



## **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.

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**ANNEX A-1****RUSSIAN FEDERATION'S NOTICE OF APPEAL\***

1. Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the Russian Federation hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russian Federation – Measures on the importation of live pigs, pork and other pig products from the European Union*). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the Russian Federation simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

2. The Russian Federation is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

3. For the reasons to be further elaborated in its submissions to the Appellate Body, the Russian Federation appeals, and requests the Appellate Body to modify or reverse, certain issues of law and legal interpretations developed by the Panel in this dispute.<sup>1</sup>

**I. THE PANEL'S FINDINGS REGARDING THE ALLEGED EU-WIDE BAN**

4. The Russian Federation seeks review by the Appellate Body of the Panel's findings that the so-called EU-wide ban is a measure that can be attributed to the Russian Federation.<sup>2</sup> The Russian Federation also appeals the underlying findings of the Panel that led to this erroneous finding: the Panel's failure to differentiate between national Russian Federation SPS measures and the terms of the bilateral EU-Russia veterinary certificates<sup>3</sup>, the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol,<sup>4</sup> and, alternatively, the Panel's failure to recognize the sequencing inherent in the bilateral veterinary certificates. As a result, the Panel erred, under Articles 1.1, 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.6, 5.7, 6.1, 6.3, 8 and Annex C of the SPS Agreement, and Article 3.3 DSU, in concluding that the Russian Federation's so-called EU-wide ban is conduct attributable to the Russian Federation that is inconsistent with the SPS Agreement.<sup>5</sup> These findings are in error, and the Russian Federation respectfully requests that the Appellate Body reverse them.

**II. THE PANEL'S FINDINGS ON ARTICLE 6 OF THE SPS AGREEMENT**

5. The Russian Federation seeks review by the Appellate Body of the Panel's failure to interpret Article 6.3 of the SPS Agreement to require 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.<sup>6</sup> The Russian Federation also appeals the Panel's conclusions – based on this interpretative error – that the European Union has provided the necessary evidence to objectively demonstrate to the Russian Federation that areas within the European Union are and are likely to remain ASF-free under Article 6.3 of the SPS Agreement.<sup>7</sup> Similarly, the Panel incorrectly found that the European Union had provided the necessary evidence to objectively demonstrate to the Russian Federation that there are areas in Lithuania,

\* This document, dated 23 September 2016, was circulated to Members as document WT/DS475/8.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the Russian Federation to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> See, e.g., Panel Report, paras. 7.74, 7.76, 7.77, 7.78, 7.79, 7.80, 7.81, 7.82, 7.83, and 7.84.

<sup>3</sup> See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.

<sup>4</sup> See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.

<sup>5</sup> See, e.g., Panel Report, paras. 7.216- 7.220, 7.235, 7.237, 7.484, 7.494, 7.571, 7.591, 7.707, 7.714, 7.719, 7.720, 7.783, 7.834, and 7.846.

<sup>6</sup> See, e.g., Panel Report, paras. 7.384, 7.389, 7.391-6, 7.399, 7.404, 7.406, 7.412, 7.413, 7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.939, 7.940, 7.969, 7.976, 7.978, 7.985, 7.987, 7.996, 7.1003, and 7.1004.

<sup>7</sup> See, e.g., Panel Report, paras. 7.449, 7.455 and 7.456.

Poland, Latvia and Estonia that are ASF-free pursuant to Article 6.3<sup>8</sup>, 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.<sup>9</sup> 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.<sup>10</sup> 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 Estonia are and are likely to remain disease-free based on a three-day window from the first African Swine Fever outbreak in Estonia. Thus, the Russian Federation requests that the Appellate Body to reverse the Panel's erroneous legal interpretation and its conclusion with respect to Estonia.

7. The Russian Federation further seeks review of the Panel's interpretation of Article 6.1 and its relationship to Article 6.3 of the SPS Agreement.<sup>11</sup> The Panel found that in situations involving a request by an exporting Member for zone recognition pursuant to Article 6.3, a finding of a violation of Article 6.1 regarding conditions in the *exporting Member* can still be found even absent a finding that the exporting country provided the necessary evidence to objectively demonstrate that areas in its territory are and are likely to remain disease-free under Article 6.3. Based on this erroneous legal interpretation, the Panel found that while the European Union had failed to provide the necessary evidence objectively demonstrating that parts of Latvia are likely to remain ASF-free, the Russian Federation nevertheless violated Article 6.1, in part, because it failed to adapt its measures to the SPS characteristics in Latvia.<sup>12</sup> The Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation and its erroneous conclusion with respect to Latvia under Article 6.1 of the SPS Agreement.<sup>13</sup>

<sup>8</sup> See, e.g., Panel Report, para. 7.963.

<sup>9</sup> See, e.g., Panel Report, paras. 7.976, 7.985, 7.1001, 7.1003, and 7.1004 (second and third sentences).

<sup>10</sup> See, e.g., Panel Report, paras. 7.384, 7.393, 7.394, 7.395, 7.396, 7.399, 7.404, 7.406, 7.412, 7.413, 7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.939, 7.940, 7.969, 7.978, 7.987, and 7.996.

<sup>11</sup> See, e.g., Panel Report, paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027, 7.1028.

<sup>12</sup> See, e.g., Panel Report, paras. 7.995, and 7.1028.

<sup>13</sup> To the extent that the Appellate Body reverses the Panel's findings under Article 6.3 with respect to Lithuania, Poland, Estonia and the EU-wide ban in accordance with the argumentation set out in paras. 93-194 above, the Russian Federation also request the Appellate Body to reverse the Panel's findings that the import restrictions on Lithuania, Poland and Estonia and the alleged EU-wide ban are inconsistent with Article 6.1 of the SPS Agreement. See, e.g., paras. 7.484, 7.1020, 7.1028.

**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 and certain legal interpretations developed by the Panel in the dispute *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (WT/DS475). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Other Appeal and the Other Appellant Submission with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- (a) 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 EU-wide ban is not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.373, 7.379, 7.485 and 8.1(d)(iii) of its report, which are based on its legally erroneous reasoning in paragraphs 7.366-7.379, and to complete the analysis;
- (b) 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 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. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.925, 7.1029 and 8.1(e)(vi) of its report, which are based on its legally erroneous reasoning in paragraphs 7.924- 7.925, and to complete the analysis.

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\* This document, dated 28 September 2016, was circulated to Members as document WT/DS475/9.

<sup>1</sup> Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its other appeal.

**ANNEX B**

**ARGUMENTS OF THE PARTICIPANTS**

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**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 from the European Union*. In accordance with Rule 21 of the Working Procedures for Appellate Review, the Russian Federation hereby submits its Appellant's Submission.

2. The first set of appeals seek clarification regarding the legal nature of the so-called EU-wide ban. In this context, the Russian Federation also seeks clarification concerning the rights and obligations arising from the Protocol of Accession of the Russian Federation, with respect to all Members, and in particular, the European Union.

3. In the second set of appeals, the Russian Federation seeks to clarify Members' rights and obligations under Article 6.3 of the SPS Agreement, in addition to the relationship between Article 6.1 and Article 6.3 of the SPS Agreement. As the Panel recognized, this is the first time a panel has interpreted the phrase "in order to objectively demonstrate" whether a disease-free area is "likely to remain" so under Article 6.3 of the SPS Agreement, especially in the context of a highly contagious disease that is rapidly evolving.<sup>1</sup>

4. As set out in this submission, the Russian Federation requests that the Appellate Body reverse various legal findings and conclusions of the Panel, as a result of the legal errors identified herein. The Russian Federation is concerned that, if left to stand, these legal findings and conclusions would upset the carefully negotiated balance between importing and exporting Members' rights and obligations under the SPS Agreement.

**A. The Panel erred in finding an EU-wide ban attributable to the Russian Federation**

5. The Russian Federation appeals the Panel's findings that a so-called EU-wide ban is a measure that can be attributed to the Russian Federation.<sup>2</sup> The Russian Federation also appeals the underlying findings of the Panel that led to this erroneous finding: the Panel's failure to differentiate between national Russian Federation SPS measures and the terms of the bilateral EU-Russia veterinary certificates<sup>3</sup>, the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol<sup>4</sup>, and, alternatively, the Panel's failure to recognize the sequencing inherent in the bilateral veterinary certificates. As a result, the Panel erred in concluding that the Russian Federation's so-called EU-wide ban is conduct attributable to the Russian Federation that is inconsistent with Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.6, 5.7, 6.1, 6.3, 8 and Annex C of the SPS Agreement.<sup>5</sup> Accordingly, the Russian Federation requests that the Appellate Body reverse the Panel's findings.

6. The Panel's findings are erroneous because (i) they fail to differentiate between the requirement to import products accompanied by a valid veterinary certificates – a national SPS requirement attributable to the Russian Federation – with the content of the bilateral veterinary certificates which is not a national Russian SPS measure; (ii) they do not give full legal effect to the valid and WTO-consistent bilateral veterinary certificates negotiated and agreed to by all WTO Members; and (iii), and alternatively, because they fail to recognize the sequencing inherent in the bilateral veterinary certificates.

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<sup>1</sup> See, e.g., Panel Report, paras. 7.390, 7.965.

<sup>2</sup> See, e.g., Panel Report, paras. 7.74, 7.76, 7.77, 7.78, 7.79, 7.80, 7.81, 7.82, 7.83, and 7.84.

<sup>3</sup> See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.

<sup>4</sup> See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.

<sup>5</sup> See, e.g., Panel Report, paras. 7.484, 7.494, 7.571, 7.591, 7.707, 7.714, 7.719, 7.720, 7.783, 7.834, and 7.846.



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".<sup>6</sup> 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<sup>7</sup>, and (b) that the European Union had provided sufficient evidence to demonstrate that zones in Lithuania, Poland, Estonia and the European Union as a whole, *are likely to remain* ASF-free.<sup>8</sup>

13. In interpreting whether exporting Members have provided the necessary evidence under Article 6.3 of the SPS Agreement, the Panel considered it sufficient to limit its examination to the evidence provided by the exporting Member. The Panel did not consider it relevant for an Article 6.3 interpretation to take into account, to the extent available, the science-based and technical evidence the importing Member relied on, in accordance with its ALOP. This legal interpretation of Article 6.3 is incorrect and unsupported by the ordinary meaning, context, object and purpose of Article 6.3.

14. The phrase "necessary evidence" in Article 6.3 is directly connected through "in order to" to the phrase "objectively demonstrate to the importing Member". This indicates that the purpose of the exporting Member collecting the necessary evidence is to convince the importing Member that parts of its territory are, and are likely to remain, disease-free. The reference to "evidence" and "*objectively* demonstrate" further indicates the centrality of scientific and technical evidence under Article 6.3 – as opposed to mere information or conjecture. Moreover, the phrase "necessary evidence" indicates that an importing Member's assessment of the necessary evidence be conducted in accordance with its ALOP.

15. An importing Member's right under the second sentence of Article 6.3 to undertake inspection visits to exporting Members claiming that parts of its territory are disease-free supports a reading of Article 6.3 that requires panels to take into account the importing Member's objective assessment of the necessary evidence. This is further confirmed by the exchange of information as part of the regionalization process envisioned by both the OIE Terrestrial Code and the SPS Committee Guidelines to Article 6, which underscore the role of the importing Member as reviewer and assessor of the necessary evidence provided. Finally, the relevant risk assessment jurisprudence under Articles 5.1 and 5.2 underscores that, at a minimum, in assessing the necessary evidence, a panel must take into account, where available, the science and technical evidence relied upon by the importing Member – be it minority or majority science. Indeed, importing Members with a high ALOP may require evidence that establishes that a territory is disease-free with a higher degree of certainty than importing Members with a low ALOP.

16. This legal interpretation is further supported by the object and purpose of Article 6 of the SPS Agreement. The key objectives of the regionalization provisions of Article 6 of the SPS Agreement are to facilitate international trade from at least some regions or zones of an exporting Member's territory while protecting the life and health of animals, plants, and human beings in the *importing* Member. On the one hand, it does not provide unfettered discretion to importing Members in conducting an assessment of the necessary evidence under Article 6.3; on the other hand, the proper interpretation of Article 6.3 allows the importing Member to base its evaluation on science-based and technical evidence in accordance with its ALOP when assessing whether sufficient evidence has been provided. By contrast, the Panel's interpretation, which focuses only on the science and evidence provided by the exporting Member, would lead to incongruity with the distinctly science-based disciplines of the SPS Agreement, including Articles 2.2, 3.3, 5.1, 5.2, 6.1 and 6.2 therein.

17. Given the dearth of factual findings made by the Panel with respect to the scientific and technical evidence presented and relied upon by the Russian Federation, the Appellate Body would not be in a position to complete the analysis should it reverse the Panel's interpretation of Article 6.3. Key scientific evidence relied upon by the Russian Federation, about which the Panel failed to make factual findings, includes evidence concerning wild boar movement and the critical

<sup>6</sup> See, e.g., Panel Report, paras. 7.384, 7.389, 7.3916, 7.399, 7.404, 7.406, 7.412, 7.413, 7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.939, 7.940, 7.969, 7.976, 7.978, 7.985, 7.987, 7.996, 7.1003, and 7.1004.

<sup>7</sup> See, e.g., Panel Report, paras. 7.449, 7.455, 7.456, and 7.963.

<sup>8</sup> See, e.g., Panel Report, paras. 7.976, 7.985, 7.1001, and 7.1004.

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.<sup>9</sup> 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.<sup>10</sup> Thus, the Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation<sup>11</sup>, 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 Article 6.3, a panel must recognize that it takes time for an importing Member to evaluate, inspect, and verify the measures and evidence both presented by the exporting Member and obtained through site-visits and for an exporting Member to gather the necessary evidence of its disease situation. Accordingly, a panel must identify a reasonable period of time that begins the moment an exporting Member requests a Member to recognize a disease-free area in response to a disease outbreak. This interpretation of Article 6.3 is supported by the ordinary meaning, context, and object and purpose of Article 6.3 of the SPS Agreement. The ordinary meaning of Article 6.3 of the SPS Agreement underscores that it cannot be given proper effect without a panel assessing the parties obligations over a reasonable period of time. On the one hand, exporting Members require time to gather the necessary evidence and observe the evolution of the disease to objectively demonstrate to the importing Member that their ASF-free territories *are*, and especially, *are likely to remain* ASF-free in the future. On the other hand, importing Members require time to review the necessary evidence, including through Article 6.3 sanctioned inspection visits to the exporting Member. The appropriate length of the reasonable period of time will necessarily be impacted by the establishment of new disease-free zones, both in countries already infected with the disease and in countries that were previously free of the disease and are experiencing their first outbreak.

21. This is further supported by the relevant context of Article 6.3. Both the SPS Committee Guidelines to Article 6 and relevant chapters in the OIE Terrestrial Code envision a dynamic exchange between importing and exporting Members in the context of a regionalization request. It takes time for both parties to carry out these relevant steps, which include collecting evidence,

<sup>9</sup> See, e.g., Panel Report paras. 7.384, 7.389, 7.3916, 7.399, 7.404, 7.406, 7.412, 7.413, 7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.939, 7.940, 7.969, 7.976, 7.978, 7.985, 7.987, 7.996, 7.1003, and 7.1004.

<sup>10</sup> Panel Report, paras. 7.963 and 7.1003.

<sup>11</sup> See, e.g., Panel Report paras. 7.384, 7.393, 7.394, 7.395, 7.396, 7.399, 7.404, 7.406, 7.412, 7.413, 7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.939, 7.940, 7.969, 7.978, 7.987, and 7.996.

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 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.<sup>12</sup> 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 region will likely remain disease free, an importing Member can be found to violate Article 6.1 for failing to adapt its SPS measures to regional conditions in the exporting Member. The Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation<sup>13</sup>, and its erroneous finding that the Russian Federation's import restrictions on Latvia violate Article 6.1 because they are not adapted to SPS characteristics in Latvia.<sup>14</sup>

25. The Panel's finding reflects an incorrect interpretation of the ordinary meaning, context, object and purpose of Article 6.1. By using the word "shall", Article 6.3 establishes that exporting Members claiming that parts of their territory are disease-free do not have the automatic right of recognition for zones they claim to be disease-free; rather, they must first provide the necessary evidence that objectively demonstrates that the alleged disease-free areas are and are likely to remain disease-free. The fact that Article 6 contains a special provision (Article 6.3) addressing situations involving specific requests for recognition of disease free zones by exporting Members indicates that these situations warrant treatment that may differ from other types of Article 6 claims.

26. This is supported by the context of the SPS Committee Guidelines to Article 6, which set out a "sequence" of steps that must be followed by exporting and importing Members when engaging with a regionalization request by an exporting Member. Based on the sequencing set out in the Guidelines, it follows that absent the exporting Member having provided the necessary evidence that parts of its territory are and are likely to remain disease-free, the importing Member is not obligated to "adapt" its measures to the disease situation in the exporting Member under Article 6.1.

27. Further context is found in Article 5.3.7 of the OIE Terrestrial Code, entitled "sequence of steps to be taken in establishing a zone/compartiment and having it recognized for international

<sup>12</sup> See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.

<sup>13</sup> See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.

<sup>14</sup> Panel Report, para. 7.995 and 7.1028.

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 that the exporting Member's cooperation in providing the "necessary" evidence is an essential element in allowing the importing Member to assess the risk and ultimately to adjust its own measures to that risk.

28. By interpreting Article 6.1 findings vis-à-vis disease prevalence in exporting Members as being dependent and contingent on an exporting Member's compliance with its obligation under Article 6.3 – in situations involving an exporting Member's request for zone recognition under Article 6.3 – proper effect is given to the provisions of Article 6.3 and the corresponding obligation on the exporting Member contained therein. By contrast, the Panel's interpretation attaches no legal or practical evidentiary significance to the exporting Member's obligation to provide the necessary evidence that a particular zone will likely remain disease-free under Article 6.3. This would render Article 6.3 superfluous, and indeed, irrelevant for claims involving Article 6.1.

29. Relevant jurisprudence from the Appellate Body Report in *India – Agricultural Products* and the Panel Report in *US – Animals* further confirms that (i) in situations involving a request by an exporting Member for zone recognition under Article 6.3, consistency with Article 6.3 is required before finding a violation of Article 6.1 vis-à-vis the situation in the exporting Member, and (ii) for all other situations, a violation of Article 6.1 can be found absent a finding of consistency with Article 6.3 of the SPS Agreement.

30. Based on the above, the Russian Federation requests the Appellate Body to reverse the Panel's interpretation that in situations in which an exporting Member requests for zone recognition, a violation of Article 6.1 can be found with respect to the conditions in the exporting Member even where the exporting Member has failed to provide the necessary evidence, and, accordingly, to reverse its findings under Article 6.1 vis-à-vis Latvia.

**ANNEX B-2****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION<sup>1</sup>****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** of the importing Member according to which that Member formally recognizes the concept of disease-free areas can only be a **provisional** one. In such a case, the European Union submits that a panel should subsequently **seek to confirm** its provisional conclusion in light of its analysis under Articles 6.3 and 6.1 of the SPS Agreement.

3. Contrary to what the Panel posits, the European Union's proposed interpretation would not lead to the inutility and redundancy of the first sentence of Article 6.2 for several reasons.

4. *First*, throughout the covered agreements there was used as a **general drafting technique** the spelling out of the more general obligations in first place, followed by more specific obligations afterwards. Article 6.2 starts with the phrase "in particular", clearly indicating that it develops a certain aspect which is already contained in a more general form in Article 6.1.

5. *Second*, the Appellate Body clearly indicated that the recognition of the concept of disease-free areas in Article 6.2 should be **harmoniously interpreted** in the light of the requirements in Article 6.1 and not read in isolation.

6. *Third*, the first sentence of Article 6.2 is the place where a panel's analysis may start and may very well end, without the need of going any further into the analysis of the other provisions in Article 6, in a scenario like *India-Agricultural Products*. However, in the present scenario a panel would reach only a **provisional conclusion** under Article 6.2, which may very well not be confirmed after a full analysis under Articles 6.3 and 6.1. Indeed, in such a case 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 will still find the challenged measure inconsistent with the first sentence of Article 6.2.

7. *Finally*, the European Union considers helpful the fact that elsewhere in its report the Panel made findings according to which **neither on the face of the measures at issue, nor in their application**, Russia recognizes the concept of regionalization.

8. Therefore, 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 thus, the measures at issue are not inconsistent with Russia's obligations under that provision.

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 5419; total number of words of the executive summary = 536.



**ANNEX B-3****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION<sup>1</sup>****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 HF-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).

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<sup>1</sup> 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 is correct. Russia sums up its case by asserting that the certificates must be "presumed" WTO-consistent. Indeed, all measures attributable to a WTO Member are presumed WTO consistent, until the contrary is demonstrated in DSU proceedings.

12. *Third*, the alleged "sequencing" argument advanced by Russia is a misrepresentation. The impossibility of the EU veterinary officials to sign valid certificates is due to Russia's own refusal to adapt the said certificates to the regional conditions in the European Union and in Russia.

13. A proper explanation of "sequencing" would take into account that as a first step Russia failed to agree to the adaptation of the wording of the bilateral certificates in accordance with the EU proposals and scientific evidence. Russia agreed in the past with adaptation of the certificates (i) for imports of beef from the European Union and (ii) for imports of poultry from Canada.

14. Russia's appeal on this point should be dismissed.

## 2. Claims related to regionalization

### *i) The Panel did not err in its interpretation of Article 6.3 of the SPS Agreement with regard to the scientific and technical evidence relied upon by the importing Member*

15. There are several introductory remarks. *First*, it is unclear what Panel finding Russia is actually appealing, as it invites consideration of 30 paragraphs of the Panel Report. *Second*, Russia does not explicitly appeal the findings at paragraph 8.1(d)(iv). *Third*, Russia attempts to fault the Panel for a "failure to interpret". This looks like a disguised Article 11 of the DSU appeal. *Fourth*, Russia asserts that Article 6.3 must be interpreted so as to "require panels" to do something. *Fifth*, Russia refers to evidence allegedly "relied upon" by Russia. Russia did not conduct an assessment of risk and the Panel's findings under Articles 5.1 and 5.7 are not appealed in this context. *Sixth*, Russia adds to its appeal claim a reference to Russia's ALOP. The materials characterised as "evidence" submitted by Russia are not part of the "matter" that the Panel was required to assess under Article 6.3.

16. The European Union considers that these observations are in themselves sufficient to dispose of Russia's appeal on this point.

17. The Panel made findings with respect to the evidence and information supplied by the European Union and not with regard to Russia's alleged assessment of this information, because Russia never assessed this information.

18. Contrary to what Russia alleges, the Panel did not omit the words "in order to" and "to the importing Member".

19. The European Union disagrees that two different elements (risk assessment and risk management) should be "merged" into only one subjective requirement. Russia attempts to equate "necessary" (evidence) in Article 6.3 with a subjective test at the unfettered discretion of an importing Member.

20. The context of Article 6.3 confirms this understanding. Article 3.3 provides that Members may depart from international standards on the basis of a risk assessment or as a consequence of a higher ALOP.

21. The European Union agrees that it is possible that a risk assessment may be based on divergent or minority views, as long as these views are from qualified and respected sources. The present case is different from previous cases such as the *Hormones* or *GMOs* cases, which involved relatively "new" issues.

22. Russia's allegations should be dismissed, taking into account that:

- the Panel did not commit any legal error and did not omit to give meaning to each and every word in Article 6.3;



- 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; Russia considers appropriate the level of protection reflected in the OIE Terrestrial Code;
- the Panel has found that the EU regionalization measures represent a significantly less trade restrictive alternative which meets Russia's ALOP;
- the factors to be taken into account under Article 6.3 are objective factors.

23. According to Article 11 of the DSU, the standard of review in an SPS case, including with respect to Article 6.3, is for a panel to make an objective assessment of the matter before it.

24. The Appellate Body will not reach the stage of considering whether or not it can complete the analysis because it will not reverse the Panel's findings under Article 6.3.

25. Russia reiterates arguments which it dropped before the Panel, as they had no relevance to the present dispute, related to containment zones and compartments. The EU regionalization measures are in line with the OIE Terrestrial Code.

26. Russia further states that the Panel did not make factual findings about the science and technical evidence allegedly "relied on" by Russia. But Russia has no risk assessment.

27. The Appellate Body should reject this ground of appeal and uphold the findings of the Panel.

- ii) *The Panel did not err in its interpretation of Article 6.3 of the SPS Agreement with regard to the reasonable period of time for exporting Members to collect the necessary evidence and for importing Members to review the respective evidence*

28. A reasonable period of time is normally required in the process envisaged by Article 6.3. The Panel was right to conclude that the European Union supplied the necessary evidence to Russia in order to objectively demonstrate that ASF-free areas are free and are likely to remain free in the European Union, and in particular in Estonia.

29. Russia employs as a "litigation technique" a "stuffing" of claims exclusively under Article 6, while by their very nature such claims are closely linked to other provisions of the SPS Agreement, such as Articles 5.1, 5.7 and Annex C, while not appealing the respective findings of the Panel.

30. *First*, according to Article 4.3.1. of the OIE Terrestrial Code, the process of regionalization is "best implemented by trading partners through establishing parameters and gaining agreement on the necessary measures prior to outbreaks of disease".

31. *Second*, the European Union provided abundant information and evidence with respect to the ASF situation and the respective regionalization measures in the European Union (including Estonia), so as to objectively demonstrate to Russia that ASF-free areas are ASF-free and are likely to remain so. Such information and evidence comprises (i) general information and evidence with respect to the ASF regulatory framework in the European Union; (ii) specific information and evidence pertaining to Estonia and (iii) immediate and constant updates with respect to the ASF situation in the European Union, including Estonia.

32. The European Union provided to Russia the necessary evidence with respect to geography, epidemiological surveillance, the effectiveness of sanitary controls in respect of ASF, relevant ecosystems, the prevalence of the disease and the existence of control or eradication programmes, in order to objectively demonstrate to Russia the requirements under Article 6.3.

33. *Third*, between the notification of an outbreak to the OIE and the moment trade resumes between the respective Members there is normally a short suspension period. This is a situation covered by Article 5.7.

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<sup>1</sup>**

1. Pursuant to Rule 22(1) of the Working Procedures for Appellate Review, the Russian Federation hereby submits its Appellee's Submission.<sup>2</sup>

2. The Russian Federation requests the Appellate Body to reject the European Union appeal, and to uphold the Panel's finding that the Russian Federation recognizes the concept of regionalization pursuant to Article 6.2, first sentence, of the SPS Agreement. The European Union's argument is based on the erroneous assumption that the only manner in which Members can satisfy their obligations under Article 6.2 is by applying regionalization in the challenged SPS measure. This position is unsupported both by the principles of treaty interpretation and the jurisprudence.

**A. The European Union's *interpretation of Article 6.2, first sentence, is unsupported by the ordinary meaning, context, and object and purpose***

3. The Panel did not err in its legal interpretation of Article 6.2, first sentence. The ordinary meaning, context, and object and purpose of Article 6.2, first sentence, support the Panel's interpretation of this provision as requiring only proof of an express recognition of the concepts of pest-or disease-free areas and areas of low pest or disease prevalence, including through a Member's national SPS regulatory and legislative framework.

4. The ordinary meaning of the phrase "recognize the concepts" confirms the Panel's interpretation that Article 6.2 requires Members to enable the application of the concept of pest-or disease-free areas, and areas of low pest or disease prevalence. This directly contradicts the European Union's argument that Article 6.2 requires Members to apply regionalization in their challenged SPS measures. Indeed, the European Union's interpretation of Article 6.2, first sentence, erroneously conflates the requirements of Article 6.1 with the requirements of Article 6.2, first sentence. The European Union's interpretation of Article 6.2, first sentence, is also contradicted by the phrase "in particular" in Article 6.2. The existence of this phrase demonstrates that Article 6.2 is linked to Article 6.1, and not, as the European Union claims, the reverse.

5. Moreover, the Panel's interpretation of Article 6.2, first sentence, is confirmed by the context of the second sentence of Article 6.2, which provides guidance on the factors that Members may take into account when recognizing the concepts of pest-or disease-free areas and of low pest or disease prevalence. It is further supported by the overall structure and design of Article 6, whereby more general obligations are set out first in Article 6.1, followed by more specific obligations in Articles 6.2 and 6.3. Indeed, Article 6.2 is a subset of Article 6.1 to the extent that it refers to situations involving pest or disease. Conversely, nothing in the context of Article 6.2, first sentence, supports the European Union's interpretation.

6. The object and purpose of Article 6 further confirm that the Panel correctly interpreted Article 6.2, first sentence. The Panel's interpretation properly differentiates between a situation where regionalization is outright prohibited (such as with respect to India's Avian Influenza outbreaks), and a situation where a Member has in place a detailed regulatory and legislative framework recognizing regionalization. In doing so, the Panel's interpretation furthers the object and purpose of incentivizing importing Members to create a legal framework that recognizes and facilitates the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. To the contrary, the European Union's interpretation would not enable panels and the

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 10071; total number of words of the executive summary = 965.

<sup>2</sup> The Russian Federation should not be taken to agree with any argument or proposition advanced by the European Union that is not specifically addressed in this Appellee's Submission.

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.

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**ANNEX C**

**ARGUMENTS OF THE THIRD PARTICIPANTS**

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## 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. In Australia's view, the Appellate Body's findings in *India – Agricultural Products* indicate that the obligation in Article 6.2 requires Members to do more than simply refer to or recognise such concepts in the abstract.
3. The Appellate Body clarified that the overarching obligation in Article 6.1 requires a Member to ensure that its SPS measures are adapted to regional SPS characteristics, and that the further paragraphs in Article 6 elaborate on the specific aspects of this obligation.<sup>1</sup>
4. In light of the Appellate Body's findings, Australia considers that to fulfil the obligation in Article 6.2, it is not sufficient for a Member to merely have a declaratory recognition of the concept of regionalisation in its legislation. Rather, a Member must ensure that its SPS measures, as implemented, are adapted to regional SPS characteristics.

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<sup>1</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.141.

**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. It also entails that such recognition be practically functional. As any other relevant obligation enshrined in the SPS Agreement, the obligation to recognize the concept of regionalization in Article 6.2 cannot be subject to a reductionist interpretation, that would devoid the provision of any practical repercussion and would encapsulate it on a mere theoretical level. The second sentence of the Article 6.2, moreover, defines precisely how the determination of the areas shall be made, making it clear that a mere recognition of the principle is not sufficient in order to comply with Article 6.2.

As regards Article 6.3, Brazil considers that the panel correctly found that the exporting Member must objectively demonstrate to the importing Member that some areas are, and are likely to remain, pest- or disease-free. As the panel correctly clarified Members have to "provide evidence" and not "merely information" concerning the information related to the determination of a disease- or pest-free area. This requirement on the exporting member to demonstrate its claims of disease- or pest-free areas could be seen as an equivalent to the obligation put on the importing Member to "recognize" the concept 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.
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**ANNEX D**

**PROCEDURAL RULING**

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**ANNEX D-1****PROCEDURAL RULING OF 14 NOVEMBER 2016**

1. On 2 November 2016, we received a letter from the Russian Federation requesting that the Appellate Body Division hearing the above appeal allow simultaneous English-to-Russian interpretation at the oral hearing in this appellate proceeding. Specifically, Russia explains that government officials in charge of sanitary and phytosanitary issues will participate in the oral hearing and that these officials do not have sufficient English skills to follow the hearing. Russia states that it will bear all costs associated with such simultaneous interpretation.

2. On 3 November 2016, we invited the European Union and the third participants to comment in writing on Russia's request. We received a response from the European Union on 4 November and responses from Australia, Brazil, Japan, Norway, and the United States on 7 November 2016.

3. The European Union opposes Russia's request. The European Union submits that this request is not related to the efficient conduct of the hearing or the effective exercise by Russia of its rights under the DSU, but reflects an attempt to promote Russian, *de facto*, as a language in WTO dispute settlement. The European Union states that the DSU does not prevent any delegation from taking steps, within the structures of the delegation, to ensure simultaneous interpretation for convenience of one or more members of a delegation. For the European Union, Russia's request is in fact about access to the WTO interpretation booths. The European Union notes that WTO meeting rooms are equipped with a limited number of such booths and raises a number of general questions that may arise in relation to the use and the allocation of these booths in practice.

4. In their respective comments, Japan, Norway, and the United States express that they have no objection to Russia providing English-to-Russian interpretation at its own expense, so that Members of its delegation may follow the proceedings. Brazil considers that such a request should be granted only in exceptional circumstances and takes no position on whether such circumstances are present in this case. Australia opposes the request, considering it unnecessary in the light of its expectation that the issues on appeal will be of a legal, rather than factual, nature.

5. Furthermore, Japan and the United States emphasize that they would oppose any request to allow interpretation going beyond the one described in the preceding paragraph. Highlighting that the three official working languages of the WTO are English, French, and Spanish, both Japan and the United States object, in particular, to interpretation from Russian into an official WTO working language being provided by interpreters. Australia emphasizes that all Members accede to the WTO and participate in proceedings in full knowledge of the constraint of three official working languages. Brazil states that WTO Members may face difficulties in having to express themselves in one of the three official working languages of the WTO when these are different from their own languages. Brazil adds that it has faced this challenge in WTO dispute settlement for the past 20 years and that every delegation should make every effort to resolve such languages issues within their delegation.

6. We note that Russia requests that the Appellate Body Division hearing the above appeal allow only simultaneous English-to-Russian interpretation at the oral hearing in this appellate proceeding. Russia does not request, and we do not address in this ruling, Russian-to-English interpretation.

7. We further note that the official working languages of the WTO are English, French, and Spanish. In the present case, the appellate proceedings are being conducted in English and thus in one of the official working languages of the Organization.

8. We recall that the Appellate Body held in *EC – Bananas III* that, in principle, it is for a WTO Member to determine the composition of its delegation in appellate proceedings.<sup>1</sup> We therefore see no impediment for a WTO Member to include individuals providing interpretation

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<sup>1</sup> Appellate Body Report, *EC – Bananas III*, paras. 10 and 12.

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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