia does not have any risk assessment;

the issue of a risk assessment based on divergent or minority views, from qualified and respected sources, is not likely to arise in a case like the present one;

Russia's ALOP was found by the Panel to be high, but not very high and not zero risk;

34. The moment a Member is asking for information which is not necessary for a more objective assessment of risk, that Member can no longer benefit from the provisional shelter of Article 5.7 and the respective delays are undue as per Annex C(1)(a).

35. Article 5.7 itself employs the notion of a "reasonable period of time", with respect to the obligation (on importing Members) to review the measure in light of a more objective assessment of risk. Russia did not review the measures at issue within a reasonable period of time, and Russia did not appeal this finding by the Panel.

36. The notions of reasonable period of time in Article 5.7 and undue delays in Annex C(1)(a) are related to each other. While Russia claims that 3 days do not constitute a reasonable period of time with respect to assessing the EU ASF regionalization measures in Estonia, at the same time Russia made unnecessary information requests (resulting in undue delays) only 5 days after the receipt of the EU regionalization request regarding Lithuania.

37. Fourth , the European Union recalls that most of the products at issue from Estonia were already subject to the EU-wide ban since 29 January 2014.

38. Fifth , the ASF regionalisation measures in Estonia, while presenting certain particularities, are sufficiently closely related to the ASF regionalization measures in the other affected EU Member States. Russia did not need an extensive period of time so as to assess the respective regionalization measures.

39. Russia's third ground of appeal should be rejected. The Appellate Body will not need to complete the analysis, as it will uphold the Panel's findings.

iii) The Panel did not err in its interpretation of the relationship between Articles 6.1 and 6.3 of the SPS Agreement

40. The debate with regard to regionalization measures is relevant only with regard to non-treated products.

41. At the interim review stage the European Union noted that certain paragraphs of the interim report were factually inaccurate. The European Union promptly provided Russia significant information on revised or updated control measures with regard to Latvia from the first case until 11 September 2014.

42. The European Union did not previously provide the Panel with copies of these communications because it was never asked to do so. The European Union could not anticipate, and the Panel did not indicate at any moment during the proceedings, that the relevant date it will take into account with regard to Latvia will be a date subsequent to the date of the Panel establishment.

43. The Panel considered that the supplied evidence is "new evidence". However, the position with respect to Article 6.1 remained unchanged.

44. The Panel did not err with respect to the interpretation of the relationship between Articles 6.3 and 6.1 neither as a matter of principle, nor in the particular case of the regionalization measures in Latvia. Russia's fourth ground of appeal should be rejected.

ANNEX B-4

EXECUTIVE SUMMARY OF THE RUSSIAN FEDERATION'S APPELLEE'S SUBMISSION

1 INTRODUCTION [1]

1. Pursuant to Rule 22(1) of the Working

Appellate Body to tailor their findings to reflect these distinctly different situations, and thus offers no incentive for Members to integrate the key principle of regionalization into their national regulatory systems.

7. Moreover, under the European Union's interpretation, where an importing Member with a legal framework recognizes the concepts of pest-or disease-free areas or areas of low pest or disease prevalence but fails to apply them in a particular case, the panel or Appellate Body will necessarily find that the importing Member acted inconsistently with both Articles 6.1 and 6.2. Thus, in this situation, a panel will not be able to make independent findings under Articles 6.1 and 6.2, thus rendering Article 6.2, first sentence, largely redundant.

B. The European Union's application of Article 6.2, first sentence, is unsupported by the Panel's factual findings

8. The European Union cannot demonstrate that the Panel's factual findings under Article 6.2, first sentence, are incorrect. The Panel made factual findings that the Russian Federation recognizes regionalization based on not one, but numerous legislative documents and agreements: Customs Union Decision 317, the 2006 EU-Russia bilateral memorandum on regionalization, and the text of the actual veterinary certificates applied between the Russian Federation and the European Union. These findings reflect the existence of a comprehensive framework for the recognition and application of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as set out in Article 6.2, first sentence.

9. Assuming, arguendo , that the Appellate Body were to find that recognizing the concepts of pest- or disease- free areas and areas of low pest or disease prevalence would require some proof beyond implementing a legal framework that expressly recognizes the concept of regionalization, various actions taken by the Russian Federation demonstrate that the Russian Federation both recognizes and applies the concept of regionalization. These actions include the numerous letters sent by the Russian Federation to the European Union explaining its regionalization requirements and requesting additional evidence; the fact that the Russian Federation has applied, and made positive regionalization determinations, with respect to other Member States, and the fact that the Panel found that the EU-Russia bilateral veterinary certificates recognize regionalization.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

ARTICLE 6 OF THE SPS AGREEMENT

1. Australia recalls the Panel's finding in this dispute that Russia had not breached Article 6.2 because it recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of African Swine Fever in its legislative framework.

2.

ANNEX C-2

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

Brazil considers that the panel addressed satisfactorily the relationship between Articles 6.1, 6.3 and 5 but is concerned about the interpretation given to Article 6.2, which would merely require WTO Members to "recognize the concept of pest- or disease-free areas", in abstract.

Article 6.2 does not command solely a formal recognition of the principle of regionalization.

ANNEX C-3

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by the Russian Federation ("Russia") and the European Union ("EU") in Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (DS475).

2. First, contrary to what Russia argues in its appellant submission, the text of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") does not support a categorical rule that a breach of Article 6.1 – on the basis of a failure to recognize particular disease free areas – can occur only after an exporting Member has satisfied its Article 6.3 obligation to provide information.

3. Second, contrary to what Russia argues, the Panel did not err in its interpretation of Article 6.3 by not taking into account in its Article 6.3 analysis evidence relied upon by Russia. Rather, both evidence supplied by the exporting Member pursuant to Article 6.3 and other evidence in the possession of the importing Member bear on the question of whether the importing Member has satisfied its Article 6.1 obligation to ensure that its SPS measures are adapted to the SPS characteristics of relevant areas.

4. Third, the Panel committed no error in its interpretation of Article 6.3 by failing to give Russia time to consider evidence following the Estonian ASF outbreak. This claim by Russia reflects its continued confusion between Article 6.1 and Article 6.3 analysis.

5. Fourth, Article 6.1 imposes obligations with respect to measures, while Article 6.2 requires recognition of concepts. Refusal to recognize specific areas as disease-free, standing alone, is unlikely to support a finding that the importing Member failed to recognize the concepts described in Article 6.2.

ANNEX D

PROCEDURAL RULING

from one of the WTO official working languages into another language for the benefit of those members of its delegation lacking the language skills required to follow the hearing.

9. At the same time, we consider interpretation provided by one member of a delegation to other members of that delegation present in the hearing room, and audible for all present in the room, not conducive to an efficient conduct of the hearing. In the interest of orderly procedure in the conduct of this appeal, the Division has therefore decided, on the basis of Rule 16(1) of the Working Procedures for Appellate Review, to allow the booths to be used by the interpreters of the Russian delegation during the oral hearing in this dispute. We do not see that the due process rights of other participants at the oral hearing would be affected by these arrangements. We also note that the Panel allowed for similar arrangements during the substantive meetings with the parties.

10. In the light of these considerations, the Division hearing this appeal authorizes Russia to use interpreters for the purpose of simultaneous interpretation from English-to-Russian. We note that Russia has undertaken to engage the interpreters and that Russia will cover all costs associated with their engagement. We underline that the oral hearing is confidential and that Russia shall take all necessary measures to ensure that the interpreters engaged by Russia maintain the confidentiality of the proceedings. The Division requests that Russia indicate in its delegation list which members of its delegation act as interpreters. In the interest of orderly procedure in the conduct of this appeal, the interpretation facilities available in the designated hearing room shall be used for simultaneous interpretation.

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