

requires the importing Member to provide an effective opportunity for the exporting Member to make the claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, by maintaining a practice of, or a process for, receiving such a claim from an exporting Member affected by a specific SPS measure, and thus to render operational the concept of regionalization. This may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence. All these elements may be relevant in the assessment of a Member's compliance with the obligation under Article 6.2. As each element may contribute to a different degree to the overall compliance by that Member with its obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, the focus of a panel's analysis will depend on the circumstances of the case and the particular instruments at issue. We disagree with the Panel's finding that Article 6.2 requires merely an acknowledgement of the concept of regionalization in the form of "abstract ideas". We also consider that the Panel erred in deeming itself precluded from taking into account in its analysis under Article 6.2 specific instances of recognition or non-recognition of the concept of regionalization.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

### 6.1 Claims relating to the attribution of the EU-wide ban

6.2. We consider that the measure that the Panel attributed to Russia was not the condition in the bilateral veterinary certificates of EU-wide freedom from ASF over a three-year period but, rather, Russia's decision to deny the importation of the products at issue, i.e. the EU-wide ban. Russia does not dispute that it banned the importation of the products at issue, and the fact that the basis for doing so may not have been set out in Russian law does not alter the conclusion that the EU-wide ban is attributable to Russia.

6.3. Moreover, the Panel was not barred from reviewing the WTO-consistency of the EU-wide ban due to commitments set out in Russia's terms of accession to the WTO. Given the ongoing nature of the obligation under Article 6 of the SPS Agreement and the requirement that SPS measures be adjusted over time to ensure adaptation to regional SPS characteristics, the fact that a WTO Member has adapted its measures to the SPS characteristics of an area at a specific point in time may not ensure that such adaptation remains adequate when the particular SPS characteristics of that area evolve. Irrespective of the commitment in Russia's terms of accession to the WTO regarding which certificate would be operative in the conduct of certain trade to Russia from other WTO Members, Russia remains under an ongoing obligation, pursuant to Article 6 of the SPS Agreement, to adapt its measures to regional SPS characteristics.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.84 and 8.1.a of the Panel Report, that the EU-wide ban is attributable to Russia.
- b. In addition, we uphold the Panel's finding, in paragraphs 7.116 and 8.1.b of the Panel Report, that Russia's terms of accession to the WTO did not limit the Panel's assessment of the European Union's claims regarding the EU-wide ban.

### 6.2 Claims relating to Article 6 of the SPS Agreement

6.4. With respect to Russia's claims on appeal that the Panel erred in its interpretation of Article 6.3 of the SPS Agreement, we consider that the process of adaptation to regional SPS characteristics pursuant to Article 6 requires that the importing Member evaluate all the relevant evidence concerning the areas that an exporting Member claims are pest- or disease-free or of low pest or disease prevalence. This evaluation is addressed by the second sentences of Articles 6.1 and 6.2 of the SPS Agreement, as it relates to the importing Member's determination of the pest or disease status of the areas concerned and its assessment of their SPS characteristics, with a view to adapting its measures accordingly. Similarly, the period of time that the importing Member may take to conduct its evaluation and to adapt its measures to the SPS characteristics of the relevant areas is covered by Article 6.1 and the second sentence of

Article 6.2, as informed by Article 8 and Annex C(1)(a) to the SPS Agreement. By contrast, neither the importing Member's evaluation of the relevant evidence nor the period of time required to carry out this evaluation are covered by Article 6.3, which addresses the duties that apply to the *exporting* Member in connection with the process set out in Article 6. A panel's review under Article 6.3 is limited to assessing whether the evidence provided by the exporting Member to the importing Member is of a nature, quantity, and quality sufficient to enable the importing Member's authorities ultimately to make a determination as to the pest or disease status of the areas that the exporting Member claims to be pest- or disease-free or of low pest or disease prevalence.

6.5. Consequently, we find that the Panel did not err in its interpretation of Article 6.3 of the SPS Agreement by not finding that this provision requires consideration of the evidence relied upon by the importing Member. In addition, we find that the Panel did not err in its interpretation of Article 6.3 of the SPS Agreement by not finding that this provision contemplates a certain period of time for the importing Member to evaluate and verify the evidence provided by the exporting Member.

- a. Therefore, we uphold the Panel's findings, in paragraphs 7.456, 7.963, and 7.1004 of the Panel Report, that, as at 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia that: (i) areas within Estonia, Latvia, Lithuania, and Poland, as well as areas within the European Union outside of the four affected member States, were ASF-free; and (ii) the ASF-free areas within Estonia, Lithuania, and Poland, as well as the ASF-free areas within the European Union outside of the four affected member States, were likely to remain so.
- b. We also uphold the Panel's conclusions contained in paragraphs 8.1.d.iv, 8.1.e.vii, and 8.1.e.viii of the Panel Report, which we understand as follows:
  - i. in the period between 7 February 2014 and 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that there were areas within the European Union, outside of Estonia, Latvia, Lithuania, and Poland, which were free of ASF and were likely to remain so;
  - ii. at least as at 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that there were areas within Estonia, Latvia, Lithuania, and Poland that were free of ASF;
  - iii. at least as at 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that the ASF-free areas within Estonia, Lithuania, and Poland were likely to remain so; however, the European Union failed to provide the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that the ASF-free areas within Latvia were likely to remain so.

6.6. With respect to Russia's claim on appeal that the Panel erred in its interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement, we consider that an exporting Member's failure to provide the necessary evidence to objectively demonstrate that areas within its territory are pest- or disease-free or of low pest or disease prevalence will, in many cases, have implications for the importing Member's ability to assess the SPS characteristics of such areas and to adapt its measures accordingly. A panel may, in certain specific situations such as those identified by the Appellate Body in *India – Agricultural Products*, find that an importing Member failed to comply with Article 6.1 irrespective of the exporting Member's compliance or non-compliance with Article 6.3. However, the panel should provide reasoning explaining why the circumstances of the dispute fall within one or more of those specific situations, or why they otherwise warrant a finding that the importing Member acted inconsistently with Article 6.1. The Panel in this dispute did not provide such reasoning.

6.7. Consequently, we find that the Panel erred, in paragraph 7.1028 of the Panel Report, in finding that Russia had failed to adapt its measure to the ASF-free areas within Latvia and thereby acted inconsistently with Article 6.1.

- a. Therefore, we modify the Panel's findings, in paragraphs 7.1028 and 8.1.e.ix of the Panel Report, to the effect that the European Union has failed to demonstrate that Russia did not adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of areas within the Latvian territory, pursuant to Article 6.1 of the SPS Agreement. However, given the Panel's finding that Russia failed to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of areas within Russia, the Panel's conclusion that this measure is inconsistent with Article 6.1 of the SPS Agreement stands.

6.8. With respect to the European Union's claim that the Panel erred in finding that Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF pursuant to the first sentence of Article 6.2 of the SPS Agreement, we consider that Article 6.2 requires the importing Member to provide an effective opportunity for the exporting Member to make the claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, by maintaining a practice of, or a process for, receiving such a claim from an exporting Member affected by a specific SPS measure, and thus to render operational the concept of regionalization. This may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence. All these elements may be relevant in the assessment of a Member's compliance with the obligation under Article 6.2. As each element may contribute to a different degree to the overall compliance by that Member with its obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, the focus of a panel's analysis will depend on the circumstances of the case and the particular instruments at issue. We disagree with the Panel's finding that Article 6.2 requires merely an acknowledgement of the concept of regionalization in the form of "abstract ideas". We also consider that the Panel erred in deeming itself precluded from taking into account in its analysis under Article 6.2 specific instances of recognition or non-recognition of the concept of regionalization.

- a. Therefore, we reverse the Panel's findings, in paragraphs 7.379, 7.485, and 8.1.d.iii, and in paragraphs 7.925, 7.1029, and 8.1.e.vi of the Panel Report, that Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF, and that, therefore, the EU-wide ban and 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.

### 6.3 Recommendation

6.9. The Appellate Body recommends that the DSB request Russia to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 26th day of January 2017 by:

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Shree Baboo Chekitan Servansing  
Presiding Member

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Ricardo Ramírez-Hernández  
Member

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Peter Van den Bossche  
Member