

territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic", is outside its terms of reference.

7.357. The Panel finds that the following measures are within its terms of reference:

- a. The 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.
- b. The 2016 Transit Bans on Non-Zero Duty Goods and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).
- c. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

## 8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. With respect to the Panel's jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that:
  - i. it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.
- b. With respect to the measures and claims within the Panel's terms of reference, the Panel finds that:
  - i. the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.
  - ii. the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.
  - iii. Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.
  - iv. Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU.

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- c. With respect to the existence of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as of the date of Ukraine's panel request, the Panel finds that:
- i. Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319).
- d. With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994, the Panel finds that:
- i. as of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;
  - ii. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;
  - iii. Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994; and
  - iv. accordingly, Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered by Article XXI(b)(iii) of the GATT 1994.

8.2. The Panel also concludes as follows:

- a. With respect to Ukraine's claims under the first sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:
- i. the 2016 Belarus Transit Requirements were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine;
  - ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine; and
  - iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.
- b. With respect to Ukraine's claims under the second sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:
- i. the 2016 Belarus Transit Requirements were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;
  - ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

- iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of entry (certain countries where entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.
- c. With respect to Ukraine's remaining claims under the GATT 1994, the Panel does not consider it necessary to address Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994.
- d. With respect to Ukraine's claims under Russia's Working Party Report, as incorporated into its Accession Protocol by reference, the Panel considers that:
  - i. Russia could justify any inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994; and
  - ii. With respect to Ukraine's claims under paragraph 1161 of Russia's Working Party Report, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both; and
  - iii. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

8.3. Having found that Russia has not acted inconsistently with its obligations under the GATT 1994 or with commitments in Russia's Accession Protocol, the Panel makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.