IN THE WORLD TRADE ORGANISATION

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

WT/DS475

Third Party Submission

by

Norway

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I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this dispute concerning important principles of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

2. In this written submission, Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss certain legal aspects of the claims related to risk assessment, regionalization and discrimination.

II. ISSUES RELATED TO RISK ASSESSMENT

A. Introduction

3. The Parties seem to agree that the Russian measures at issue in this dispute[1] are sanitary and phytosanitary (SPS) measures, as set out in Annex A.1 to the SPS Agreement. According to Article 2.1 of the SPS Agreement, Members have the right to take SPS measures "necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with provision of the [..] Agreement". However, with this right follows certain obligations. It is for instance a requirement that Members

> *ensure that any sanitary or phytosanitary measure is [...] based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.*[2]

4. Furthermore, Article 5.1 of the SPS Agreement requires that

> *Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.*

5. This provision is viewed as a "specific application" of the basic obligation set out in Article 2.2.[3] The Appellate Body has made clear that where a measure is not based on a risk

[1] The measures are described in the Parties' submissions; see i.a. the European Union's First Written Submission part III, B and Russia's First Written Submission part C.
[2] SPS Agreement, Article 2.2.
[3] Appellate Body, *European Communities – Hormones* para 180. and Panel Report, *EC – Biotech* para. 7.1439. The latter report indicated that the "specific application" refers to the second and third requirements of Article 2.2; that is the requirements to base SPS measures on scientific principles and make sure SPS measures are not maintained without sufficient scientific evidence.

assessment in accordance with Article 5.1, it will be presumed to be inconsistent with the second and third prongs of Article 2.2.[4]

B. Article 5.7

6. Where relevant scientific evidence is insufficient to perform an assessment in accordance with Article 5.1, it follows from Article 5.7 that

> *a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.*

7. The panel in *European Communities – Biotech* characterized Article 5.7 as an autonomous right rather that an exception. A measure that is compatible with Article 5.7 will not be inconsistent with Article 5.1.[5] The European Union claims that the Russian measures do not meet the requirements of Article 5.7.[6] Russia disagrees with this.[7]

8. The Appellate Body has noted that Article 5.7 is concerned with situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk.[8] It has identified four cumulative requirements that must be fulfilled for a Member to have recourse to Article 5.7:

- *It must be imposed in respect of a situation where "relevant scientific information is insufficient";*
- *It must be adopted "on the basis of available pertinent information";*
- *The Member must "seek to obtain the additional information necessary for a more objective assessment of risk"; and*
- *The Member must "review the […] measure accordingly within a reasonable period of time".*

[4] See Appellate Body Report, *Australia – Salmon* para. 138.
[5] Panel Report, *EC – Biotech,* para. 7.2997. In para. 7.3000 of the report, the Panel confirms that the initial burden of proof under Article 5.7 rests with the complainant.
[6] See, *for instance*, the European Union's First Written Submission, para. 7
[7] See, *for instance*, Russia's First Written Submission, para. 382.
[8] *US/Canada – Continued Suspension*, para. 677.

9. For Article 5.7 to apply, each of these requirements must be met. Norway will in the following give a brief overview over the interpretation of the requirements by panels and the Appellate Body in previous disputes.

(i) Insufficient Scientific Evidence

10. The threshold condition for application of Article 5.7 is that the relevant scientific evidence is insufficient. If this condition is met, Article 5.7 is applicable.

11. The Appellate Body has held that there is

> *a link or relationship between the first element of Article 5.7 and the obligation to perform a risk assessment meeting the demands of Article 5.1: "relevant scientific evidence" will be "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement.* [9]

12. Accordingly, the main question will be whether the available scientific evidence permits an assessment of risks within the meaning of Article 5.1, or not. The concept of risk assessment for the purposes of the SPS Agreement is found in Annex A, paragraph 4, which includes two definitions, depending on the nature of the risk to be assessed. In the case at hand, only the first definition is relevant. This definition is concerned with

> *the evaluation of the establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological or economic consequences*

13. The Appellate Body has held that a risk assessment of this type must consist of the following three elements:[10]

- *identify the disease or pests whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry establishment or spread of these diseases or pests;*
- *evaluate the likelihood of entry, establishment or spread of these diseases or pests, as well as the associate potential biological and economic consequences;*

[9] Appellate Body Report, *Japan – Apples*, para. 179.
[10] Appellate Body Report, *Australia – Salmon,* para. 135.

- *evaluate the likelihood of entry, establishment or spread of these diseases or pests according to the SPS measures which might be applied.*

14. If the available scientific evidence is insufficient to undertake an assessment within these parameters, then the gateway to Article 5.7 is open. "Insufficient" in this regard refers both to situations where there is not enough scientific evidence (in quantitative terms) and to situations where there is enough evidence, but it does not give reliable results (in qualitative terms).[11] However, the Appellate Body has made clear that insufficiency of scientific evidence is not the same as "scientific uncertainty".[12] In the words of the panel in *EC – Biotech*, risk assessments "need not necessarily inform a Member 'unequivocally' about risk".[13] In the same dispute, it was underscored that the notion of "insufficiency" does not imply "a relationship between the scientific evidence and the matters of concern to the legislator", including the appropriate level of protection.[14]

15. The Appellate Body has explained that the "possibility of conducting further research or of analysing additional information, by itself, should not mean that the relevant scientific evidence is or becomes insufficient".[15] It has also confirmed that the existence of scientific controversy in itself is not enough to conclude that the relevant scientific evidence is "insufficient".[16]

16. The determination of whether the relevant scientific evidence is "insufficient" must be made at time of adoption of the provisional SPS measure.[17] The "insufficiency" is, however, a transitory state, which only last "until such time as the imposing Member procures the additional scientific evidence which allows the performance of a more objective assessment of risk."[18]

(ii) The provisional measure must be adopted on the basis of available pertinent information

17. The right to take provisional measures where there is "insufficient scientific evidence" to perform a proper risk assessment is subject to a requirement that such measures are "based on available pertinent information". It follows from the wording of Article 5.7 that this may

[11] Appellate Body Report, *Japan – Apples,* para. 185.
[12] Appellate Body Report, *Japan – Apples,* para. 184.
[13] Panel Report, *European Communities – Biotech,* para. 7.3240.
[14] Panel Report, *European Communities – Biotech*, para. 7.3234.
[15] Appellate Body Report, *US/Canada – Continued Suspension*, para.702.
[16] Appellate Body Report, *US/Canada – Continued Suspension*, para. 677.
[17] Panel Report, *European Communities – Biotech,* para. 7.3253.
[18] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679.

include information from "the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members". In the case at hand, at least the Office of Epizooties (OIE) should be deemed a relevant organization.

18. The Appellate Body has set out that

> *Article 5.7 contemplates situations where there is some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment. Moreover, there must be a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure. In this sense, Article 5.7 provides a 'temporary "safety valve" in situations where some evidence of a risk exists but not enough to complete a full risk assessment, thus making it impossible to meet more rigorous standards set by Articles 2.2 and 5.1.'*[19]

19. In accordance with this, the "available pertinent information" must equate to "some evidence of a risk", even if it is not enough to perform a proper risk assessment. In addition, there must be a rational relationship between the evidentiary basis and the provisional measure. Even if the rigorous standards of Article 5.1, together with Articles 5.2 and 5.3 and annex A(4), do not apply under Article 5.7, those standards must be considered as relevant context, and thus indicate what types of information may be considered as "available pertinent information".

(iii) Additional information must be sought

20. The third requirement under Article 5.7, sets out that the Member must "seek to obtain the additional information necessary for a more objective assessment of risk". This requirement is a reflexion of the temporary nature of the provisional measures within the meaning of Article 5.7. The Appellate Body has explained that "as of the adoption of the provisional measure, a WTO Member must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organization and other sources".[20] Furthermore, the Appellate Body has noted that "the information sought must be germane to conducting 'a more objective assessment of the risk', i.e. the evaluation of the likelihood of entry, establishment or spread of, *in casu,* a pest, according to the SPS measures that might be applied".[21] However, a Member "is not expected to guarantee specific results […] [n]or is it expected to

[19] Appellate Body Report, *US/Canada – Continued Suspension*, para. 678.
[20] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679.
[21] Appellate Body Report, *Japan – Agricultural Products II*, para. 92.

predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure".[22]

(iv) Review within a reasonable period of time

21. It is confirmed in previous disputes that an analysis of what constitutes a "reasonable period of time" should be conducted on a case-by-case basis, and that it will depend "upon the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure".

III. ISSUES RELATED TO REGIONALIZATION

22. Article 6 of the SPS Agreement establishes the concept of regionalization, which concerns the recognition of pest- or disease-free areas and areas of low pest or disease prevalence. The concept of regionalization is of special importance in situations where there is an outbreak of a disease in one part of a Member's territory, but not in other parts of the territory. In such situations, regionalization could permit trade to continue without the Member having to renounce on its high level of protection.[23]

23. The Parties disagree as to whether Russia has fulfilled the requirements of Article 6.[24] While there are claims related to all three paragraphs of this provision, Norway will only comment upon some of the aspects of the interpretation of paragraphs 1 and 2.

24. In accordance with Article 6.1,

> *Members shall ensure that their sanitary and phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all of parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pest, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.*

25. Article 6.2 sets out that

> *Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such*

[22] Appellate Body Report, *Japan – Agricultural Products II*, para. 92.
[23] See the European Union's First Written Submission, para. 206.
[24] See, *for instance*, the European Union's First Written Submission, para. 8, and Russia's First Written Submission, para. 7.

> *areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.*

26. In a recent dispute, *India – Certain Agricultural Products*, the panel explained that an assessment of a measure's conformity with Articles 6.1 and 6.2 should start with the first sentence of Article 6.2, followed by the second sentence of Article 6.2, before turning to Article 6.1:

> *Members must adapt their SPS measures to the SPS characteristics of an area from which goods originate or to which they are destined, and logically, they must already have recognized as per Article 6.2 the "concepts" of pest- or disease-free areas and areas of low pest or disease prevalence in order to do so.* [25]

27. In accordance with this, the panel in the present case should first assess whether Russia properly has recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and whether any determination of such areas is based on relevant factors, including geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary and phytosanitary control.

28. Second, the panel should assess whether Russia has ensured that the measures at issue in this case are adapted to the SPS characteristics of the affected area, as set out in Article 6.1. According to the second sentence of this provision, it should be considered whether Russia in its assessment of the SPS characteristics of a region has taken into account relevant factors, such as the level of prevalence of African Swine Fever, the existence of eradication and control programmes, and appropriate criteria or guidelines developed by the relevant international organizations.

29. The Panel in *India – Certain Agricultural Products* stated that a finding that the respondent party has not recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, will lead to a finding that this party has not ensured that its measures are adapted to the SPS characteristics of the those areas pursuant to Article 6.1, first sentence.[26]

30. Conversely, where there is a finding that the respondent party *has* recognised these concepts, a consideration must be undertaken, of whether this party has ensured that its

[25] Panel Report, *India – Agricultural Products*, para. 680.
[26] Panel Report, *India – Agricultural Products*, para. 690.

measures are adapted to the SPS characteristics of the affected areas and whether it took into account relevant factors when assessing the SPS characteristics of a region, consistent with Article 6.1.[27]

IV. ISSUES RELATED TO DISCRIMINATION

A. Introduction

31. The European Union claims that the Russian measures discriminate at two different levels, both between the Russian territory and that of the European Union, and between the European Union and Ukraine. Moreover, it is claimed that the measures amount to a disguised restriction on international trade. Accordingly, in the view of the European Union, Russia's measures are inconsistent with Article 2.3 of the SPS Agreement. [28] Russia disagrees with this view.[29]

32. Article 2.3 comprises two components, each constituting a separate obligation which must be respected:

> *Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.*

B. Article 2.3, first sentence

33. According to previous case law, three cumulative elements are required for a violation of the first sentence of Article 2.3:

> *i. The measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure an that of another Member:*
>
> *ii. the discrimination is arbitrary or unjustifiable; and*
>
> *iii. identical or similar conditions prevail in the territory of the Members compared.*[30]

[27] Panel Report, *India – Certain Agricultural Products*, para. 7.691.
[28] See, *for instance*, European Union's First Written Submission, para. 10.
[29] See, *for instance,* Russia's First Written Submission, para. 8.
[30] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

(i) The first element: whether there is discrimination between Members or between Russia and the European Union

34. The panel in *India – Certain Agricultural Products* started out its examination of this element by explaining that there was little jurisprudence to guide the understanding of Article 2.3, specifically with regard to the meaning of 'discrimination'. The panel in that case, however, found it "appropriate to interpret 'discrimination' in Article 2.3 of the SPS Agreement, in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994".[31] In this regard, it especially noted the similarity of the language in the two provisions, and in addition noted that the preamble of the SPS Agreement refers to Article XX of the GATT 1994. It went on to explain that

> *in the context of Article 2.3 of the SPS Agreement, we consider that "discrimination" may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for an inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.*[32]

(i) The second element: whether the discrimination is arbitrary or unjustifiable

35. Also with respect to this element, the panel in *India – Certain Agricultural Products* noted a lack of jurisprudence. However, it found that it would be guided, as appropriate, by the Appellate Body's interpretation of "arbitrary or unjustifiably" in the context of Article XX of the GATT 1994.[33] In line with this, the panel explained that

> *that the meaning of "arbitrary or unjustifiable discrimination" in the context of Article 2.3 of the SPS Agreement involves a consideration of the "cause" or "rationale" put forward to explain the discrimination in question, and whether there is a "rational connection" between the reasons given for the discriminatory treatment and the objective of the measure.*[34]

36. In the same dispute, the panel observed that unjustifiable discrimination "may exist […] when a measure is applied in a "rigid and unbending" manner across members without any regard for differences between those Members".[35] One element of the panel's analysis in

[31] Panel Report, *India – Certain Agricultural Products*, para.7.400.
[32] Panel Report, *India – Certain Agricultural Products*, para 7.400.
[33] Panel Report, *India – Certain Agricultural Products*, para. 7.427.
[34] Panel Report, *India – Certain Agricultural Products*, para. 7.429.
[35] Panel Report, *India – Certain Agricultural Products*, para. 7.432.

this dispute was an observation that the respondent did not apply similar standards to the internal movement of products associated with the risk of disease as it did to imports.

(i) The third element: whether identical or similar conditions prevail

37. In previous case law, it has been noted that the same facts that inform whether or not discrimination is arbitrary or unjustifiable may also inform whether or not identical or similar conditions prevail.[36] Furthermore, and of special relevance to the present dispute, it has been stated "that the relevant 'conditions', for the purpose of a given analysis, may be the presence of a disease within a territory (and the concomitant risk associated with that disease)".[37]

C. Article 2.3, second sentence

38. The Panel in *India – Certain Agricultural Products* interpreted the second sentence of Article 2.3 for the first time. In its interpretative analysis, it relied, *inter alia*, on observations made by the Appellate Body regarding what factors might indicate that a Member maintains a disguised restriction on international trade within the context of Article 5.5 of the SPS Agreement.

39. Specifically, it was noted that the Appellate Body has stated that

> *a finding that an SPS measure is not based on risk assessment, including instances in which there was no risk assessment at all, is a strong indication that the measure "is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure, i.e., a 'disguised restriction on international trade'". The Appellate Body also said that, where a panel has doubts regarding whether a responding Member applies similarly strict standards to the internal movement of products associated with risk within its territory as it does to imports of those products, that may be considered a factor to be taken into account […]*[38]

40. In addition, the panel found that the interpretation of the phrase "disguised restriction on international trade" in the context of Article XX of the GATT 1994 was relevant for the interpretation of the similar language of Article 2.3 of the SPS Agreement. In this regard, the panel observed that the Appellate Body has said that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade".[39] In line with this, the panel referred to its earlier

[36] Panel Report, *India – Certain Agricultural Products*, para. 7.460.
[37] Panel Report, *India – Certain Agricultural Products*, para. 7.460.
[38] Panel Report, *India – Certain Agricultural Products*, para. 7.475.
[39] Panel Report, *India – Certain Agricultural Products*, para. 7.476.

observation that the respondent did not apply similar standards to the internal movement of products associated with the risk of disease as it did to imports. Moreover, the panel recalled that the measures at issue were not based on, and thus did not conform to, the relevant international standards.[40]

V. CONCLUSION

41. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims relating to risk assessment, regionalization and discrimination.

[40] Panel Report, *India – Certain Agricultural Products*, para. 7.477.