

Having reached this conclusion, it is not necessary for us to proceed any further with our examination of the European Union's claims under Annex B.

7.1438. In the alternative, the Panel considers it appropriate to exercise judicial economy on the claims by the European Union under Annex B. This is so as the Panel considers that findings on these elements of the claims are not necessary in order to enable the DSB to make sufficiently precise recommendations and rulings as to allow for prompt compliance with those recommendations and rulings "in order to ensure effective resolution" of the dispute.<sup>1818</sup> The measures at issue are now well known to the European Union and no action by Russia at this stage would increase the transparency of these measures, in a timely manner, to the benefit of the European Union or other WTO Members.

### 7.8.3 Summary of conclusions in respect of the challenged measures

7.1439. Based on the foregoing, the Panel finds that the European Union has failed to establish a *prima facie* case that the measures at issue fall within the scope of Article 7 and Annex B. In the alternative, the Panel exercises judicial economy in respect of these claims of the European Union.

## 8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As described in greater detail above, the Panel *finds* that:

- a. The European Union has demonstrated the existence of the alleged EU-wide ban as a composite measure which reflects Russia's refusal to accept certain imports of the products at issue from the European Union. The basis for Russia's refusal is the requirement contained in the veterinary certificates negotiated with the European Union. According to this general requirement, the whole of the European Union's territory, except for Sardinia, has to be ASF free for three years in order for the products at issue to be imported into Russia. Following the ASF outbreaks in Lithuania, the products from the European Union do not meet that requirement. Therefore, the actions by Russia to apply this general requirement to the current situation in the European Union results in an EU-wide ban of the products at issue attributable to Russia. Hence, the EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism.
- b. There is no limitation in Russia's Protocol of Accession to the Panel's assessment of the merits of the European Union's claims brought in respect of the EU-wide ban.
- c. The import restrictions on the products at issue from Estonia and Latvia are within the Panel's terms of reference.
- d. In respect of the European Union's claims regarding the EU-wide ban, pursuant to the SPS Agreement:
  - i. the EU-wide ban is an SPS measure within the meaning of Annex A(1) of the SPS Agreement;
  - ii. the EU-wide ban is not based on the Terrestrial Code and is in consequence inconsistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement;
  - iii. 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 EU-wide ban is not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement;
  - iv. in the period between 7 February 2014 and 11 September 2014, the European Union objectively demonstrated to Russia, pursuant to Article 6.3 of the SPS Agreement, that there are areas within the European Union territory, outside Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so;

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<sup>1818</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

- v. Russia did not adapt the EU-wide ban to the SPS characteristics related to ASF of the areas where the products subject to that measure originated nor to the SPS characteristics related to ASF in Russia. Therefore, the EU-wide ban is inconsistent with Article 6.1;
  - vi. Russia's process of consideration of the European Union's request for recognition of the ASF-free areas within the European Union falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. Russia formulated information requirements, in respect of the EU-wide ban, that were not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c). In addition, Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). Consequently the procedure at issue is inconsistent with Article 8 of the SPS Agreement;
  - vii. there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the non-affected EU member States, as appropriate to the circumstances. Moreover, Russia did not provisionally adopt the measure on the basis of available pertinent information, did not seek to obtain the additional information necessary for a more objective assessment of risk, and did not review the EU-wide ban within a reasonable period of time. Therefore, the EU-wide ban does not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia. Moreover, Russia did not base the EU-wide ban on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2; and Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2 therefore the EU-wide ban is also inconsistent with Article 2.2;
  - viii. the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, because by not basing that measure on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement;
  - ix. the EU-wide ban is inconsistent with Article 5.6 of the SPS Agreement, with respect to non-treated products covered by Chapter 15.1 of the Terrestrial Code, because it is significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of inconsistency of the EU-wide ban with Article 5.6, the EU-wide ban is inconsistent with Article 2.2 of the SPS Agreement because it is applied beyond the extent necessary to protect animal life or health.
- e. In respect of the European Union's claims regarding the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, pursuant to the SPS Agreement:
- i. the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are SPS measures within the meaning of Annex A(1) of the SPS Agreement;
  - ii. the import bans on the products at issue from Estonia, Latvia, Lithuania, and Poland do not conform to the relevant international standards contained in the Terrestrial Code, and thus are inconsistent with Article 3.2 of the SPS Agreement. Therefore, Russia is not entitled to benefit from the presumption of consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with the other relevant provisions of the SPS Agreement and of the GATT 1994;
  - iii. the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, as applicable to treated products, are not "based on" the relevant international standards, as articulated in Articles 15.1.14-15.1.16 of the Terrestrial

Code; and are therefore, to the extent applicable to treated products, inconsistent with Article 3.1 of the SPS Agreement;

- iv. the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, are not "based on" the relevant international standards, as articulated in the relevant Articles of Chapter 15.1 of the Terrestrial Code; and are therefore, to the extent applicable to non-treated products, inconsistent with Article 3.1 of the SPS Agreement;
- v. the ban on the imports of the products at issue from Latvia, as applicable to non-treated products, is "based on" the relevant international standards, as articulated in the relevant Articles of Chapter 15.1 of the Terrestrial Code; and is therefore, to the extent applicable to non-treated products, consistent with Article 3.1 of the SPS Agreement;
- vi. 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 bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement;
- vii. at least as at 11 September 2014, the European Union provided to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Estonia, Lithuania, and Poland, that are free of ASF and are likely to remain so;
- viii. at least as at 11 September 2014, the European Union failed to provide to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Latvia that are free of ASF *and are likely to remain so*;
- ix. Russia did not adapt the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland to the SPS characteristics related to ASF of the areas where the products subject to the bans on the imports from these four EU member States originated nor to the SPS characteristics related to ASF in Russia. Furthermore, Russia did not perform a risk assessment on which it could base its evaluation of the relevant elements to determine the SPS characteristics of the areas from which the products at issue originate. Therefore, the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 6.1;
- x. Russia's process of consideration of the European Union's request for recognition of ASF-free areas within the European Union including the four affected EU member States falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. Russia formulated, in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, information requirements that were not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c). Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). Consequently the procedure at issue is inconsistent with Article 8 of the SPS Agreement;
- xi. there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the affected EU member States, as appropriate to the circumstances. Moreover, Russia provisionally adopted the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, on the basis of available pertinent information, except with respect to those measures as applicable to the treated products at issue. In addition, Russia did not seek to obtain the additional information necessary for a more objective assessment of risk, and did not review the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time. Therefore, the bans on the affected EU member States do not fall within the scope of Article 5.7 and the qualified exemption

to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia in respect of these measures. Furthermore, Russia did not base the bans on the affected EU member States on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2. Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2, therefore the bans on the affected EU member States are also inconsistent with Article 2.2;

- xii. the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 5.3 of the SPS Agreement, because by not basing those measures on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement;
  - xiii. the bans on the imports from Estonia, Latvia, Lithuania, and Poland, as applicable to treated products, are inconsistent with Article 5.6 of the SPS Agreement, with respect to treated products covered by Chapter 15.1 of the Terrestrial Code, because they are significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the lack of arguments or evidence raised by the Russian Federation in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of breach of Article 5.6, we find that the bans on the imports of the products at issue, as applicable to treated products, from Estonia, Latvia, Lithuania, and Poland, are inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect animal life or health.
  - xiv. the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, are inconsistent with Article 5.6 of the SPS Agreement, with respect to non-treated products covered by Articles 15.1.5, 15.1.8, 15.1.10, 15.1.12, and 15.1.13 of the Terrestrial Code, because they are significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of breach of Article 5.6, we find that the bans on the imports of the products at issue, as applicable to non-treated products, from Estonia, Lithuania, and Poland, are inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect animal life or health.
- f. In respect of the European Union's claims pursuant to Article 2.3 of the SPS Agreement with respect to the measures at issue:
- i. Russia's measures at issue are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. We also find that Russia's ASF measures are inconsistent with Article 2.3, second sentence, because they are applied in a manner which constitutes a disguised restriction on international trade.

8.2. Having found that Russia's ASF measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel *declines to rule* on the European Union's claim under Article 5.5 of the SPS Agreement.

8.3. The Panel also *declines to rule* on the European Union's claims in respect of the ban on the imports of the products at issue from Latvia, as applicable to non-treated products, pursuant to Articles 5.6 and 2.2 of the SPS Agreement, because the European Union failed to make a *prima facie* case that the alternative identified by the European Union in respect of non-treated products is significantly less restrictive to trade than this measure.

8.4. The Panel also *declines to rule* on the European Union's claims in respect of the measures at issue pursuant to Article 7 and Annex B of the SPS Agreement, because the European Union has

failed to establish a *prima facie* case that the measures at issue fall within the scope of those provisions, thus failing to make a *prima facie* case of inconsistency thereof.

8.5. The Panel also *declines to rule* on the European Union's claims in respect of the measures at issue pursuant to Annex C(1)(b) of the SPS Agreement because the European Union failed to make a *prima facie* case of inconsistency thereof.

8.6. The Panel also *declines to rule* on the European Union's claims in respect of Russia not taking into account the relevant economic factors listed in Article 5.3 when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection in respect of ASF, because the European Union failed to make a *prima facie* case of inconsistency thereof.

8.7. The Panel also *declines to rule* on the European Union's claims in respect of Russia not taking into account the objective of minimizing negative trade effects when determining the appropriate level of sanitary and phytosanitary protection, because the Panel finds that Article 5.4 does not impose a positive obligation on WTO Members.

8.8. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the specified provisions of the SPS Agreement, they have nullified or impaired benefits accruing to European Union under that agreement.

8.9. Pursuant to Article 19.1 of the DSU, having found that Russia acted inconsistently with its obligations under Articles 3.1, 3.2, 5.1, 5.2, 2.2, 5.3, 5.6, 6.1, and 8 as well as Annex C(1)(a) and C(1)(c) of the SPS Agreement, we recommend that the DSB request Russia to bring its measures into conformity with its obligations under the SPS Agreement.

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