Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union

(WT/DS475)

Third Party Submission of Australia

10 March 2015
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## TABLE OF ABBREVIATIONS

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<th>Abbreviation</th>
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<tr>
<td>ASF</td>
<td>African Swine Fever.</td>
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<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes.</td>
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<td>SPS Agreement</td>
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<td>WTO</td>
<td>World Trade Organization.</td>
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TABLE OF CASES REFERRED TO IN THIS SUBMISSION

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A. INTRODUCTION

1. Australia considers that these proceedings initiated by the European Union (EU) under the DSU raise important issues of interpretation of the SPS Agreement.

2. In particular, Australia notes that this dispute is important as it will consider the obligations imposed by Article 6 of the SPS Agreement on regionalization, including in the context of the SPS Agreement’s requirements regarding harmonization (Article 3), risk assessment (Article 5), and control, inspection and approval procedures (Article 8).

3. Australia notes that many of the claims in this dispute will require the Panel to come to a view on the facts. Australia offers no view on these at this point. Rather, for the purposes of this submission, Australia offers some general observations in relation to harmonization with international standards (Article 3.2 of the SPS Agreement); risk assessment (Article 5.7 of the SPS Agreement); and transparency (Article 7 and Annex B(1), (2), (5) and (6) of the SPS Agreement).

4. Australia reserves the right to raise other issues in the third party hearing with the Panel.

B. HARMONIZATION WITH INTERNATIONAL STANDARDS

5. A central issue in this dispute is whether measures conform to a relevant international standard under Article 3.2 of the SPS Agreement, in particular the OIE Code standards on ASF\(^1\), including in relation to zoning and compartmentalization\(^2\).

6. Russia claims it adhered to the relevant OIE standards in connection with the four ASF-infected EU Member States and that this creates a presumption that Russia has complied with, inter alia, Articles 5.1, 5.2, 5.3, 5.4, 5.6, 6.1, 6.2 and 6.3 of the SPS Agreement\(^3\).

7. Article 3.2 of the SPS Agreement provides:

   *Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*

8. Australia notes that the Panel will therefore need to determine, as a matter of fact, whether Russia’s measures conform to, or are based on, the OIE Code, noting that only measures which *conform to* international standards enjoy the presumption of

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2 Ibid, chapter 4.3.
consistency with the SPS Agreement. Australia also notes that that presumption is rebuttable.

9. Bearing this in mind, Australia considers that it would be appropriate for the Panel to commence its analysis with the claims under Article 3, followed by consideration, if necessary, of the subsequent claims under Articles 5 and 6 of the SPS Agreement.

C. RISK ASSESSMENT

10. Australia notes that Russia does not appear to have conducted a risk assessment in relation to trade in relevant products from those areas unaffected by ASF, whether within the four affected EU Members or EU-wide. Russia seeks to justify this on the basis of Article 5.7 of the SPS Agreement.

11. It will be necessary for the Panel to consider whether the level of scientific information was insufficient so as to justify Russia’s provisional adoption of SPS measures not based on a risk assessment in accordance with Article 5.7 of the SPS Agreement.

12. In explaining its actions Russia states there is: ‘insufficient scientific information’.

13. The Appellate Body in *Japan–Agricultural Products II* set out four cumulative requirements in order for a Member to rely on Article 5.7 of the SPS Agreement. In accordance with this it will thus be necessary for the Panel to assess whether: 1) the relevant scientific information Russia had was insufficient; 2) the measures adopted by Russia were on the basis of available pertinent information; 3) whether Russia sought to obtain additional information for a more objective assessment of the risk; and 4) whether Russia has reviewed its measures within a reasonable period of time.

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5 This accords with the order of analysis undertaken by the Panel in *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R and Add.1R, circulated to WTO Members 14 October 2014 (not yet adopted), see paragraph 7.125.


> Under these circumstances, and given the insufficient scientific information available, the Russian Federation chose to provisionally comply with the language of the veterinary certificates while also requesting additional information from the European Union in order to perform a proper risk assessment based on a complete picture of the epizootic situation of ASF in each EU Member State. Specifically, the Russian Federation aimed to better understand the likelihood of entry of ASF into the Russian Federation from the importation of uncertified pigs and pork products from other EU Member States.

14. Australia underscores that the insufficiency of evidence must relate to information that is relevant to the risk assessment in question. Australia also notes that the reasonable period of time requirement has to be established on a case-by-case basis. In this case, where the apparent uncertainty relates to containment zones for ASF, the Panel may wish to take into account related rules and guidelines on regionalization.

D. REGIONALIZATION

15. Central to this dispute is the principle of regionalization. Australia considers that regionalization is an important principle aimed at allowing the continuation of trade while meeting an importing Member’s appropriate level of protection. It is especially important in the case of Members with large territories where an outbreak a disease is contained to a zone in one part of their territory, including movement controls on risk products and other means of disease spread, and the Member can demonstrate that the disease has not spread to other parts of its territory thus the risk from the ‘disease-free’ parts of the Member’s territory is no greater than risk prior to the disease incident occurring in the Member.

16. In this dispute, the Panel will need to determine whether Russia’s measures deny or contradict the recognition of pest- or disease-free areas and areas of low pest or disease prevalence under Article 6.2 of the SPS Agreement.

17. The EU, asserts that Russia did not recognize such areas, stating:

   ...in this case, Russia did not recognize the concept of disease-free areas and areas of low disease prevalence with respect to ASF in the EU.

18. Russia contests the EU’s assertion, stating:

   ...an incorrect interpretation of Article 6.2 of the SPS Agreement, which merely requires abstract recognition of the concept. Even if the European Union’s interpretation were correct, however, it would still fail to demonstrate that the Russian Federation violates the provisions of Article 6.2 of the SPS Agreement.

19. Australia agrees with Russia that the first sentence of Article 6.2 of the SPS Agreement requires only the recognition of the concept of “pest- or disease-free areas and areas of low pest or disease prevalence”. However, as the Appellate Body in India - Agricultural Products went on to find:

   ...in our view, to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the

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9 Ibid, paragraph 93.
10 Ibid, paragraph 201.
20. It will be necessary for the Panel to determine whether Russia’s measures, notified or otherwise, operate in a manner such as to deny or contradict the recognition of such areas. Such a finding may be informed by the Panel’s other findings under Article 3 and Article 5 of the SPS Agreement.

E. TRANSPARENCY

21. The EU claims that Russia failed to observe the transparency obligations in the SPS Agreement.

22. Australia notes the importance of compliance with transparency obligations in the SPS Agreement. It is important that measures are published promptly and in such a manner as to enable interested Members to become acquainted with them as required by Article 7 and Annex B(1), (2), (5) and (6).

23. Australia further notes that one of the benefits of undertaking a public risk assessment process is that it provides an opportunity for all stakeholders, including trading partners, to consult with the importing country government and thereby understand the basis for each country’s risk assessment conclusions and resulting sanitary measures. This provides a transparent process consistent with the obligation outlined in Article 7 of the SPS Agreement.

F. CONCLUSION

24. Australia thanks the Panel for the opportunity to provide this third party submission.

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