WORLD TRADE ORGANIZATION

WT/DS475/AB/R

23 February 2017

(17-1107)

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

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
2006 Memorandum	Memorandum dated 4 April 2006 between the European Community represented by DG Health and Consumer Protection and the Presidency and the Russian Federation represented by the Federal Service for Veterinary and Phytosanitary Surveillance concerning principles of zoning and regionalisation in the veterinary field (Panel Exhibit EU-61)
Accession Protocol	Protocol on the Accession of the Russian Federation, WT/MIN(11)/24 / WT/L/839, 17 December 2011
ALOP	Appropriate level of protection
Article 6 Guidelines	Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, adopted by the Committee at its meeting of 2-3 April 2008, G/SPS/48
ASF	African swine fever
Customs Union	Customs Union of Belarus, Kazakhstan, and Russia
Customs Union Decision No. 317	Decision of the Customs Union Commission No. 317 of 18 June 2010 on Common Veterinary (Veterinary and Health) Requirements in relation to Goods Subject to Veterinary Control (Inspection), as amended (Panel Exhibit RUS-25.b)
DG SANCO	European Commission's Directorate General for Health and Consumer Protection
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU panel request	Request for the Establishment of a Panel by the European Union of 27 June 2014, WT/DS475/2
FSVPS	Russian Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*)
OIE	World Organisation for Animal Health (formerly Office International des Epizooties)
Panel Report	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
Terrestrial Code	OIE Terrestrial Animal Health Code, available at: <http://www.oie.int/international-standard-setting/terrestrial-code/access-online/>
Working Party Report	Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70 / WT/MIN(11)/2, 17 November 2011
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Description	Short Title (if applicable)
RUS-25 a.(RU) b.(EN)	Decision of the Customs Union Commission No. 317 of 18 June 2010 on Common Veterinary (Veterinary and Health) Requirements in relation to Goods Subject to Veterinary Control (Inspection), as amended	Customs Union Decision No. 317
RUS-28 a.(RU) b.(EN)	Letter dated 25 January 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/1023	
RUS-29 a.(RU) b.(EN)	Letter dated 27 February 2014 from FSVPS to its Heads of Territorial Departments, FS-NV-8/2972	
RUS-37 a.(RU) b.(EN)	Letter dated 11 September 2014 from FSVPS to its Heads of Territorial Departments, FS-NV-8/17431	
RUS-53 a.(RU) b.(EN)	Letter dated 2 April 2014 from FSVPS to DG SANCO, FS-EN-8/5095	
RUS-296	Data from OIE WAHIS Interface, as at 31 August 2015	
EU-14 a.(RU) b.(EN)	Letter dated 29 January 2014 from FSVPS to DG SANCO, FS-SA-8/1277	
EU-15 a.(RU) b.(EN)	Letter dated 14 February 2014 from Russia's Ministry of Agriculture to DG SANCO, [NF]-12-26/1650	
EU-16 a.(RU) b.(EN)	FSVPS website announcement dated 6 February 2014, available at: http://fsvps.ru/fsvps/news/8935.html (RU) and <http://fsvps.ru/fsvps/main.html?_language=en> (EN)	FSVPS website announcement
EU-17 a.(RU) b.(EN)	List of returned consignments of pig products, annexed as Annex 2 to Letter dated 6 August 2014 from FSVPS to DG SANCO, FS-EN-7/14507 (Panel Exhibit EU-171)	List of returned consignments
EU-52	Veterinary certificate for piglets for fattening, being exported from the European Union into the Russian Federation, 11 November 2006	Veterinary certificate for EU exports to Russia
EU-61	Memorandum dated 4 April 2006 between the European Community represented by DG Health and Consumer Protection and the Presidency and the Russian Federation represented by the Federal Service for Veterinary and Phytosanitary Surveillance concerning principles of zoning and regionalisation in the veterinary field	2006 Memorandum
EU-161 a.(RU) b.(EN)	Letter dated 29 January 2014 from FSVPS to its Heads of Territorial Departments, FS-SA-7/1275	

Exhibit Number	Description	Short Title (if applicable)
EU-168 a.(RU) b.(EN)	Letter dated 2 April 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/5081	
EU-169 a.(RU) b.(EN)	Letter dated 27 June 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/11315	
EU-171 a.(RU) b.(EN)	Letter dated 6 August 2014 from FSVPS to DG SANCO, FS-EN-7/14507	

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365

Short Title	Full Case Title and Citation
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
India – Agricultural Products	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Agricultural Products II	Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report WT/DS76/AB/R, DSR 1999:I, p. 315
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
US – Animals	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909

Short Title	Full Case Title and Citation
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Russian Federation, *Appellant/Appellee*
European Union, *Other Appellant/Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
China, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Norway, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
South Africa, *Third Participant*
United States, *Third Participant*

AB-2016-5

Appellate Body Division:

Servansing, Presiding Member
Ramírez-Hernández, Member
Van den Bossche, Member

1 INTRODUCTION

1.1. The Russian Federation (Russia) and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*[1] (Panel Report).

1.2. In these proceedings, the European Union challenges "certain Russian measures adopting, maintaining or applying an import ban or import restrictions, which prevent the importation of the products at issue from the EU into Russia."[2] In particular, the European Union identified as the measures at issue before the Panel specific bans on imports from Estonia, Latvia, Lithuania, and Poland, as well as the refusal by Russia to accept imports of the products at issue from the entire European Union, amounting to an EU-wide ban.[3] The measures at issue in this dispute are set forth in more detail in section 7.3.5 and Table 2 of the Panel Report. The products at issue comprise live pigs and their genetic material, pork, and certain other pig products.[4] The product coverage of the measures at issue is set forth in more detail in Table 1 in section 7.3.4 of the Panel Report.

1.3. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 19 August 2016, the Panel found that Russia has acted inconsistently with its obligations under Articles 2.2, 3.1, 3.2, 5.1, 5.2, 5.3, 5.6, 6.1, and 8, and Annexes C(1)(a) and C(1)(c) to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and has thus nullified or impaired benefits accruing to the European Union under that Agreement.[5]

1.4. Specifically, the Panel made the following findings that are relevant to this appeal:

a. the European Union has demonstrated the existence of the alleged EU-wide ban as a composite measure which reflects Russia's refusal to accept certain imports of the products at issue from the European Union. The basis for Russia's refusal is the requirement contained in the veterinary certificates negotiated with the European Union. According to this general requirement, the whole of the European Union, except for

[1] WT/DS475/R, 19 August 2016.
[2] Request for the Establishment of a Panel by the European Union of 27 June 2014, WT/DS475/2 (EU panel request), p. 1.
[3] EU panel request, pp. 1-2; European Union's first written submission to the Panel, paras. 86-87; Panel Report, para. 2.9 and fn 33 thereto.
[4] EU panel request, p. 1; Panel Report, para. 2.10 and Table 1 at para. 7.144.
[5] Panel Report, paras. 8.8-8.9.

Sardinia, has to be free of African swine fever (ASF) for three years in order for the products at issue to be imported into Russia. Following the ASF outbreaks in Lithuania, the products from the European Union do not meet that requirement. Therefore, the actions by Russia to apply this general requirement to the current situation in the European Union result in an EU-wide ban of the products at issue attributable to Russia. Hence, the EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism[6];

b. there is no limitation in the Protocol on the Accession of the Russian Federation to the WTO[7] (Accession Protocol) to the Panel's assessment of the merits of the European Union's claims brought in respect of the EU-wide ban[8];

c. the import restrictions on the products at issue from Estonia and Latvia were within the Panel's terms of reference[9];

d. with respect to the European Union's claims regarding the EU-wide ban, pursuant to the SPS Agreement:

   i. 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[10];

   ii. in the period between 7 February 2014 and 11 September 2014, the European Union objectively demonstrated 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, that were free of ASF and were likely to remain so[11]; and

   iii. Russia did not adapt the EU-wide ban to the SPS characteristics related to ASF in the areas where the products subject to that measure originated, nor to the SPS characteristics related to ASF in Russia. Therefore, the EU-wide ban is inconsistent with Article 6.1 of the SPS Agreement[12]; and

e. with respect to the European Union's claims regarding the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, pursuant to the SPS Agreement:

   i. 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 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[13];

   ii. at least as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there were areas within Estonia, Lithuania, and Poland that were free of ASF and were likely to remain so[14];

   iii. at least as at 11 September 2014, the European Union had failed to provide to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there were areas within Latvia that were free of ASF *and were "likely to remain so"*[15]; and

[6] Panel Report, para. 8.1.a.
[7] WT/MIN(11)/24 / WT/L/839, 17 December 2011.
[8] Panel Report, para. 8.1.b.
[9] Panel Report, para. 8.1.c.
[10] Panel Report, para. 8.1.d.iii.
[11] Panel Report, para. 8.1.d.iv.
[12] Panel Report, para. 8.1.d.v.
[13] Panel Report, para. 8.1.e.vi.
[14] Panel Report, para. 8.1.e.vii.
[15] Panel Report, para. 8.1.e.viii. (emphasis original)

iv. Russia did not adapt the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland to the SPS characteristics related to ASF in the areas where the products subject to the bans on imports from these four EU member States originated, nor to the SPS characteristics related to ASF in Russia. Furthermore, Russia did not perform a risk assessment on which it could base its evaluation of the relevant elements to determine the SPS characteristics of the areas from which the products at issue originate. Therefore, the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 6.1 of the SPS Agreement.[16]

1.5. In addition, the Panel made a number of findings that have not been appealed. In particular, with respect to the EU-wide ban, the Panel concluded that: (i) the EU-wide ban is an SPS measure within the meaning of Annex A(1) to the SPS Agreement[17]; (ii) the EU-wide ban is not based on the World Organisation for Animal Health (OIE) Terrestrial Animal Health Code (Terrestrial Code) and is, therefore, inconsistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement[18]; (iii) Russia's process of consideration of the European Union's requests for recognition of ASF-free areas is inconsistent with Annex C(1)(a), Annex C(1)(c), and Article 8 of the SPS Agreement[19]; (iv) the EU-wide ban does not fall within the scope of Article 5.7 of the SPS Agreement[20]; (v) Russia did not base the EU-wide ban on a risk assessment within the meaning of Annex A(4) to the SPS Agreement, thus breaching Articles 5.1 and 5.2 of the SPS Agreement[21]; (vi) Russia had not rebutted the presumption of inconsistency in respect of Article 2.2 of the SPS Agreement and, therefore, the EU-wide ban is inconsistent with Article 2.2[22]; (vii) the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement[23]; and (viii) the EU-wide ban is inconsistent with Articles 5.6 and 2.2 of the SPS Agreement.[24]

1.6. With respect to the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, the Panel concluded that these bans are SPS measures within the meaning of Annex A(1) to the SPS Agreement[25]; that these bans do not conform to the relevant international standards contained in the Terrestrial Code and are, therefore, inconsistent with Article 3.2 of the SPS Agreement[26]; and that these bans, as applicable to treated products, are not "based on" the relevant international standards, as articulated in Articles 15.1.14 to 15.1.16 of the Terrestrial Code, and are therefore, to the extent that they are applicable to treated products, inconsistent with Article 3.1 of the SPS Agreement.[27]

1.7. With respect to the bans on imports of the products at issue from Estonia, Lithuania, and Poland, the Panel concluded that, as applicable to non-treated products, the bans are not "based on" the relevant international standards, as articulated in the relevant Articles of Chapter 15.1 of the Terrestrial Code, and are, therefore, to the extent that they are applicable to non-treated products, inconsistent with Article 3.1 of the SPS Agreement.[28] With respect to the ban on imports of the products at issue from Latvia, the Panel concluded that, as applicable to non-treated products, the ban is "based on" the relevant international standards, as articulated in the relevant Articles of Chapter 15.1 of the Terrestrial Code, and is, therefore, to the extent that it is applicable to non-treated products, consistent with Article 3.1 of the SPS Agreement.[29]

1.8. Furthermore, with respect to the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, the Panel concluded that: (i) Russia's process of consideration of the European Union's requests for recognition of ASF-free areas is inconsistent with Annex C(1)(a),

[16] Panel Report, para. 8.1.e.ix.
[17] Panel Report, para. 8.1.d.i.
[18] Panel Report, para. 8.1.d.ii.
[19] Panel Report, para. 8.1.d.vi.
[20] Panel Report, para. 8.1.d.vii.
[21] Panel Report, para. 8.1.d.vii.
[22] Panel Report, para. 8.1.d.vii.
[23] Panel Report, para. 8.1.d.viii.
[24] Panel Report, para. 8.1.d.ix.
[25] Panel Report, para. 8.1.e.i.
[26] Panel Report, para. 8.1.e.ii.
[27] Panel Report, para. 8.1.e.iii.
[28] Panel Report, para. 8.1.e.iv.
[29] Panel Report, para. 8.1.e.v.

Annex C(1)(c), and Article 8 of the SPS Agreement[30]; (ii) the bans on imports of the products at issue from the four affected EU member States do not fall within the scope of Article 5.7 of the SPS Agreement[31]; (iii) Russia did not base the bans on imports of the products at issue from the four affected EU member States on a risk assessment within the meaning of Annex A(4) to the SPS Agreement, thus breaching Articles 5.1 and 5.2 of the SPS Agreement[32]; (iv) Russia has not rebutted the presumption of inconsistency resulting from the Panel's finding under Article 2.2 of the SPS Agreement, and therefore the bans on imports of the products at issue from the four affected EU member States are also inconsistent with Article 2.2[33]; (v) the bans on imports of the products at issue from the four affected EU member States are inconsistent with Article 5.3 of the SPS Agreement[34]; and (vi) the country-specific import bans, as applicable to treated products, are inconsistent with Articles 5.6 and 2.2 of the SPS Agreement.[35]

1.9. Finally, with respect to the European Union's claims regarding both the EU-wide ban and the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, the Panel found these measures to be inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail, and also to be inconsistent with Article 2.3, second sentence, of the SPS Agreement because they are applied in a manner which constitutes a disguised restriction on international trade.[36]

1.10. On 23 September 2016, Russia notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[37] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[38] (Working Procedures). On 28 September 2016, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal[39] and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 11 October 2016, the European Union and Russia each filed an appellee's submission.[40] On 14 October 2016, Australia, Brazil, and the United States each filed a third participant's submission.[41] On the same day, China, India, Japan, Korea, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each notified its intention to appear at the oral hearing as a third participant.[42] On 17 October 2016, South Africa notified its intention to appear at the oral hearing as a third participant.[43]

1.11. On 2 November 2016, the Appellate Body Division hearing this appeal received a letter from Russia requesting that the Division allow simultaneous English-to-Russian interpretation at the oral hearing in these appellate proceedings. Russia explained that government officials in charge of sanitary and phytosanitary (SPS) issues intending to participate in the oral hearing did not have sufficient English skills to follow a hearing conducted in English. Russia stated that it would bear all costs associated with such simultaneous interpretation.

1.12. On 3 November 2016, the Division invited the European Union and the third participants to comment in writing on Russia's request by 5 p.m. on Monday, 7 November. The European Union submitted a response on 4 November and comments from Australia, Brazil, Japan, Norway, and the United States were received on 7 November 2016.

[30] Panel Report, para. 8.1.e.x.
[31] Panel Report, para. 8.1.e.xi.
[32] Panel Report, para. 8.1.e.xi.
[33] Panel Report, para. 8.1.e.xi.
[34] Panel Report, para. 8.1.e.xii.
[35] Panel Report, paras. 8.1.e.xiii and 8.1.e.xiv.
[36] Panel Report, para. 8.1.f.i.
[37] WT/DS475/8.
[38] WT/AB/WP/6, 16 August 2010.
[39] WT/DS475/9.
[40] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[41] Pursuant to Rule 24(1) of the Working Procedures.
[42] Pursuant to Rule 24(2) of the Working Procedures.
[43] Pursuant to Rule 24(4) of the Working Procedures.

1.13. The European Union opposed Russia's request, submitting that it was not related to the efficient conduct of the hearing or the effective exercise by Russia of its rights under the DSU but, rather, reflected an attempt to promote Russian, *de facto*, as a language in WTO dispute settlement.

1.14. In their respective comments, Japan, Norway, and the United States stated that they had no objection to Russia providing English-to-Russian interpretation, at its own expense, so that all Members of its delegation could follow the proceedings. Brazil considered that such a request should be granted only in exceptional circumstances, and took no position on whether such circumstances were present in this case. Australia opposed the request, considering it unnecessary in light of its expectation that the issues on appeal would be of a legal, rather than factual, nature.

1.15. On 14 November 2016, the Division issued a Procedural Ruling. The Division noted that Russia's request related to simultaneous English-to-Russian interpretation at the oral hearing. Russia did not request, and the Division did not address in its Ruling, Russian-to-English interpretation. The Division authorized Russia to use interpreters for the purpose of simultaneous interpretation from English to Russian at the oral hearing and determined that, in the interest of orderly procedure in the conduct of this appeal, the interpretation facilities in the designated hearing room would be used by the Russian interpreters for simultaneous interpretation.[44]

1.16. By letter of 21 November 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[45] The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, and the fact that the Appellate Body was at the time composed of five, rather than the full complement of seven, Appellate Body Members. On 16 December 2016, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 23 February 2017.[46]

1.17. The oral hearing in this appeal was held on 24 November 2016. The participants and third participants made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[47] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS475/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed written submissions are reflected in the executive summaries of those submissions provided to the Appellate Body[48], and are contained in Annex C of the Addendum to this Report, WT/DS475/AB/R/Add.1.

[44] The Procedural Ruling is contained in Annex D-1 of the Addendum to this Report, WT/DS475/AB/R/Add.1.

[45] WT/DS475/10.

[46] WT/DS475/11.

[47] Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[48] Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. whether the Panel erred in finding that the EU-wide ban is attributable to Russia, and 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 (raised by Russia);

b. whether the Panel erred in its interpretation of Article 6.3 of the SPS Agreement:

i. by not finding that this provision requires consideration of the evidence relied upon by the importing Member (raised by Russia); and

ii. 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 (raised by Russia);

c. whether the Panel erred in its interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement by finding a violation of Article 6.1 by the importing Member in a situation where the exporting Member has failed to comply with Article 6.3 (raised by Russia); and

d. whether 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, and that, therefore, the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, as well as the EU-wide ban, are not inconsistent with Russia's obligation under the first sentence of Article 6.2 of the SPS Agreement (raised by the European Union).

5 ANALYSIS OF THE APPELLATE BODY

5.1 The measures at issue

5.1. Before turning to the issues of law and legal interpretation raised in this appeal, we provide a brief overview of the measures at issue in this dispute, namely: (i) the "EU-wide ban", consisting of Russia's ban on the importation of the products at issue from the entire European Union; and (ii) the country-specific import bans imposed by Russia on the products at issue from Estonia, Latvia, Lithuania, and Poland.[49] The Panel found that the European Union had properly identified these as the measures at issue in this dispute.[50]

5.1.1 The EU-wide ban

5.2. In its panel request, the European Union identified as one of the measures at issue the "refusal by Russia to accept imports of the products at issue from the entire EU, amounting to an EU-wide ban."[51] The European Union characterized this measure both as an action (in the form of an import ban or restriction) and, in the alternative, as an omission (in the form of a failure to accept imports from the European Union). The European Union also sought the review of this measure as such and as applied, *de jure* and *de facto*, and insofar as it is written or unwritten.

5.3. The Panel examined various documents submitted by the European Union to demonstrate the existence of the EU-wide ban. The documents consist of the following:

a. A letter, dated 29 January 2014, from the Russian Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*) (FSVPS) to the European Commission's Directorate General for Health and Consumer Protection (DG SANCO).[52] The Panel considered that this letter provided "a clear reference to the fact that, as a consequence

[49] Panel Report, para. 7.37.
[50] Panel Report, para. 7.170.
[51] Panel Report, para. 7.47 (quoting EU panel request, p. 2).
[52] Letter dated 29 January 2014 from FSVPS to DG SANCO, FS-SA-8/1277 (Panel Exhibit EU-14.b).

of the detection of ASF in the European Union's territory, … products accompanied with veterinary certificates attesting to the veterinary requirements provided in the bilateral certificates agreed by Russia and the European Union in 2006 would be returned upon arrival to Russia."[53]

b. A letter, dated 29 January 2014, from FSVPS to its heads of territorial departments, recalling requirements in the bilateral veterinary certificates, which, the Panel noted, "are precisely related to the absence of ASF, for the last three years, in the entire territory of the European Union".[54]

c. A letter, dated 14 February 2014, from Russia's Ministry of Agriculture to DG SANCO, which states that the two detected cases of ASF in wild boar in Lithuania "considerably changes the epizootic status not only of Lithuania, but of the whole EU".[55] In addition, the letter provides that, "in order to avoid a complete halt of trade in pork products with the EU, [FSVPS] agreed upon the imports of safe finished deep heated products."[56]

d. An announcement on the FSVPS website, dated 6 February 2014, that border agents in Russia had banned consignments of pork products (frozen heads and hearts) of Austrian and German origin in the Tver and Pskov regions because of alleged ASF risks in the entire territory of the European Union.[57]

e. A list of rejected consignments of pig products with reasons for rejection that was attached as Annex 2 to a letter, dated 6 August 2014, from FSVPS to DG SANCO.[58] According to the document, the products at issue were not allowed entry into Russia due to the unreliability of information regarding the ASF status of the European Union's territory in the accompanying veterinary certificates.[59]

5.4. On the basis of its review of the foregoing documents, the Panel concluded that Russia's authorities had rejected consignments of the products at issue that failed to satisfy the requirement of EU-wide freedom from ASF for a period of three years (with the exception of Sardinia). The Panel added that "[t]hese actions taken together constitute a composite measure" comprising the "EU-wide ban" that the Panel assessed for its conformity with the relevant provisions of the SPS Agreement.[60]

5.1.2 The country-specific import bans

5.5. In its panel request, the European Union also identified country-specific bans on imports of certain non-treated pig products from Lithuania and Poland as measures at issue in this dispute.

[53] Panel Report, para. 7.63.
[54] Letter dated 29 January 2014 from FSVPS to its Heads of Territorial Departments, FS-SA-7/1275 (Panel Exhibit EU-161.b). See also Panel Report, para. 7.64.
[55] Letter dated 14 February 2014 from Russia's Ministry of Agriculture to DG SANCO, [NF]-12-26/1650 (Panel Exhibit EU-15.b). See also Panel Report, para. 7.67.
[56] Letter dated 14 February 2014 from Russia's Ministry of Agriculture to DG SANCO, [NF]-12-26/1650 (Panel Exhibit EU-15.b). See also Panel Report, para. 7.68.
[57] FSVPS website announcement dated 6 February 2014, available at: <http://fsvps.ru/fsvps/main.html?_language=en> (FSVPS website announcement) (Panel Exhibit EU-16.b). See also Panel Report, para. 7.69; and European Union's first written submission to the Panel, para. 93.
[58] List of returned consignments of pig products (Panel Exhibit EU-17.b), attached as Annex 2 to Letter dated 6 August 2014 from FSVPS to DG SANCO, FS-EN-7/14507 (Panel Exhibit EU-171.b) (List of returned consignments). See also Panel Report, para. 7.70.
[59] List of returned consignments (Panel Exhibit EU-17.b). See also Panel Report, para. 7.70. The Panel noted that Russia had admitted that it "imposed import restrictions with respect to the consignments of pork products accompanied by veterinary certificates dated later than 27 January 2014 – a few days after Lithuania experienced its first ASF outbreak." (Panel Report, para. 7.70 (quoting Russia's response to Panel question No. 25, para. 10)) The Panel also referred to "other supporting evidence" demonstrating the existence of the EU-wide ban. (Ibid., paras. 7.71-7.73 (referring to, *inter alia*, Letter dated 29 January 2014 from FSVPS to its Heads of Territorial Departments, FS-SA-7/1275 (Panel Exhibit EU-161.b); and Letter dated 29 January 2014 from FSVPS to DG SANCO, FS-SA-8/1277 (Panel Exhibit EU-14.b))) In particular, the Panel noted that "[t]he letter of FSVPS of 2 April 2014 to DG SANCO, recognizes the existence of the import restrictions of the products at issue into Russia". (Ibid., para. 7.71 (referring to Letter dated 2 April 2014 from FSVPS to DG SANCO, FS-EN-8/5095 (Panel Exhibit RUS-53.b)))
[60] Panel Report, para. 7.83.

With respect to Lithuania, the European Union maintained that a ban on such imports was set out in a letter from FSVPS to its heads of territorial departments on 25 January 2014.[61] With respect to Poland, FSVPS issued a similar letter on 27 February 2014.[62] Following a letter dated 2 April 2014 from FSVPS to its heads of territorial departments, these bans on imports from Lithuania and Poland were extended to certain processed pork products.[63]

5.6. Subsequently, in its first written submission to the Panel, the European Union referred to restrictions on imports from Latvia and Estonia that had been adopted through separate letters from FSVPS to its heads of territorial departments on 27 June 2014 and 11 September 2014, respectively.[64] These measures were not identified in the European Union's panel request. Although the parties agreed that these two sets of restrictions were within the Panel's terms of reference, the Panel decided to consider this question on its own motion.[65] The Panel found that the import restrictions on the products at issue from Estonia and Latvia were "closely related to the measures explicitly described in the European Union's panel request"[66], and were therefore within its terms of reference.[67]

5.2 Russia's claims relating to the attribution of the EU-wide ban

5.7. Russia appeals the Panel's finding that the EU-wide ban is a measure attributable to Russia. Russia also appeals the Panel's finding that there is no limitation, in Russia's terms of accession to the WTO, on the Panel's assessment of the merits of the European Union's claims as they pertain to the EU-wide ban. These two claims on appeal address findings contained in sections 7.3.2 and 7.3.3, respectively, of the Panel Report. Russia also requests, should we reverse the Panel's findings pertaining to the EU-wide ban as a measure, that we consequently also reverse all of the Panel's findings that the EU-wide ban 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 to the SPS Agreement.[68]

5.8. We begin by summarizing the Panel's findings before addressing Russia's claims on appeal.

5.2.1 The Panel's findings

5.9. Before the Panel, the European Union identified as a distinct measure at issue the "refusal by Russia to accept imports of the products at issue from the entire EU, amounting to an EU-wide ban".[69] The Panel explained that it would examine whether the EU-wide ban is susceptible to challenge under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) by, first, identifying the "content and extent" of the alleged measure, and, second, by verifying whether it is "attributable" to Russia.[70]

5.10. With regard to the existence of the measure, the Panel noted that the European Union had submitted various letters and instructions from Russian authorities, including the following documents[71]: (i) a letter, dated 29 January 2014, from FSVPS to DG SANCO[72]; (ii) a letter, dated 29 January 2014, from FSVPS to its heads of territorial departments[73]; (iii) a letter,

[61] EU panel request, p. 1 (referring to Letter dated 25 January 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/1023 (Panel Exhibit RUS-28.b)).
[62] EU panel request, p. 2 (referring to Letter dated 27 February 2014 from FSVPS to its Heads of Territorial Departments, FS-NV-8/2972 (Panel Exhibit RUS-29.b)).
[63] EU panel request, p. 2 (referring to Letter dated 2 April 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/5081 (Panel Exhibit EU-168.b)).
[64] Panel Report, para. 7.117 and fns 271 and 272 to para. 7.158 (referring to Letter dated 27 June 2014 from FSVPS to its Heads of Territorial Departments, FS-EN-8/11315 (Panel Exhibit EU-169.b); and Letter dated 11 September 2014 from FSVPS to its Heads of Territorial Departments, FS-NV-8/17431 (Panel Exhibit RUS-37.b)).
[65] Panel Report, para. 7.119.
[66] Panel Report, para. 7.160.
[67] Panel Report, para. 7.167.
[68] Russia's appellant's submission, para. 82.
[69] Panel Report, para. 7.47 (quoting EU panel request, p. 2).
[70] Panel Report, para. 7.57.
[71] Panel Report, para. 7.60.
[72] Letter dated 29 January 2014 from FSVPS to DG SANCO, FS-SA-8/1277 (Panel Exhibit EU-14.b).
[73] Letter dated 29 January 2014 from FSVPS to its Heads of Territorial Departments, FS-SA-7/1275 (Panel Exhibit EU-161.b).

dated 14 February 2014, from Russia's Ministry of Agriculture to DG SANCO[74]; (iv) an announcement by FSVPS, dated 6 February 2014, regarding a ban on the importation of pork products of Austrian and German origin due to alleged ASF risks in the entire European Union[75]; and (v) instances of banned exports of pork products from EU member States after 25 January 2014.[76] The Panel reviewed these documents and other evidence and concluded that the European Union had established that the actions undertaken by Russia amounted to a ban on the importation of certain pig products from the entire European Union.[77]

5.11. The Panel then examined whether the EU-wide ban is a measure attributable to Russia. The Panel started by recalling that acts or omissions of the organs of a State, including those of the executive branch, are usually attributable to the State.[78] The Panel then noted that the evidence before it supported the proposition that Russia was undertaking specific actions rendering it impossible for exporters in the European Union to export the products at issue to Russia.[79] Specifically, the Panel found that these actions demonstrated that imports of the products at issue from the European Union were refused by the territorial departments of FSVPS. Having observed that, pursuant to Russia's domestic legislation, FSVPS and its territorial departments are organs of the Russian Government, the Panel concluded that FSVPS's actions, and those of the heads of its territorial departments, are attributable to Russia.[80]

5.12. The Panel recognized that, "as of 25 January 2014, the entire territory of the European Union except for Sardinia is not free of ASF − thus not matching the exact wording in the bilaterally agreed veterinary certificates."[81] However, in the Panel's view, "it is Russia, rather than the European Union, that takes the action that gives effect to the import ban."[82] In addition, the Panel observed that "the terms of the veterinary certificates are not what is required by the European Union for imports into its territory, but what is required by Russia for products to enter into its territory."[83] The Panel further noted that Russia "more broadly regulates the importation of the products at issue"[84] by requiring not only the presentation of a veterinary certificate by the exporting country, but also compliance with a number of requirements under the control of the Russian authorities, including the issuance of an import permit by Russia. Finally, the Panel noted that, following an outbreak of ASF in Lithuania on 24 January 2014, the Russian authorities "actively enforce[d]"[85] the requirement in the bilateral veterinary certificates that the entire European Union, except for Sardinia, be ASF-free for three years for the products at issue to be imported into Russia. The Panel thus concluded that the European Union had demonstrated the existence of the EU-wide ban as a "composite measure" consisting of Russia's refusal to accept imports of the products at issue from the European Union.[86]

5.13. The Panel then turned to examine Russia's argument that the validity of the bilateral veterinary certificates is a term of Russia's WTO membership, and that the recognition of these certificates in the terms of Russia's accession implies the consistency of these certificates with Russia's obligations under the WTO agreements. The Panel considered that the question before it was "whether Russia can rely on its terms of accession to effectively shield the measure at issue from further scrutiny under the DSU and the SPS Agreement."[87]

[74] Letter dated 14 February 2014 from Russia's Ministry of Agriculture to DG SANCO, [NF]-12-26/1650 (Panel Exhibit EU-15.b).
[75] European Union's first written submission to the Panel, para. 93; FSVPS website announcement (Panel Exhibit EU-16.b).
[76] List of returned consignments (Panel Exhibit EU-17.b); European Union's first written submission to the Panel, paras. 94-96.
[77] Panel Report, para. 7.74.
[78] Panel Report, para. 7.75 (referring to, *inter alia*, Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 81).
[79] Panel Report, para. 7.77.
[80] Panel Report, para. 7.79.
[81] Panel Report, para. 7.80.
[82] Panel Report, para. 7.80.
[83] Panel Report, para. 7.80.
[84] Panel Report, para. 7.81.
[85] Panel Report, para. 7.83.
[86] Panel Report, para. 7.84.
[87] Panel Report, para. 7.98.

5.14. The Panel noted the language of paragraph 893 of the Report of the Working Party on the Accession of the Russian Federation to the WTO[88] (Working Party Report), according to which "[b]ilateral veterinary export certificates initialled by one of the CU [Customs Union] Parties before 1 July 2010, *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 until an export certificate was agreed with a CU Party based on the agreed positions of the other CU Parties."[89] The Panel considered that this language "would seem to imply that Russia's commitment is to acknowledge the validity of the bilateral veterinary export certificates or their amendments for those imports from [WTO] Members into Russia."[90] Referring to Appellate Body jurisprudence regarding the use of waivers from WTO obligations[91], the Panel considered that, where a Member claims that a provision in its protocol of accession allows it to depart from other obligations enshrined in the WTO agreements, the text of such a provision should at least have clear and unambiguous language to that effect.[92] The Panel observed that the text of paragraph 893 of Russia's Working Party Report does not refer to Russia's substantive obligations under the SPS Agreement, or provide that the application of the requirements contained in the bilateral veterinary certificates is automatically consistent with Russia's rights and obligations under the SPS Agreement.[93] The Panel, therefore, was "not persuaded by Russia's argument that its terms of accession to the WTO render the direct or indirect application of the bilateral veterinary export certificates consistent with its obligations under the SPS Agreement."[94] As a result, the Panel found no limitation, in Russia's terms of accession, to assessing the merits of the European Union's claims brought in respect of the EU-wide ban.[95]

5.2.2 Whether the Panel erred in attributing the EU-wide ban to Russia

5.15. Russia appeals the Panel's finding that the EU-wide ban is a measure attributable to Russia. Russia claims, first, that the Panel erroneously attributed the "content" of the bilateral veterinary certificates to Russia.[96] In referring to the "content" of the bilateral veterinary certificates, Russia focuses on the condition in those certificates that, in order for the relevant products to be certified for export to Russia, the entire European Union (with the exception of Sardinia) must be free of ASF for a period of three years. According to Russia, while it is authorized by its domestic law to require veterinary certificates in order to import the products at issue, the specific condition of EU-wide freedom from ASF is not set out in Russia's SPS legislation. As Russia puts it, "the Panel overlooked the difference between the general requirement to provide some form of a valid veterinary certificate … with the specific requirements contained in the EU-Russia bilaterally negotiated veterinary certificates."[97] Russia underscores that, "[w]hile the former is a national SPS measure attributable to the Russian Federation, the latter is not."[98] Russia further asserts that the Panel failed to recognize the sequencing inherent in the bilateral veterinary certificates, whereby the European Union must first issue a valid certificate before Russia may recognize the validity of the certificate and allow access to imports.[99]

5.16. The European Union responds that Russia is seeking to misrepresent the Panel's findings by arguing that the Panel considered the bilateral veterinary certificates to constitute Russia's national SPS measures. According to the European Union, the Panel never used such reasoning but, rather, examined several pieces of evidence and concluded that the measure at issue consists of different actions by Russia that amount to the EU-wide ban.[100] Moreover, the European Union points out that the definition of an SPS measure broadly refers to "any" measure, and that any act or

[88] WT/ACC/RUS/70 / WT/MIN(11)/2, 17 November 2011.
[89] Panel Report, para. 7.103 (quoting Working Party Report, para. 893). (emphasis added by the Panel)
[90] Panel Report, para. 7.105.
[91] Panel Report, paras. 7.106-7.107 (referring to Appellate Body Reports, *EC – Bananas III*, paras. 164-166 and 183; and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 382).
[92] Panel Report, para. 7.108.
[93] Panel Report, para. 7.109. The Panel also considered that paragraph 1450 of the Working Party Report did not provide otherwise. (Ibid., para. 7.110)
[94] Panel Report, para. 7.111.
[95] Panel Report, para. 7.116.
[96] Russia's appellant's submission, para. 45 et seq.
[97] Russia's appellant's submission, para. 53.
[98] Russia's appellant's submission, para. 53.
[99] Russia's appellant's submission, para. 73 et seq.
[100] European Union's appellee's submission, para. 73 (referring to Panel Report, para. 7.74).

omission may be a measure for the purposes of WTO dispute settlement.[101] The European Union further submits that Russia's alternative argument regarding sequencing also reflects a misrepresentation. In the European Union's view, a proper explanation of sequencing would take into account the fact that, as a first step, Russia failed to agree to the adaptation of the wording of the bilateral veterinary certificates in order to give effect to Russia's WTO obligations.[102]

5.17. In *US − Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[103] With regard to the EU-wide ban, Russia's argumentation suggests that the "act" the Panel attributed to Russia consists of the condition of EU-wide freedom from ASF over a three-year period. We do not see that this is supported by the manner in which the European Union framed its challenge. The Panel noted that, in its panel request, the European Union indicated that it was challenging the "refusal by Russia to accept imports of the products at issue from the entire EU, amounting to an EU-wide ban."[104] The European Union added that it was identifying "this specific measure at issue both as an action (an import ban or restriction) and, in the alternative, as an omission (failure to accept imports from the EU)".[105] Although the European Union also referred, in its panel request, to evidence that contained references to the need for proper veterinary certificates in order to import the products at issue[106], the European Union's challenge with respect to the EU-wide ban is clearly directed at Russia's decision, either through action or omission, to deny the importation of the products at issue.

5.18. Moreover, we do not see that the Panel attributed the bilateral veterinary certificates, or the condition regarding EU-wide freedom from ASF, to Russia. In assessing whether the EU-wide ban could be attributed to Russia, the Panel focused principally on the fact that "it is Russia, rather than the European Union, that takes the action that gives effect to the import ban."[107] As the Panel observed, even if one considers the role of the bilateral veterinary certificates, they "are not what is required by the European Union for imports into its territory, but what is required by Russia for products to enter into its territory."[108] The Panel further noted that the requirement concerning veterinary certificates forms part of a broader regulatory framework in Russia governing the importation of products.[109] Although the Panel acknowledged that Russia's import ban "is grounded on the inability of the European Union's veterinarians to certify [compliance with] the requirement set out in the bilaterally agreed veterinary certificates", the Panel held that it was "Russia's authorities [that] actively enforce this requirement by rejecting consignments of the products at issue that fail to satisfy this requirement".[110] Accordingly, the Panel concluded that "[t]hese actions taken together constitute a composite measure, and this is what the European Union refers to as an 'EU-wide ban', and this is what constitutes a measure at issue attributable to Russia."[111]

5.19. In light of the manner in which the European Union framed its claims before the Panel and the Panel's analysis and conclusions regarding those claims, we see no support for the assertion that the Panel attributed the content of the bilateral veterinary certificates − in the form of the condition of EU-wide freedom from ASF over a three-year period − to Russia. Rather, the Panel clearly explained that the measure it was attributing to Russia was Russia's decision to deny the importation of the products at issue − i.e. the EU-wide ban. Although Russia may have relied on the particular condition of EU-wide freedom from ASF set out in the certificates to ban imports of

[101] European Union's appellee's submission, para. 74.
[102] European Union's appellee's submission, para. 104. In the European Union's view, the certificates could easily be adapted in accordance with Article 6.1 of the SPS Agreement, as Russia did for imports of beef from the European Union in 2011, and for imports of poultry from Canada in 2015. (Ibid., paras. 105-107)
[103] Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 81. (fn omitted)
[104] Panel Report, para. 2.9 (quoting EU panel request, p. 2).
[105] Panel Report, para. 2.9 (quoting EU panel request, p. 2).
[106] Panel Report, para. 2.9 (quoting EU panel request, pp. 1-2). The European Union notes that the Russian authorities stated that "veterinary doctors in the EU Member-States must stop certification of the above-mentioned products. Otherwise these products accompanied with these veterinary certificates issued after 27.01.2014, cannot be allowed into the territory of the Member States of the Customs Union and are subject to returns." (European Union's appellee's submission, para. 76 (quoting Letter dated 29 January 2014 from FSVPS to DG SANCO, FS-SA-8/1277 (Panel Exhibit EU-14.b)))
[107] Panel Report, para. 7.80.
[108] Panel Report, para. 7.80.
[109] Panel Report, paras. 7.81-7.82.
[110] Panel Report, para. 7.83.
[111] Panel Report, para. 7.83.

the products at issue, it was Russia's "actions" of "enforc[ing] this requirement by rejecting consignments of the products at issue" that the Panel considered to constitute "a measure at issue attributable to Russia".[112] Russia does not dispute that it banned the importation of the products at issue, or that the European Union had provided a sufficient evidentiary basis to establish the existence of the ban. Accordingly, we do not consider that Russia's arguments on appeal disturb the Panel's attribution of the EU-wide ban to Russia.

5.20. To the extent that Russia is suggesting that the import ban may not be attributed to Russia because the basis upon which it was imposed is derived, in part, from a condition that is not set out in Russian law, Russia's claim cannot be sustained. We do not see on what grounds the act of a Member may not be attributed to that Member due to the fact that the basis for doing so is not contained in that Member's municipal law. As we have set out above, the decision to deny the importation of the products at issue is undeniably an act of the Russian Government. It is immaterial that the condition in the bilateral veterinary certificates upon which Russia's decision was based may have been developed in conjunction with, or may have involved prior action on the part of, the European Union. Moreover, to the extent that Russia maintains that the basis for the EU-wide ban is a relevant consideration because it justifies its conduct under WTO law, this is, in our view, not relevant to whether the import ban itself is attributable to Russia. Indeed, the question of whether a measure is consistent with, or may be justified in respect of, a Member's WTO obligations may only be engaged once the attribution of that measure to the respondent has been established. Thus, we do not agree with Russia to the extent that it maintains that the fact that the basis for banning the importation of the products at issue emanates from veterinary certificates jointly agreed to by Russia and the European Union somehow undermines the attribution of the EU-wide ban to Russia.

5.21. Moreover, we take note of Russia's "alternative" argument that the Panel failed to understand conformity with the bilateral veterinary certificates as consisting of certain sequential steps: first, the issuance of valid veterinary certificates by the European Union; and, second, the recognition of the validity of such certificates by Russia. According to Russia, "there can be no legitimate finding of the Russian Federation's compliance, or lack thereof, with the valid bilateral veterinary certificates because that would represent a contingent *second* step in the certification process that would occur … only after the European Union veterinary officials have issued a valid bilateral veterinary certificate."[113] We have noted above that, even if one takes into account the condition in the bilateral veterinary certificates regarding EU-wide freedom from ASF, this does not undermine the conclusion that Russia decided on the basis of this condition to impose an import ban. The fact that the issuance of a certificate by the European Union must precede Russia's recognition of the validity of that certificate does not alter this conclusion. Irrespective of the events preceding Russia's conduct, the fact remains that Russia undertook actions to deny the importation of the products at issue, and it is these actions that the Panel found to comprise the measure attributable to Russia.

5.2.2.1 Conclusion on Russia's claim regarding the attribution of the EU-wide ban to Russia

5.22. In sum, 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.

5.23. For the foregoing reasons, 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.

[112] Panel Report, para. 7.83. We note that, in referring to the EU-wide ban as a "composite measure", the Panel was referring to the "actions taken together" by the Russian authorities of "rejecting consignments of the products at issue". We also note the Panel's statement that FSVPS and its territorial departments are organs of the Russian Government. (Ibid., para. 7.79)

[113] Russia's appellant's submission, para. 81. (emphasis original)

5.2.3 Whether the Panel erred in finding 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

5.24. Russia further claims that the "validity" of the bilateral veterinary certificates must be given "full legal effect" by requiring a finding that Russia's actions taken to comply with the requirements of the certificates render them WTO-consistent.[114] Russia's claim rests on two interrelated propositions. First, Russia submits that the commitment in its Working Party Report that the bilateral veterinary certificates "would remain valid" amounts to a commitment during Russia's accession process that the only certificates that can be used to import the products at issue are those agreed to by Russia and the European Union. Second, Russia maintains that, in order to ensure the "full legal effect" of the bilateral veterinary certificates, Russia must, in acting in accordance with those certificates, be found to have acted consistently with its WTO obligations.

5.25. The European Union responds that Russia's reading of its Working Party Report is contrary to Russia's terms of accession, which establish that the obligation to maintain the validity of the bilateral veterinary certificates is a commitment, not a right. In addition, the European Union disagrees with Russia's attempt to portray the certificates as "frozen in time".[115] The European Union recalls that paragraph 893 of the Working Party Report refers to "any subsequent amendments" to the bilateral certificates. According to the European Union, such reference is logical from a regionalization perspective, because the obligation of adaptation under Article 6.1 of the SPS Agreement is a continuing one.[116] The European Union argues that the rationale for introducing the commitment regarding the validity of bilateral certificates was to allow, and not to restrict, trade with Russia, and notes that paragraph 892 of the Working Party Report contains a reference to regionalization and Article 6 of the SPS Agreement as the concern of the WTO Members that sought a commitment from Russia regarding the validity of bilateral certificates.[117] Thus, the European Union submits that, contrary to Russia's position that its bilateral certificates are deemed to be consistent with Russia's WTO obligations, a cumulative reading of paragraphs 892 and 893 of the Working Party Report reveals the concern of certain Members regarding Russia's compliance with the regionalization obligations in the SPS Agreement.[118]

5.26. As a preliminary matter, we note our understanding that this claim by Russia is distinct from its claim that the EU-wide ban was erroneously attributed to Russia. As we have remarked above, whether a measure can be attributed to a Member does not, in our view, engage the question of whether such measure is consistent with, or may be justified in respect of, that Member's WTO obligations. Such an understanding comports with the manner in which the Panel structured its analysis of the issues, in which it first addressed the attribution question in section 7.3.2 of its Report, before turning to examine, in section 7.3.3 of its Report, whether Russia's accession commitments nevertheless shield the EU-wide ban from further scrutiny under the SPS Agreement.[119]

5.27. We therefore turn to assess whether the terms of Russia's accession commitments in its Working Party Report shield the EU-wide ban from further scrutiny under the SPS Agreement.

5.28. With regard to the manner in which the text of paragraph 893 of the Working Party Report relates to Russia's overall undertakings in its Accession Protocol, we note that paragraph 2 of the Accession Protocol provides that the protocol, "which shall include the commitments referred to in paragraph 1450 of the Working Party Report, shall be an integral part of the WTO Agreement". Paragraph 1450, in turn, provides that the Working Party took note of the commitments by Russia as set out in several paragraphs of the Working Party Report, including paragraph 893. Thus, by virtue of these references, the commitments by Russia that are set out in paragraph 893 of its

[114] Russia's appellant's submission, section II.D.
[115] European Union's appellee's submission, para. 92.
[116] European Union's appellee's submission, para. 93 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.154).
[117] European Union's appellee's submission, para. 95.
[118] European Union's appellee's submission, para. 96.
[119] In its Notice of Appeal, Russia separately appeals discrete paragraphs in section 7.3.2 (e.g. paras. 7.74 and 7.76-7.84) and section 7.3.3 (e.g. paras. 7.108-7.112 and 7.114-7.116) of the Panel Report. (Russia's Notice of Appeal, WT/DS475/8, para. 4)

Working Party Report form an integral part of the Accession Protocol. In addition, as Russia acknowledges, these commitments apply in respect of all WTO Members.[120]

5.29. Russia relies principally on the language contained in paragraphs 892 and 893 of its Working Party Report, which provide as follows:

> 892. Members expressed concern regarding a mandatory requirement to use a common CU [Customs Union] Veterinary Certificate. They noted that currently, some exporting countries had veterinary certificates that included requirements that differed significantly from those in the common form and the veterinary requirements of the Russian Federation. These differences reflected conditions in the exporting country or region, in line with Article 6 of the WTO SPS Agreement and other international agreements. These Members sought confirmation that the Russian Federation and its CU partners would negotiate specific certificates with requirements that could differ from the CU Common Requirements and that export certificates currently in effect with the Russian Federation would remain valid until CU replacement had been agreed. Moreover, if there was no certificate governing trade in a regulated product, these Members sought confirmation that an exporting country could negotiate a certificate with the CU Parties that included requirements that differed from the CU Common Requirements.
>
> 893. The representative of the Russian Federation confirmed that the Russian Federation and its CU Parties would work with interested Members to negotiate veterinary certificates that included requirements that differed from the CU common form and specific CU Common Requirements, if an exporting country made a substantiated request prior to 1 January 2013 to negotiate such a veterinary export certificate. Bilateral veterinary export certificates initialled by one of the CU Parties before 1 July 2010, 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 until an export certificate was agreed with a CU Party based on the agreed positions of the other CU Parties. Bilateral veterinary export certificates initialled by one of the CU Parties between 1 July 2010 and 1 December 2010 would remain valid for import and circulation of relevant goods, only in the territory of the CU Party that initialled the certificate, until a bilateral veterinary certificate was agreed with a CU Party based on the agreed positions of the other CU Parties. These new certificates would include terms on matters dealt within an international treaty that were no less favourable than the corresponding terms on that matter in such treaty that was concluded prior to 1 July 2010 between a Party and the relevant third country. While such bilateral veterinary export certificates could contain requirements that differed from the CU Common Form and specific provisions of the Common Requirements, such certificates had to ensure the appropriate level of protection as determined by the CU Parties. The Working Party took note of these commitments.[121]

5.30. It is noted, in paragraph 892, that WTO Members expressed the concern that there was a mandatory requirement to use a Customs Union[122] common veterinary certificate, notwithstanding the fact that some exporting countries had negotiated bilateral veterinary certificates containing requirements that "currently … differed significantly" from those in the Customs Union common certificate. These differences "reflected conditions in the exporting country or region, in line with Article 6 of the WTO SPS Agreement and other international agreements". These Members thus sought confirmation that Russia would negotiate certificates that differed from the Customs Union common certificate with respect to conditions in the exporting country as they relate to, *inter alia*, Article 6 of the SPS Agreement. In addition, paragraph 892 indicates that Members also sought confirmation that any export certificates currently in effect with Russia "would remain valid", i.e. would remain in effect, until a replacement form for the Customs Union had been agreed. Thus, where a bilateral veterinary certificate had been negotiated with certain WTO Members, paragraph 892 would seem to indicate that these Members sought to avoid trade disruptions that might result from requiring reliance on the Customs Union common certificate in lieu of such a

[120] Russia's appellant's submission, para. 60.
[121] Fns omitted.
[122] The Customs Union of Belarus, Kazakhstan, and Russia.

bilaterally negotiated certificate. We further note that, by virtue of the express reference in paragraph 892 to Article 6 of the SPS Agreement, it is clear that the particular differences between the two types of certificates related to concerns regarding regionalization.

5.31. Paragraph 893 then sets out the commitment undertaken by Russia, namely, that the relevant "[b]ilateral veterinary export certificates … as well as any subsequent amendments to such certificates … would remain valid … until an export certificate was agreed with a [Customs Union] Party". Against the background of the concerns described in paragraph 892, this commitment reflects an undertaking regarding the status of bilateral veterinary certificates vis-à-vis the Customs Union common certificate. Using language identical to that in paragraph 892, this commitment provides that the bilateral veterinary certificates "would remain valid", ensuring that bilateral veterinary certificates would continue to remain in effect until a Customs Union common certificate was agreed. In addition, by referring to "any subsequent amendments", paragraph 893 also evidences the understanding that existing bilateral veterinary certificates would be subject to modification. This is further supported by language in the bilateral veterinary certificates between Russia and the European Union, which refers to the possibility of modifying "[a]dministrative territories, zones and time periods" on the basis of mutual agreement in accordance with certain principles of zoning and regionalization.[123]

5.32. Taking the above considerations together, we understand Russia's commitment in paragraph 893 as an undertaking that addresses *which* certificate would remain in effect, until amended or replaced, in trade relations between WTO Members and Russia. In other words, Russia accepted that, where a bilateral veterinary certificate exists, it is this certificate, and not the Customs Union common certificate, that would be considered a valid certificate. Russia maintains that, by virtue of the terms "would remain valid" in paragraph 893, the bilateral veterinary certificates must not only be "recognized as … legitimate veterinary certificate[s] for export"[124], but that this also means that "the certificates are presumed to be WTO-consistent."[125] As an initial matter, we draw a distinction between, on the one hand, the bilateral veterinary certificates, which require, *inter alia*, certain factual attestations regarding the disease status in the exporting country and, on the other hand, the WTO-consistency of actions taken by the importing country. It is not at issue whether the bilateral veterinary certificates between the European Union and Russia are themselves WTO-consistent. Rather, the question is whether a particular SPS measure – in this case, the EU-wide ban, which was adopted on the basis of the ASF status in the European Union – is consistent with Russia's obligations under Article 6 of the SPS Agreement.

5.33. We recall the Appellate Body's observation in *India – Agricultural Products* that the "main and overarching"[126] obligation under Article 6 is to ensure that SPS measures are adapted to regional SPS characteristics, and that the nature of that obligation "is not static, but rather ongoing".[127] Such an obligation, the Appellate Body added, requires that SPS measures be adjusted over time so as to establish and maintain their continued suitability in respect of the SPS characteristics of the relevant areas. 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. Therefore, even if one were to maintain that the condition of EU-wide freedom from ASF may have been reflective of the SPS situation at the time the bilateral veterinary certificates were originally agreed, this does not rule out that the SPS characteristics of the relevant areas may have changed over time. Moreover, as we have suggested, the question of whether the condition of EU-wide

[123] A footnote in the relevant bilateral veterinary certificates provides that "Administrative territories, zones and time periods may be modified with a mutual agreement on the basis of the Memorandum of 4 April 2006 on zoning and regionalisation". (Veterinary certificate for piglets for fattening, being exported from the European Union into the Russian Federation, 11 August 2006 (Veterinary Certificate for EU exports to Russia) (Panel Exhibit EU-52)) The 2006 Memorandum was agreed between the European Union and Russia and contains provisions aimed at applying the principles of zoning and regionalization to the international movement of animals and products of animal origin between EU member States and Russia. (See Panel Report, para. 7.371 (referring to e.g. Veterinary certificate for EU exports to Russia (Panel Exhibit EU-52); and Memorandum dated 4 April 2006 between the European Community represented by DG Health and Consumer Protection and the Presidency and the Russian Federation represented by the Federal Service for Veterinary and Phytosanitary Surveillance concerning principles of zoning and regionalisation in the veterinary field (2006 Memorandum) (Panel Exhibit EU-61)))

[124] Russia's appellant's submission, para. 66.

[125] Russia's appellant's submission, para. 67.

[126] Appellate Body Report, *India – Agricultural Products*, para. 5.141.

[127] Appellate Body Report, *India – Agricultural Products*, para. 5.132.

freedom from ASF accurately reflects the prevailing SPS situation at a particular point in time is distinct from the question of whether the SPS measure that was taken − in this case, a measure banning the importation of the products at issue − is consistent with the provisions of the SPS Agreement, and in particular Article 6. Thus, 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.

5.34. Russia maintains that, by finding that its compliance with the bilateral veterinary certificates is WTO-inconsistent, the Panel is requiring Russia to act inconsistently with paragraph 893 of the Working Party Report by unilaterally invalidating the conditions of those certificates.[128] We do not consider that the commitment set out in paragraph 893 can be understood as an obligation holding Russia or any other WTO Member captive to the terms of the bilateral veterinary certificates, when acting in accordance with those terms would put that Member at variance with its WTO rights or obligations. We also do not consider that Russia must, as it suggests, choose between violating the terms of its Working Party Report or other obligations in the WTO covered agreements. As the Appellate Body has explained, provisions of the WTO covered agreements must be read "in a way that gives meaning to *all* of them, harmoniously".[129] Accordingly, while Russia and other WTO Members agreed that the bilateral veterinary certificates would continue to remain in effect until a Customs Union common certificate was agreed, this cannot be read to absolve the Members involved from acting in good faith to make the necessary amendments to the certificates so as to ensure that SPS measures taken on the basis of such certificates are in compliance with their WTO obligations. As noted above, paragraph 893 refers not only to the bilateral veterinary certificates as they were agreed at the time of accession, but also to "any subsequent amendments".[130]

5.2.3.1 Conclusion on Russia's claim regarding Russia's terms of accession to the WTO

5.35. In sum, 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.

5.36. For the foregoing reasons, 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.

5.3 Claims under Article 6 of the SPS Agreement

5.37. We now turn to the participants' claims on appeal with respect to the Panel's analysis under Article 6 of the SPS Agreement.

5.38. In its appeal, Russia requests us to reverse the Panel's conclusions contained in paragraphs 8.1.d.iv, 8.1.e.vii, and 8.1.e.ix of its Report[131], namely:

- in the period between 7 February 2014 and 11 September 2014, the European Union objectively demonstrated to Russia, pursuant to Article 6.3 of the SPS Agreement, that there are areas within the European Union, outside of Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so;

[128] Russia's appellant's submission, para. 67.
[129] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81. (emphasis original; fn omitted)
[130] As also noted, the bilateral veterinary certificates themselves refer to the possibility of modifying "[a]dministrative territories, zones and time periods" on the basis of mutual agreement in accordance with certain principles of zoning and regionalization.
[131] Russia's response to questioning at the oral hearing.

– at least as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Estonia, Lithuania, and Poland, that are free of ASF and are likely to remain so; and

– Russia did not adapt the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland to the SPS characteristics related to ASF of the areas where the products subject to the bans on the imports from these four EU member States originated nor to the SPS characteristics related to ASF in Russia. Furthermore, Russia did not perform a risk assessment on which it could base its evaluation of the relevant elements to determine the SPS characteristics of the areas from which the products at issue originate. Therefore, the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 6.1 of the SPS Agreement.

5.39. In particular, Russia raises two claims of error with respect to the Panel's analysis under Article 6.3 of the SPS Agreement and one claim of error with respect to the Panel's analysis under Article 6.1 of the SPS Agreement.

5.40. First, Russia submits that the Panel erred in failing to find that Article 6.3 requires panels to take into account the scientific and technical evidence relied upon by an importing Member, as well as that Member's assessment of the evidence submitted by an exporting Member, in accordance with the importing Member's appropriate level of sanitary or phytosanitary protection (ALOP).[132] Russia asserts that, as a result of its incorrect interpretation, the Panel erred in finding, in paragraphs 7.963 and 7.456 of its Report, that the European Union had provided Russia with the necessary evidence to objectively demonstrate that areas within Lithuania, Poland, Latvia, and Estonia, and the European Union as a whole, respectively, were ASF-free.[133] Likewise, Russia maintains that the Panel erred in finding, in paragraphs 7.1004 and 7.456 of its Report, that the European Union had provided Russia with the necessary evidence to objectively demonstrate that the ASF-free areas within Lithuania, Poland, and Estonia, and the European Union as a whole, respectively, were likely to remain so.[134]

5.41. Second, Russia claims that the Panel erred in its interpretation of Article 6.3 by failing to find that this provision contemplates a certain time period for an importing Member to evaluate and verify the evidence provided by an exporting Member.[135] Russia submits that, as a result of its improper interpretation, the Panel erred in finding, in paragraphs 7.963 and 7.1003 of its Report, that, as at 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia that parts of Estonia are, and are likely to remain, disease-free.[136]

5.42. Third, Russia asserts that the Panel erred in its interpretation of Article 6.1 by finding that an importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in the situation where the exporting Member has failed to provide the necessary evidence, pursuant to Article 6.3, in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.[137] Russia maintains that, as a result of its interpretative error, the Panel improperly found, in paragraph 7.1028 of its Report, that the ban on imports of the products at issue from Latvia is inconsistent with Article 6.1, despite having found, in paragraph 7.995 of its

[132] Russia's appellant's submission, para. 93 (referring to Panel Report, paras. 7.384, 7.389, 7.391-7.396, 7.399, 7.404, 7.406, 7.412-7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938, 7.940, 7.969, 7.976, 7.978, 7.985, 7.987, 7.996, 7.1003, and 7.1004).

[133] Russia's appellant's submission, para. 95.

[134] Russia's appellant's submission, para. 95.

[135] Russia's appellant's submission, para. 195 (referring to Panel Report, paras. 7.384, 7.393-7.396, 7.399, 7.404, 7.406, 7.412-7.414, 7.416, 7.454, 7.930, 7.932, 7.933, 7.938-7.940, 7.963, 7.969, 7.978, 7.987, and 7.996).

[136] Russia's appellant's submission, para. 195.

[137] Russia's appellant's submission, para. 259 (referring to Panel Report, paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027, and 7.1028).

Report, that the European Union had failed to show that the ASF-free areas within Latvia's territory were likely to remain so.[138]

5.43. In response, the European Union requests us to uphold the Panel's conclusions contained in paragraphs 8.1.d.iv, 8.1.e.vii, and 8.1.e.ix of its Report.[139]

5.44. In its other appeal, the European Union requests us to reverse the Panel's conclusions, contained in paragraphs 8.1.d.iii and 8.1.e.iv of its 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 country-specific bans on the importation of the products at issue from the four affected EU member States are not inconsistent with Russia's obligation under the first sentence of Article 6.2 of the SPS Agreement.[140] Russia requests us to uphold these Panel conclusions.[141]

5.3.1 Russia's claims under Article 6.3 of the SPS Agreement

5.45. We begin by assessing Russia's claims on appeal concerning the Panel's analysis under Article 6.3 of the SPS Agreement. First, we provide an overview of the Panel's findings under Article 6.3, referring, where relevant, to the Panel's broader assessment of the European Union's claims under Article 6. Next, we examine the content of Article 6.3 in the context of the process of adaptation of measures to regional SPS characteristics pursuant to Article 6. We then proceed to evaluate the merits of Russia's claims, namely, that: (i) the Panel erred in its interpretation of Article 6.3 by failing to find that this provision requires panels to take into account the scientific and technical evidence relied upon by an importing Member[142]; and (ii) the Panel erred in its interpretation of Article 6.3 by failing to find that this provision contemplates a "reasonable period of time" for the importing Member to evaluate and verify the evidence submitted to it by the exporting Member.[143]

5.3.1.1 The Panel's findings

5.46. The Panel conducted its analysis under Article 6.3 of the SPS Agreement as part of its assessment of the European Union's claims under Article 6. In setting out the order of its analysis, the Panel stated that it would first examine "whether Russia recognizes the concept of disease-free areas within the meaning of Article 6.2".[144] Next, the Panel would turn to examining "whether the European Union provided the necessary evidence … in order to objectively demonstrate to Russia that within the European Union there are areas that are, and are likely to remain, pest- or disease-free in accordance with Article 6.3".[145] Finally, the Panel would consider "whether Russia complied with the obligation in Article 6.1 to ensure the adaptation of its measures to the SPS characteristics of the area from which the products originate and to which they are destined."[146]

5.47. The Panel began its analysis under Article 6.3 by setting out the legal test it would apply in order to assess whether the European Union had provided the necessary evidence to objectively demonstrate to Russia that areas within the European Union are, and are likely to remain, ASF-free. The Panel noted that Article 6.3 does not specify what type of evidence an exporting

[138] Russia's appellant's submission, para. 259 (referring to Panel Report, paras. 7.995 and 7.1028). Russia limits the scope of its claim to the Panel's findings with respect to the ban on imports of the products at issue from Latvia. However, should we reverse the Panel's findings under Article 6.3 – that the European Union provided the necessary evidence to objectively demonstrate to Russia that areas within Estonia, Lithuania, and Poland, and the European Union as a whole, are and are likely to remain ASF-free – Russia requests us also to reverse the Panel's findings that the EU-wide ban and the country-specific bans on imports of the products at issue from Estonia, Lithuania, and Poland are inconsistent with Article 6.1 of the SPS Agreement.

[139] European Union's appellee's submission, para. 256.

[140] European Union's other appellant's submission, para. 50 (referring to Panel Report, paras. 7.373, 7.379, and 7.485 with respect to the EU-wide ban, and to Panel Report, paras. 7.925 and 7.1029 with respect to the country-specific bans on imports of the products at issue from the four affected EU member States).

[141] Russia's appellee's submission, para. 2.

[142] Russia's appellant's submission, para. 93.

[143] Russia's appellant's submission, paras. 198-199 and 201.

[144] Panel Report, para. 7.365. See also para. 7.923.

[145] Panel Report, para. 7.365. See also para. 7.923.

[146] Panel Report, para. 7.365. See also para. 7.923.

Member must provide in order to make the objective demonstration required under that provision.[147] However, the Panel took the view that the factors listed in the second sentence of Article 6.1, as well as the second sentence of Article 6.2, inform what evidence an exporting Member needs to provide in order to make an objective demonstration under Article 6.3. The Panel also considered the Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures[148] (Article 6 Guidelines) to be informative in this respect.[149] Thus, according to the Panel, an exporting Member seeking to objectively demonstrate to the importing Member that areas within its territory are pest- or disease-free or of low pest or disease prevalence should submit evidence relating, where relevant, to: (i) geography; (ii) ecosystems; (iii) epidemiological surveillance; (iv) effectiveness of SPS controls; (v) level of prevalence of specific diseases or pests; (vi) existence of eradication or control programmes; and (vii) information corresponding to appropriate criteria or guidelines developed by the relevant international organizations.[150] The Panel cautioned that the amount of evidence in respect of each category has to be determined on a case-by-case basis, taking due account of the actual circumstances analysed by a panel.[151] The Panel also explained that it is impossible for any Member to provide "laboratory-type scientific proof" that a particular disease is not present in a certain area.[152] Rather, what an exporting Member must objectively demonstrate depends on the specific disease and on the situation in the particular area at issue.[153]

5.48. Applying this test to the circumstances of this dispute, the Panel took the view that the European Union needed to provide to Russia the necessary evidence in respect of: (i) epidemiological surveillance of ASF; (ii) the effectiveness of sanitary or phytosanitary controls in respect of ASF; (iii) regarding ecosystems, the presence of ASF in wildlife; and (iv) the level of prevalence of ASF.[154] The Panel stated that, were it to find that "the European Union [had] provided to Russia the necessary evidence in respect of the freedom of ASF in certain areas, and the likelihood of those areas remaining ASF-free, regardless of subsequent developments", the European Union "would have succeeded in objectively demonstrating that at any given point in time the areas it claims to be ASF-free, are free of such disease and are likely to remain so."[155]

5.49. With respect to the "temporal framework" for its assessment[156], the Panel considered it appropriate to examine the matter referred to it up to and including the date of adoption of Russia's latest measure at issue – namely, the ban on imports of the products at issue from Estonia, adopted on 11 September 2014.[157] Applying this temporal framework to its analysis under Article 6.3, the Panel found it appropriate to examine the evidence provided by the European Union to Russia up to 11 September 2014, as well as "any subsequent information on record", in order "to determine if and at which points in time the European Union provided the necessary evidence".[158]

5.50. Using this framework, the Panel reviewed the information that the European Union had provided to Russia in support of its request for recognition of the relevant areas as ASF-free. This information included: updates on the evolving ASF situation in the four affected EU member States[159]; communications sent by the European Union to Russia in connection with consultations on the manner in which to address the situation[160]; and letters containing information requested by Russia so as to determine whether the European Union had sufficiently substantiated its "regionalization" request.[161]

[147] Panel Report, para. 7.385.
[148] Adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 2-3 April 2008, G/SPS/48.
[149] Panel Report, para. 7.388 (referring to Panel Report, *US – Animals*, para. 7.660).
[150] Panel Report, paras. 7.389 and 7.395. See also para. 7.930.
[151] Panel Report, para. 7.389.
[152] Panel Report, para. 7.400.
[153] Panel Report, para. 7.400.
[154] Panel Report, para. 7.404. See also para. 7.413.
[155] Panel Report, para. 7.414.
[156] Panel Report, section 7.3.6.
[157] Panel Report, para. 7.176.
[158] Panel Report, para. 7.417.
[159] Panel Report, para. 7.420.
[160] Panel Report, para. 7.421.
[161] Panel Report, para. 7.422.

5.51. Having examined this information, the Panel concluded that, in the period up to 11 September 2014, the European Union had "objectively demonstrated to Russia that there [were] areas within the European Union territory, outside of Estonia, Latvia, Lithuania, and Poland, which [were] free of ASF and [were] likely to remain so".[162] The Panel also noted that the latest available information on the spread of ASF in the European Union, submitted by the parties after 11 September 2014, served to "confirm and support" this conclusion.[163]

5.52. Concerning the existence of ASF-free areas within Estonia, Latvia, Lithuania, and Poland, the Panel acknowledged "the difference in time in respect … of ASF outbreaks in the four affected EU member States", and thus undertook a "composite and progressive examination" of the bans on imports of the products at issue from each affected EU member State.[164] Having reviewed "common evidentiary elements"[165], the Panel concluded that the European Union had "provided to Russia the necessary evidence to objectively demonstrate that, at any given point in time, there were ASF-free areas within each of [those] States."[166] The Panel, however, found it "more difficult" to determine whether the information provided by the European Union was sufficient to objectively demonstrate that such areas were "likely to remain" ASF-free.[167] In particular, the Panel observed that, while it would have to reach its conclusions based on the evidence that the European Union had provided to Russia as at 11 September 2014, "neither party could have known", at that date, "what the situation would be almost one year later".[168] Indeed, the Panel noted that the European Union's complaint was "brought during the course of an active outbreak" of ASF "at a time when the situation continued to evolve rapidly", and that both parties had provided information regarding cases of ASF within the four affected EU member States occurring until late 2015.[169] For the Panel, "the provision of information in this context should be detailed and efficient", lest it prove "very difficult to consider that such evidence amounts to what is necessary" to make the objective demonstration required under Article 6.3.[170]

5.53. Having reviewed specific evidence in respect of Lithuania and Poland[171], the Panel concluded that, based on information available as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that the ASF-free areas within those States' territories were likely to remain so.[172] Similarly, with respect to Estonia, the Panel found that, as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that the ASF-free areas within that State's territory were likely to remain so.[173] Given that the first ASF outbreak in Estonia occurred in September 2014, the Panel also considered that "the shorter time-frame for the consideration of the necessary evidence of the effectiveness of control measures necessitate[d] an examination of additional information provided by the European Union after September 2014."[174] The Panel found that such additional information "seem[ed] to demonstrate an effective control system that ha[d] prevented movement of infected boar into the ASF-free area and contained outbreaks in domestic pig holdings within infected zones, with few cases [having] affect[ed] a small pig population". Thus, according to the Panel, this information "[did] not undermine"[175] but, rather, "confirm[ed] and support[ed]"[176] a conclusion that, as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that the ASF-free areas within Estonia were likely to remain so.

5.54. Finally, with respect to Latvia, the Panel found that, as at 11 September 2014, the European Union had failed to submit to Russia the necessary evidence to objectively demonstrate

[162] Panel Report, para. 7.456.
[163] Panel Report, para. 7.456. See also para. 7.455 (referring to Data from OIE WAHIS Interface, as at 31 August 2015 (Panel Exhibit RUS-296), submitted by Russia with its comments on the European Union's responses to Panel questions).
[164] Panel Report, para. 7.941.
[165] Panel Report, paras. 7.942-7.962.
[166] Panel Report, para. 7.963.
[167] Panel Report, para. 7.964.
[168] Panel Report, para. 7.965.
[169] Panel Report, para. 7.965.
[170] Panel Report, para. 7.967.
[171] Panel Report, paras. 7.969-7.976 and 7.978-7.985, respectively.
[172] Panel Report, paras. 7.976 and 7.985, respectively.
[173] Panel Report, para. 7.1004.
[174] Panel Report, para. 7.998.
[175] Panel Report, para. 7.1003.
[176] Panel Report, para. 7.1004.

that areas within that State's territory were likely to remain ASF-free. In particular, the Panel stated that, while the European Union had provided to Russia "a fair amount of information in respect of the measures applied in Latvia, including swiftly communicating the facts of the outbreaks to Russia", it had "failed to provide updated and additional information on Latvia's early detection, surveillance and eradication plans after the outbreaks", which "would have been necessary for Russia to evaluate the capacity and effectiveness of Latvia's ASF control plans".[177]

5.55. The Panel noted that all four affected EU member States had experienced further ASF outbreaks *after* September 2014, and stated that it would address such subsequent developments in the context of its analysis under Article 6.1 of the SPS Agreement.[178] In the context of that analysis, the Panel explained that Article 6.1 sets forth an "ongoing … obligation to ensure adaptation" of measures, thus requiring an assessment of the SPS characteristics of the relevant areas in light of "the most updated information on record".[179] Having assessed the parties' arguments and evidence concerning ASF outbreaks that occurred in the four affected EU member States between 11 September 2014 and 2 September 2015, the Panel concluded that, in August 2015, there were areas within each of the four affected EU member States that "remained free of ASF".[180]

5.3.1.2 Interpretation of Article 6.3 of the SPS Agreement

5.56. Article 6.3 of the SPS Agreement is part of Article 6, entitled "Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence". Article 6 of the SPS Agreement provides:

> 1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area − whether all of a country, part of a country, or all or 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 pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
>
> 2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
>
> 3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

5.57. Article 6 addresses several aspects of the process of adaptation of Members' measures to regional SPS characteristics. The Appellate Body has noted "the existence of important common elements throughout Article 6", which "reveal the interlinkages that exist among the paragraphs of this provision".[181] The "main and overarching obligation" is set forth in the first sentence of Article 6.1, according to which Members shall ensure that their measures are "adapted" to the SPS characteristics of the areas from which the products at issue originate and to which they are destined. The remainder of Article 6 "elaborates" on aspects of that obligation and sets forth "the

[177] Panel Report, para. 7.995. Among the necessary information that was missing, the Panel referred to the eradication plan for Latvia, which the European Union provided to Russia only on 19 May 2015 − i.e. almost 11 months after the initial ASF outbreak. (See ibid., para. 7.992)
[178] Panel Report, paras. 7.977, 7.986, 7.994, and 7.1002.
[179] Panel Report, para. 7.1014.
[180] Panel Report, paras. 7.1015-7.1018.
[181] Appellate Body Report, *India − Agricultural Products*, para. 5.141.

respective duties that apply to importing and exporting Members in this connection".[182] The regional "characteristics" that are relevant for the adaptation of an SPS measure are those relating to the specific risk that such a measure seeks to address. In the case of a pest or disease, the specific risk consists of the "likelihood of entry, establishment or spread" of that pest or disease "within the territory of an importing Member" and "the associated potential biological and economic consequences".[183] This risk is relevant to determining the level of protection deemed appropriate by the Member establishing an SPS measure to protect "human, animal or plant life or health within its territory".[184] Therefore, as with any SPS measure, the regulating Member's adaptation of its measures to regional SPS characteristics may be informed by that Member's ALOP.

5.58. Under the first sentence of Article 6.1, Members are required to ensure that their measures are adapted to regional SPS characteristics. The Appellate Body has noted that this requirement "is an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter".[185] Thus, Members are required to ensure adaptation both when adopting SPS measures and as they maintain them, and may be required to adjust such measures over time as the SPS characteristics of the relevant areas change.[186] The Appellate Body has also highlighted that the obligation contained in the first sentence of Article 6.1 applies to both "the area from which the product originated and the area to which the product is destined".[187]

5.59. The second sentence of Article 6.1 speaks to a Member's "assess[ment of] the sanitary or phytosanitary characteristics of a region", which must be conducted taking into account, "*inter alia*, the level of prevalence of specific diseases or pests", the "existence of eradication or control programmes", and any "appropriate criteria or guidelines" developed by the relevant international organizations. We consider this sentence to indicate that a Member must evaluate all the evidence relevant to "assessing" the SPS characteristics of an area. This assessment, in turn, provides the basis, and therefore constitutes a prerequisite, for the adaptation of that Member's measures to such SPS characteristics pursuant to the first sentence of Article 6.1. We note that certain parallels exist between the assessment of the SPS characteristics of an area and the assessment of risks pursuant to Articles 5.1 through 5.3 of the SPS Agreement. In particular, Article 5.2 requires Members conducting a risk assessment to take into account, *inter alia*, the "prevalence of specific diseases or pests" and the "existence of pest- or disease-free areas". In light of these parallels, we consider that the assessment of the SPS characteristics of an area within the meaning of the second sentence of Article 6.1 may be conducted as part of a Member's risk assessment pursuant to Articles 5.1 through 5.3.[188]

5.60. The main and overarching obligation to ensure adaptation of measures to regional SPS characteristics is further informed by the second sentence of Article 6.2, which refers to a Member's "[d]etermination" of pest- or disease-free areas or areas of low pest or disease prevalence.[189] Under this sentence, Members are required to base such a determination on factors such as "geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls". By its own terms, the second sentence of Article 6.2 applies only in the situation where the level of pest or disease prevalence in a particular area is relevant. When such a situation arises, a Member must, as part of its assessment of the SPS characteristics of the

[182] Appellate Body Report, *India – Agricultural Products*, para. 5.141.
[183] Annex A(4) to the SPS Agreement.
[184] Annex A(5) to the SPS Agreement.
[185] Appellate Body Report, *India – Agricultural Products*, para. 5.157. (emphasis original; fn omitted)
[186] Appellate Body Report, *India – Agricultural Products*, para. 5.132.
[187] Appellate Body Report, *India – Agricultural Products*, para. 5.132.
[188] See Panel Report, *US – Animals*, para. 7.644. In this respect, we note that, similar to the obligation under Article 6.1 to adapt measures to regional SPS characteristics, the requirement under Article 5.1 that measures be based on a risk assessment does not apply solely at the time of adoption but, rather, throughout the maintenance of such measures. (See Panel Reports, *Japan – Agricultural Products II*, paras. 8.28-8.31; and *EC – Approval and Marketing of Biotech Products*, para. 7.3031)
[189] Annex A(6) to the SPS Agreement defines a pest- or disease-free area as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur." In turn, Annex A(7) to the SPS Agreement defines an area of low pest or disease prevalence as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures."

relevant area, make a "determination" as to the pest or disease status of that area, based on factors such as those listed in the second sentence of Article 6.2.[190]

5.61. Article 6.3, for its part, addresses the situation where an *exporting* Member claims that areas within its territory are pest- or disease-free or of low pest or disease prevalence. In this situation, the exporting Member must, pursuant to the first sentence of Article 6.3, "provide the necessary evidence" in support of its claim "in order to objectively demonstrate to the importing Member" that the relevant areas "are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence". The second sentence of Article 6.3 adds that the exporting Member shall give the importing Member reasonable access to the areas covered by its claim, in order for the importing Member to conduct "inspection, testing and other relevant procedures". The duties set forth in Article 6.3 are aimed at facilitating the process of adaptation of measures to the SPS characteristics of areas within an exporting Member's territory. That Member is usually best placed to gather and provide information about the level of pest or disease prevalence in areas located within its territory. In fact, without this cooperation by the exporting Member, it may prove difficult for an importing Member to determine the pest or disease status of such areas and to adapt its measures to their SPS characteristics.[191]

5.62. When an exporting Member claims that a certain area within its territory is pest- or disease-free or of low pest or disease prevalence, the importing Member must evaluate all the evidence relevant to making a determination as to the pest or disease status of that area. To this end, the importing Member will have to examine and verify the evidence provided by the exporting Member. Also, where relevant, the importing Member may analyse data gathered through on-site visits to the area concerned and rely upon any other information that it may have acquired from other sources, including from competent international organizations.[192] As discussed in paragraphs 5.59 and 5.60 above, an importing Member's "determination" of the pest or disease status of a given area is addressed by the second sentence of Article 6.2, and forms part of that Member's "assess[ment]" of the SPS characteristics of that area within the meaning of the second sentence of Article 6.1. By contrast, the importing Member's evaluation of the relevant evidence is *not* covered by Article 6.3, which addresses the "duties that apply to … *exporting* Members".[193]

5.63. We now focus more closely on the terms of the first sentence of Article 6.3. In particular, we ascertain what an exporting Member has to do in order to provide the "necessary evidence … to objectively demonstrate to the importing Member" that areas within the exporting Member's territory "are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence". We note that the term "evidence" has been defined as "[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact".[194] We further observe that the evidence provided by the exporting Member under the first sentence of Article 6.3 is aimed at demonstrating the pest or disease status of a particular area within that Member's territory. This indicates that an exporting Member is expected to provide particularized evidence with respect to the pest or disease and the area concerned, and cannot merely adduce generic information or unsubstantiated assertions. Depending on the circumstances of the case, this evidence may encompass laboratory-type scientific information (e.g. the pathogenicity of a given disease) and/or technical information about the situation on the ground (e.g. the effectiveness of SPS controls in place in the area covered by the exporting Member's claim). We further consider that the non-exhaustive list of factors enumerated in the second sentence of Article 6.2 − including geography, ecosystems, epidemiological surveillance, and the effectiveness of SPS controls − may shed light on the type of evidence that an exporting Member is expected to provide under Article 6.3.[195]

5.64. Turning to the meaning of the term "necessary", we consider that this term is not to be read in isolation from the remainder of the first sentence of Article 6.3. In particular, the "necessary" nature of the evidence to be provided by the exporting Member relates to that Member's "objective

[190] We examine the obligations set forth in Article 6.2, and especially the requirement to "recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence" in the first sentence thereof, in section 5.3.3 of this Report.

[191] See e.g. Panel Report, *US − Animals*, para. 7.664.

[192] This reading comports with Article 5.3.7(d) of the Terrestrial Code, which requires an importing Member to "determine … whether it accepts an area as a zone for the importation of animal products".

[193] Appellate Body Report, *India − Agricultural Products*, para. 5.141. (emphasis added)

[194] *Black's Law Dictionary*, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 578.

[195] See Panel Report, *US − Animals*, para. 7.660.

demonstration" with respect to the pest or disease status of an area within its territory. This objective demonstration is to be made "to the importing Member", whose authorities must evaluate the evidence provided by the exporting Member in respect of the relevant area. Accordingly, we consider that the term "necessary" qualifies the nature, quantity, and quality of the evidence to be provided by the exporting Member, which must be sufficient to enable the importing Member ultimately to make an objective "determination" as to the pest or disease status of the area concerned, within the meaning of the second sentence of Article 6.2. As we have explained in paragraph 5.59 above, this determination forms part of the importing Member's assessment of the SPS characteristics of that area, within the meaning of the second sentence of Article 6.1, and provides the basis for the importing Member's adaptation of its measure to such SPS characteristics, as required by the first sentence of Article 6.1. At the same time, the term "necessary" may also indicate certain limitations on the nature, quantity, and quality of the evidence to be provided by the exporting Member: in particular, the exporting Member cannot be required to provide evidence that is excessive or not pertinent to a determination by the importing Member with respect to the pest or disease status of the relevant area.

5.65. What exactly constitutes "necessary" evidence for the purposes of the first sentence of Article 6.3 must be ascertained in light of the facts and circumstances of each case. Given the interlinkages between the various provisions of Article 6, an analysis of whether the evidence is "necessary" may be informed by what the second sentences of Articles 6.1 and 6.2 require for an assessment of the SPS characteristics of the relevant area. Moreover, an importing Member will usually design its SPS measures, as well as the modalities of their adaptation to regional SPS characteristics, on the basis of its ALOP. Therefore, the importing Member's ALOP may inform the nature, quantity, and quality of the evidence that an exporting Member is expected to provide in order to make the objective demonstration provided for in Article 6.3.[196] The situation may arise where, upon review, the evidence provided by the exporting Member proves insufficient for the importing Member to reach a determination as to the pest or disease prevalence in the area concerned in light of its ALOP. In this case, the importing Member may request the exporting Member to supply additional evidence, pursuant to Article 6.3.[197] In this situation, however, the term "necessary" also serves to ensure that requests for additional information by the importing Member do not go beyond what is required for determining the pest or disease status of the relevant areas.[198]

5.66. Finally, we wish to highlight an implication stemming from the fact that the objective demonstration by the exporting Member, provided for in the first sentence of Article 6.3, is addressed "to the importing Member". As discussed in paragraph 5.64 above, it is for the importing Member's authorities to evaluate all evidence relevant to the pest or disease status of a given area. Hence, a panel's review of compliance by the exporting Member with Article 6.3 must be 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 relevant areas within the exporting Member's territory. However, a panel assessing compliance with

[196] We note that, in the context of Article 5.1 of the SPS Agreement, the Appellate Body has stated that a risk assessment "cannot be entirely isolated" from the ALOP, as there may be circumstances in which the ALOP chosen by a Member "affects the scope or method of the risk assessment". (Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 534) According to the Appellate Body, "the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk [is not] disconnected from the intended level of protection." (Ibid., para. 686) At the same time, the Appellate Body has cautioned that the chosen ALOP "must not affect the rigour or objective nature of the risk assessment" or "pre-determine [its] results". (Ibid., para. 534) Similar considerations apply, in our view, in the context of the process set out in Article 6. For instance, the importing Member's ALOP may be relevant for assessing what constitutes "low pest or disease prevalence" and what scientific and technical evidence is required, pursuant to the first sentence of Article 6.3, to show that the level of pest or disease prevalence in a given area is, indeed, "low". However, this does not suggest that the importing Member's ALOP may affect the rigour or pre-determine the result of that Member's evaluation of the evidence in respect of the relevant areas under the second sentences of Articles 6.1 and 6.2.

[197] In this respect, we observe that the typical administrative steps set out in the Article 6 Guidelines contemplate an exchange of information in good faith between the exporting Member and the importing Member, whereby the former provides scientific and technical information about areas within its territory and the latter reviews it and communicates any deficiencies.

[198] This finds support in Annex C(1)(c) to the SPS Agreement, which requires Members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that "information requirements are limited to what is necessary for appropriate control, inspection and approval procedures".

Article 6.3 is not called upon to determine for itself, based on the evidence provided by the exporting Member, whether the relevant areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.

5.3.1.3 Whether the Panel erred in not finding that Article 6.3 requires consideration of the evidence relied upon by the importing Member

5.67. We now proceed to evaluate Russia's claim that the Panel erred in its interpretation of Article 6.3 of the SPS Agreement by failing to find that this provision requires panels to take into account the scientific and technical evidence relied upon by the importing Member, as well as the importing Member's assessment of the evidence submitted by the exporting Member, in light of the importing Member's ALOP.[199] According to Russia, Article 6.3 requires panels assessing the exporting Member's compliance with that provision to consider: (i) findings regarding the quality, nature, extent, and timing of the evidence provided by the exporting Member to the importing Member; (ii) findings regarding evidence generated by the importing Member from audits and investigations conducted on the territory of the exporting Member; (iii) an assessment and findings of the quality and credibility of the scientific and technical evidence relied upon by the importing Member; (iv) evaluations of the exporting Member's evidence by the importing Member; (v) an assessment of the importing Member's ALOP; and (vi) an assessment of the experience and knowledge of the importing Member in combating the disease in question.[200]

5.68. In Russia's view, this interpretation finds support in the text and context of Article 6.3. Beginning with the text, Russia argues that the words "in order to", followed by the phrase "objectively demonstrate to the importing Member", indicate that the focus of the exporting Member's task of assembling the necessary evidence is "to convince the *importing Member* to accept the proffered zone" as being, and likely to remain, disease-free.[201] Russia asserts that an importing Member's assessment of the evidence pursuant to Article 6.3 is directed at evaluating the scientific and technical evidence put forth by the exporting Member, and may entail drawing from different, and possibly competing, sources.[202] Russia further submits that the word "necessary" before the word "evidence" indicates that the sufficiency of an exporting Member's evidence may depend on the importing Member's ALOP.[203] In terms of context, Russia maintains, first, that the second sentence of Article 6.3, which accords the importing Member the right to inspect a zone "for the purpose of verifying" the exporting Member's demonstration[204], indicates that panels "cannot ignore" the evidence obtained from inspection visits and audit reports relied upon by the importing Member.[205] Second, Russia points out that Article 5.3.7(d) of the Terrestrial Code requires an importing Member to "determine … whether it accepts an area as a zone for the importation of animal products".[206] Third, Russia notes that the nine typical administrative steps in the recognition process set out in the Article 6 Guidelines envisage that the importing Member evaluates the information provided by the exporting Member.[207] Fourth, Russia submits that, since the importing Member's evaluation under Article 6 forms part of that Member's risk assessment under Articles 5.1 and 5.2 of the SPS Agreement[208], a panel's task is limited to reviewing whether the assessment carried out by the importing Member is objectively justifiable.[209] Finally, in Russia's view, interpreting Article 6.3 as not requiring consideration of the scientific and technical evidence relied upon by the importing Member in light of that Member's

[199] See *supra*, para. 5.40.
[200] Russia's appellant's submission, para. 155.
[201] Russia's appellant's submission, para. 113. (emphasis original)
[202] Russia's appellant's submission, para. 119.
[203] Russia's appellant's submission, para. 124. According to Russia, this is buttressed by paragraphs 8-10 of the Article 6 Guidelines, which state that an importing Member may reach any determination under Article 6 in accordance with its ALOP.
[204] Russia's appellant's submission, para. 127 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.140).
[205] Russia's appellant's submission, para. 128.
[206] Russia's appellant's submission, para. 131.
[207] Russia's appellant's submission, paras. 132-133.
[208] Russia's appellant's submission, para. 135 (referring to Panel Report, *US – Animals*, paras. 7.644 and 7.1025).
[209] Russia's appellant's submission, para. 136 (referring to Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 590).

ALOP would not allow for the adequate protection of the life and health of animals, thereby frustrating the object and purpose of the SPS Agreement.[210]

5.69. The European Union, for its part, maintains that the Panel did not err in its interpretation of the first sentence of Article 6.3 of the SPS Agreement with regard to the scientific and technical evidence relied upon by an importing Member.[211] The European Union recognizes that, as part of the process set out in Article 6, the evidence submitted by the exporting Member must be assessed by the importing Member. However, the European Union contends that the first sentence of Article 6.3 speaks solely to the "evidence" that an exporting Member must provide to an importing Member in the context of the administrative process between the two Members.[212] Therefore, according to the European Union, the "matter" before the Panel in this dispute was the question of whether the evidence provided to Russia by the European Union fulfilled the requirements of Article 6.3.[213] By contrast, the European Union argues that the "self-fabricated" information that Russia submitted to the Panel during the course of the proceedings did not form part of that matter.[214] Hence, the European Union asserts that the Panel rightfully omitted to review that information, otherwise it would have engaged in an impermissible *de novo* review.[215] The European Union also maintains that, contrary to Russia's position, the first sentence of Article 6.3 does not relate to the importing Member's ALOP but, rather, to the necessary evidence relating to the matters specified in that sentence.[216] For the European Union, Russia's attempt to equate the word "necessary" in Article 6.3 with a subjective test, giving unfettered discretion to the importing Member, is at odds with the notion of "necessity" under Article XX(b) of the General Agreement on Tariffs and Trade 1994 − on which the SPS Agreement elaborates − and with the concept of "objective demonstration" in Article 6.3.[217]

5.70. We begin our assessment by recalling that, under the first sentence of Article 6.3, an exporting Member claiming that areas within its territory are pest- or disease-free or of low pest or disease prevalence must "provide the necessary evidence" in support of its claim "in order to objectively demonstrate to the importing Member" that the relevant areas "are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence". Further, in paragraph 5.64 above, we have explained that the evidence to be provided by the exporting Member under the first sentence of Article 6.3 must be of a nature, quantity, and quality sufficient for an objective determination by the importing Member as to the pest or disease status of the relevant area. In paragraph 5.62 above, we have noted that Article 6.3 addresses exclusively the "duties that apply to … *exporting* Members" in connection with the process set out in Article 6.[218] Thus, we consider that Article 6.3 does not address the obligations of the *importing* Member in the context of this process.

5.71. Rather, the obligations of the importing Member in connection with the process of adapting measures to regional SPS characteristics are set forth in Articles 6.1 and 6.2. In particular, when an exporting Member claims, pursuant to Article 6.3, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, the importing Member is required to evaluate all the relevant evidence concerning those areas, with a view to "determin[ing]" their pest or disease status under the second sentence of Article 6.2 and "assessing" their SPS characteristics under the second sentence of Article 6.1. In conducting their evaluation, the importing Member's authorities must review the evidence provided by the exporting Member. They may also rely upon data gathered through on-site visits to the areas concerned and on any other relevant evidence that the importing Member may have acquired from other sources, including from competent international organizations. We have further considered that the importing Member's assessment of the SPS characteristics of the relevant areas may, in certain cases, be conducted as part of a Member's risk assessment pursuant to Articles 5.1 through 5.3. In this respect, we note that, in its analysis under Article 6.1, the Panel found that Russia did not base the measures at issue on a risk

[210] Russia's appellant's submission, paras. 147-151.
[211] European Union's appellee's submission, section III.B.2.iii.
[212] European Union's appellee's submission, para. 142.
[213] European Union's appellee's submission, para. 144.
[214] European Union's appellee's submission, para. 144. See also paras. 142 and 192.
[215] European Union's appellee's submission, para. 145.
[216] European Union's appellee's submission, para. 147.
[217] European Union's appellee's submission, paras. 159-160.
[218] Appellate Body Report, *India − Agricultural Products*, para. 5.141. (emphasis added)

assessment[219]; nor did Russia show that its authorities had otherwise conducted an evaluation of scientific and technical evidence in respect of the SPS characteristics of the relevant areas.[220]

5.72. In light of the above, while we consider that the process of adaptation to regional SPS characteristics pursuant to Article 6 requires that all the pertinent evidence in respect of the relevant areas (including by relying upon scientific and technical evidence in its possession) be evaluated, we disagree with Russia that this requirement is contained in Article 6.3. As set out in paragraph 5.62 above, the obligations of an importing Member in connection with the process of adapting measures to regional SPS characteristics are set forth in Articles 6.1 and 6.2; Article 6.3, in turn, sets out the duties of an *exporting* Member claiming that areas within its territory are pest- or disease-free or of low pest or disease prevalence. Thus, the Panel's task under Article 6.3 was to assess whether the evidence provided by the European Union to Russia was of a nature, quantity, and quality sufficient to enable the Russian authorities ultimately to make a determination as to the pest or disease status of the relevant areas within the European Union. In paragraph 5.66 above, we have clarified that, in conducting an assessment under Article 6.3, a panel is not called upon to determine *for itself*, based on the evidence provided by the exporting Member, whether the relevant areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.

5.73. In articulating what it considered to be its task under Article 6.3, the Panel stated that, if it were to find that "the European Union [had] provided to Russia the necessary evidence in respect of the freedom of ASF in certain areas, and the likelihood of those areas remaining ASF-free, regardless of subsequent developments", then it would conclude that "the European Union [had] succeeded in objectively demonstrating that at any given point in time the areas it claims to be ASF-free, are free of such disease and are likely to remain so."[221] This statement is somewhat ambiguous as to whether the Panel considered that the assessment of whether the European Union had provided the necessary evidence required for an "objective demonstration" of the ASF status of the relevant areas was to be conducted by *the Panel itself*, rather than by the Russian authorities.

5.74. While the Panel's articulation of its task may be read as suggesting that the Panel did not clearly recognize the role of the Russian authorities in evaluating evidence in respect of the relevant areas, we observe that, in the remainder of its analysis, the Panel correctly identified the importing Member's authorities as the proper addressee of the European Union's objective demonstration of the pest or disease status of the relevant areas under Article 6.3. For instance, the Panel found that "the European Union [had] provided *to Russia* the necessary evidence to objectively demonstrate" that, at any given point in time, there were ASF-free areas within the four affected EU member States.[222] Similarly, the Panel found that "the European Union had not provided sufficient information to 'objectively demonstrate' *to Russia*" that the ASF-free areas within Latvia were likely to remain so.[223] Specifically, the Panel stated that the European Union had failed to provide to Russia "information [that] would have been *necessary for Russia to evaluate* the capacity and effectiveness of Latvia's ASF control plans".[224] These findings indicate to us that, despite some ambiguity in the language used in parts of its reasoning, the Panel properly understood its role under Article 6.3, and limited its review to whether the European Union's evidence was sufficient to enable the Russian authorities to reach a determination as to the ASF status of the relevant areas.

[219] Panel Report, paras. 7.482, 7.483, 7.1025, and 7.1026.

[220] In this respect, we recall that, while the importing Member's ALOP may inform the nature, quantity, and quality of the evidence that an exporting Member is expected to provide in order to make the objective demonstration provided for in Article 6.3, it cannot affect the rigour or pre-determine the result of that Member's evaluation of the evidence in respect of the relevant areas under the second sentences of Articles 6.1 and 6.2. (See *supra*, para. 5.65 and fn 196 thereto) Therefore, we do not see that Russia's ALOP in respect of ASF would affect its obligation to objectively evaluate the evidence provided by the European Union with a view to determining the pest or disease status of the relevant areas and assessing their SPS characteristics.

[221] Panel Report, para. 7.414. Similarly, later in its Report, the Panel stated that "to objectively demonstrate that there are ASF-free areas in the European Union …, the European Union's burden … [was] to demonstrate that it provided Russia the necessary evidence" in respect of the relevant factors previously identified by the Panel. (Ibid., para. 7.428)

[222] Panel Report, para. 7.963. (emphasis added) The Panel used similar wording also in its conclusion that "the European Union [had] provided to Russia the necessary evidence to objectively demonstrate" that ASF-free areas within Estonia, Lithuania, and Poland were likely to remain so. (Ibid., para. 7.1004)

[223] Panel Report, para. 7.995. (emphasis added)

[224] Panel Report, para. 7.995. (emphasis added)

5.75. Based on the foregoing, while the Panel could have been clearer in articulating its task under Article 6.3, 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.

5.3.1.4 Whether the Panel erred in not finding that Article 6.3 contemplates a period of time for the importing Member to evaluate and verify the evidence provided by the exporting Member

5.76. Russia also claims that the Panel erred in its interpretation of Article 6.3 of the SPS Agreement by not finding that this provision contemplates some time for the importing Member to evaluate and verify the evidence provided by the exporting Member.[225] Russia submits that, as a consequence of its incorrect interpretation, the Panel improperly set the cut-off date for its assessment at 11 September 2014, thereby establishing a timeframe of only three days between the date of the first ASF outbreak in Estonia (8 September 2014) and the date at which, according to the Panel, the European Union had provided the necessary evidence to Russia under Article 6.3. According to Russia, this time interval was insufficient for the Russian authorities to even translate the relevant documents into Russian, let alone send experts to carry out an inspection visit to Estonia.[226]

5.77. Russia contends that the importing Member's evaluation of whether the exporting Member has provided the "necessary" evidence, as well as the importing Member's conduct of "inspection, testing and other relevant procedures"[227], are actions that take a reasonable period of time to be completed.[228] In Russia's opinion, what constitutes a "reasonable" time period depends on various factors[229], including: the timespan that has elapsed between the disease outbreak and the "regionalization" request[230]; the expansion of disease-free areas and/or the establishment of new disease-free areas[231]; the differences in veterinary services and geography between exporting countries[232]; whether the exporting country is dealing with an outbreak for the first time or has already accumulated experience from prior outbreaks[233]; and whether, during the importing Member's evaluation, disease outbreaks occur in the alleged disease-free areas.[234] Russia asserts that its interpretation finds support in the context of Article 6.3. In particular, Russia points to the Article 6 Guidelines and Article 5.3.7(d) of the Terrestrial Code, which both indicate that the importing Member should evaluate the information provided by the exporting Member and reach a determination thereon within a reasonable period of time.[235] Russia also stresses that, under Article 8 and Annex C(1)(a) to the SPS Agreement, not every lapse of time constitutes an undue delay, as "a certain period of time is usually necessary for a Member to undertake and complete a control, inspection or approval procedure".[236] In this respect, Russia also recalls the Panel's finding, in the context of Article 5.7 of the SPS Agreement, that a Member may require a certain period of time to process detailed and complex information.[237]

5.78. The European Union acknowledges that, in principle, the process set out in Article 6 requires a certain time period to be completed. In particular, the European Union argues that a "short suspension period" is usually needed between the notification of an outbreak to the OIE and the moment trade resumes, in order for the exporting and the importing Members to conduct their respective domestic procedures.[238] However, for the European Union, such a suspension period is not covered by Article 6.3 but, rather, by Article 5.7 of the SPS Agreement, which allows the importing Member temporarily to stop trade based on a "less" objective risk assessment, while

[225] See *supra*, para. 5.41.
[226] Russia's appellant's submission, para. 202.
[227] Russia's appellant's submission, paras. 210-211.
[228] Russia's appellant's submission, para. 212.
[229] See, generally, Russia's appellant's submission, para. 237.
[230] Russia's appellant's submission, para. 214.
[231] Russia's appellant's submission, para. 215.
[232] Russia's appellant's submission, paras. 215-216.
[233] Russia's appellant's submission, para. 218.
[234] Russia's appellant's submission, para. 217.
[235] Russia's appellant's submission, paras. 223 and 225.
[236] Russia's appellant's submission, para. 227 (quoting Panel Report, *US – Animals*, para. 7.113).
[237] Russia's appellant's submission, para. 230.
[238] European Union's appellee's submission, para. 221.

seeking the additional information necessary for a "more" objective risk assessment.[239] In turn, the European Union contends that the notion of a reasonable period of time under Article 5.7 is "related" to the notion of "undue delay" under Annex C(1)(a) to the SPS Agreement.[240] According to the European Union, Russia is improperly attempting to "merge" an analysis under Annex C(1)(a) and Article 5.7 with the analysis under Article 6.3.[241] The European Union maintains that, given the factual circumstances of this case, the Panel correctly concluded that the European Union had provided Russia with the necessary evidence for the Russian authorities to determine that areas within Estonia were and were likely to remain ASF-free.[242] In particular, the European Union asserts that, after the first ASF case in Lithuania in January 2014, but well before the first ASF case in Estonia in September 2014, it had provided the Russian authorities with "abundant information and evidence" so as to objectively demonstrate the existence of areas, including within the territory of Estonia, that were and were likely to remain ASF-free.[243]

5.79. In paragraphs 5.59-5.62 above, we have explained that, when adapting measures to regional conditions pursuant to Article 6 of the SPS Agreement, an importing Member is required to evaluate all the relevant evidence concerning the areas that the exporting Member claims to be pest- or disease-free or of low pest or disease prevalence. The importing Member's evaluation must include the evidence provided by the exporting Member, and may encompass data gathered through on-site visits to the areas concerned, as well as any other relevant scientific and technical information that the importing Member may have acquired from other sources, including from competent international organizations. We have also clarified that the importing Member's evaluation of the relevant evidence is *not* covered by Article 6.3 but, rather, relates to the importing Member's "determination" as to the pest or disease status of the relevant areas under the second sentence of Article 6.2, and constitutes a component of that Member's "assess[ment]" of the SPS characteristics of those areas pursuant to the second sentence of Article 6.1. In turn, the assessment and determination made by the importing Member under the second sentences of Articles 6.1 and 6.2 provide the basis for the "adapt[ation]" of that Member's measures to the SPS characteristics of the relevant areas, as required by the first sentence of Article 6.1.

5.80. The importing Member's evaluation of the relevant evidence for the purposes of assessing the SPS characteristics of a particular area and determining its pest or disease status can hardly be performed instantly but, rather, requires a certain period of time to be carried out. Neither participant disputes this, and the Panel itself recognized that "a Member may require [a] certain [period of] time to process detailed and complex information", and "may even need to translate such information in order to properly assess it".[244] Likewise, the adaptation of a measure to the SPS characteristics of the relevant area may require a certain period of time in light of the importing Member's domestic regulatory processes. Hence, when an exporting Member claims that areas within its territory are pest- or disease-free or of low pest or disease prevalence, the importing Member must be accorded a certain period of time to conduct its evaluation of the relevant evidence concerning the pest or disease status of such areas and to adapt its measures accordingly, as prescribed by Article 6.1 and the second sentence of Article 6.2.

5.81. However, the time that may be taken by the importing Member for its evaluation of evidence concerning the pest or disease status of the relevant areas is not left to that Member's unfettered discretion. In fact, we note that Annex C(1)(a) to the SPS Agreement requires Members to "ensure, with respect to any procedure to check and ensure the fulfilment of [SPS] measures, that … such procedures are undertaken and completed without undue delay".[245] This obligation to proceed without undue delay helps shed light on the appropriateness of the period of time that the importing Member enjoys to evaluate the relevant evidence concerning the pest or disease status of a given area in the context of its assessment and determination pursuant to the second sentences of Articles 6.1 and 6.2, and adapt its measures to the SPS characteristics of the relevant

[239] European Union's appellee's submission, para. 222.
[240] European Union's appellee's submission, para. 228.
[241] European Union's appellee's submission, para. 224.
[242] European Union's appellee's submission, para. 207.
[243] European Union's appellee's submission, para. 213.
[244] Panel Report, para. 7.705. See also para. 7.1186.
[245] Annex C(1) is given operational effect through Article 8 of the SPS Agreement, according to which "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures". We observe that the Panel found that the process set out in Article 6 constitutes a procedure falling within the purview of Article 8 and Annex C(1). (Panel Report, paras. 7.518, 7.521, 7.522, 7.1057, and 7.1061) These Panel findings have not been appealed.

areas pursuant to the first sentence of Article 6.1. In particular, the notion of "undue delay" does not cover any lapse of time, but only delays that "[go] beyond what is warranted" or are otherwise "unjustifiable".[246] This suggests that what constitutes an appropriate period of time is to be assessed on a case-by-case basis and may depend on, among other things, the nature and complexity of the procedure to be undertaken and completed.[247]

5.82. In light of the above, we consider that the time required for an importing Member to evaluate all the relevant evidence relating to a given area pertains to the determination of the pest or disease status of that area pursuant to the second sentence of Article 6.1, the assessment of its SPS characteristics pursuant to the second sentence of Article 6.2, and ultimately the adaptation of the importing Member's measures to such SPS characteristics pursuant to the first sentence of Article 6.1. Likewise, the period of time required for the importing Member's authorities to fulfil such duties and obligations is covered by the disciplines of Articles 6.1 and 6.2, and is not part of the duties of an exporting Member pursuant to Article 6.3. We therefore disagree with Russia that the Panel was required, as part of its analysis under Article 6.3, to take into account the period of time required for the Russian authorities to evaluate and verify the evidence provided by the European Union.

5.83. Instead, as we have explained in paragraph 5.72 above, the Panel's task under Article 6.3 was to assess whether the evidence provided by the European Union to Russia was of a nature, quantity, and quality sufficient to enable the Russian authorities ultimately to make a determination as to whether the relevant areas were, indeed, ASF-free and likely to remain so. To recall, the Panel found that the evidence provided by the European Union as at 11 September 2014 was sufficient for Russia to make such a determination with respect to areas within Estonia, Lithuania, and Poland, as well as to areas within the European Union outside of the four affected member States.[248] The scope of these Panel findings is limited to the European Union's compliance with Article 6.3. By contrast, contrary to Russia's position, the Panel's findings do not imply that Russia was required to comply with its obligations under Articles 6.1 and 6.2 *immediately* after the European Union had provided the necessary evidence under Article 6.3. In our view, the Panel did not require Russia to have evaluated all the scientific and technical evidence in respect of the relevant areas by 11 September 2014. Rather, Russia enjoyed a certain period of time to conduct its evaluation with a view to reaching a determination as to the ASF status of the relevant areas and assessing their SPS characteristics. Nor do we believe that the Panel's findings imply that Russia was required to adapt its measures to the SPS characteristics of such areas by that date.

5.84. In this regard, we note that the Panel did consider the period of time required for the Russian authorities to evaluate and verify the evidence provided by the European Union and move forward with the process. For instance, when examining the consistency of Russia's measures with Article 8 and Annex C(1)(a) to the SPS Agreement, the Panel considered that, when a Member "makes unnecessary information requests, which go far beyond what would be required to make a substantive assessment of the situation subject to the procedure at issue", that Member would act in a manner that impedes undertaking and completing the respective procedures without undue delay.[249] The Panel found that, at several points in the process, Russia addressed "excessive information requests" to the European Union with respect to the ASF situation in the relevant areas.[250] The Panel concluded that, by making such requests, Russia failed to undertake and complete the procedure without undue delay, inconsistently with Article 8 and Annex C(1)(a).[251] These Panel findings have not been appealed. We thus proceed on the basis that Russia failed to carry out its duties in connection with the process set out in Article 6 within an appropriate period of time.

5.85. Finally, we observe that, while the Panel stated that it would examine the matter referred to it up to 11 September 2014, and found that the European Union had provided the necessary evidence in respect of areas within Estonia, Lithuania, and Poland, as well as areas within the

[246] Appellate Body Report, *Australia – Apples*, para. 437; Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495; *US – Animals*, para. 7.115.

[247] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497; *US – Poultry (China)*, para. 7.354; *US – Animals*, para. 7.114.

[248] Panel Report, paras. 7.456 and 7.1004.

[249] Panel Report, para. 7.583. See also para. 7.1097.

[250] Panel Report, paras. 7.568-7.570, 7.1085, and 7.1086.

[251] Panel Report, paras. 7.584 and 7.1099.

European Union outside of the four affected member States[252], the Panel, in fact, also took into account information submitted after 11 September 2014 at several points in its analysis. Indeed, the Panel expressly recognized that its factual assessment was made more complex by the "constantly shifting situation and frequent expansion of the protection and surveillance zones" in the four affected EU member States.[253] In reviewing the evidence provided by the European Union in respect of areas within Estonia claimed to be disease-free or of low disease prevalence, the Panel considered that, given that the first ASF outbreak in that EU member State occurred on 8 September 2014, the "time-frame for the consideration of the necessary evidence of the effectiveness of control measures" required an "examination of additional information provided by the European Union *after* September 2014".[254] In its review, the Panel found that this additional information "[did] not undermine" its conclusion that, as at 11 September 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that the ASF-free areas within Estonia were likely to remain so.[255] The Panel also expressed its awareness that Estonia experienced further ASF outbreaks after September 2014, and stated that it would address such subsequent developments in the context of its analysis under Article 6.1.[256] Having conducted this additional review, the Panel concluded that the arguments and evidence adduced by the parties concerning ASF outbreaks that occurred in Estonia between 11 September 2014 and 2 September 2015 showed that, "in August 2015, there were areas in Estonia that remained free of ASF."[257]

5.86. In sum, an importing Member's evaluation of the evidence provided by an exporting Member requires a certain period of time to be completed. This period of time is not covered by Article 6.3 but, rather, 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. The Panel did take into account the period of time required for the Russian authorities to evaluate and verify the evidence provided by the European Union, and made the unappealed finding that Russia failed to complete the process set out in Article 6 within an appropriate period of time. Moreover, we disagree with Russia that the Panel improperly set the cut-off date for its assessment at 11 September 2014. The Panel did, in fact, consider evidence submitted after that date as part of its analysis under Article 6.1. We therefore 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.

5.3.1.5 Conclusions on Russia's claims under Article 6.3 of the SPS Agreement

5.87. 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.

[252] Panel Report, para. 7.1004.
[253] Panel Report, para. 7.967. (fn omitted)
[254] Panel Report, para. 7.998. (emphasis added)
[255] Panel Report, para. 7.1003.
[256] Panel Report, para. 7.1002.
[257] Panel Report, para. 7.1018.

5.88. For the reasons set out above, 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.[258] We note that the Panel's conclusions, as set out in paragraphs 8.1.d.iv, 8.1.e.vii, and 8.1.e.viii of its Report, are worded somewhat differently from the Panel's findings mentioned above. Therefore, while we uphold these conclusions, we understand them as follows:

a. 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;

b. 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;

c. 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.

5.3.2 Russia's claim regarding the relationship between Article 6.1 and Article 6.3 of the SPS Agreement

5.89. We now turn to Russia's claim that the Panel erred in its interpretation of Article 6.1. In particular, Russia submits that the Panel erred in finding that an importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in a situation where the exporting Member has failed to provide the necessary evidence, pursuant to Article 6.3, in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.[259] Russia contends that, as a result of its interpretative error, the Panel improperly found that the ban on imports of the products at issue from Latvia is inconsistent with Article 6.1.[260] We begin by providing a brief overview of the Panel's findings under Article 6.3 and Article 6.1 in respect of the ban on imports of the products at issue from Latvia.

5.3.2.1 The Panel's findings

5.90. As part of its analysis under Article 6.3 of the SPS Agreement, the Panel evaluated whether the European Union had provided the necessary evidence to objectively demonstrate to Russia that areas within the territory of Latvia were, and were likely to remain, ASF-free.[261] The Panel made the intermediate finding that the European Union had provided to Russia the necessary evidence to objectively demonstrate that, "at any given point in time, there were ASF-free areas"

[258] As discussed in footnote 138 above, had we reversed the Panel's findings under Article 6.3, Russia would have requested us also to reverse the Panel's findings that the EU-wide ban and the country-specific bans on imports of the products at issue from Estonia, Lithuania, and Poland are inconsistent with Article 6.1. Since we are, instead, upholding the Panel's findings under Article 6.3, we need not address Russia's conditional claim on appeal.

[259] Russia's appellant's submission, para. 259 (referring to Panel Report, paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027, and 7.1028).

[260] Russia's appellant's submission, para. 259 (referring to Panel Report, paras. 7.995 and 7.1028).

[261] Panel Report, paras. 7.942-7.968 and 7.987-7.995.

within Latvia.[262] However, the Panel also found that the European Union had not provided Russia with the necessary evidence to objectively demonstrate that such ASF-free areas within Latvia *were likely to remain so*. In particular, the Panel considered that, "although the European Union [had] provided to Russia a fair amount of information in respect of the measures applied in Latvia", it had "failed to provide updated and additional information on Latvia's early detection, surveillance and eradication plans after the outbreaks", which would have been "necessary for Russia to evaluate the capacity and effectiveness of Latvia's ASF control plans".[263]

5.91. In setting out the legal test for its analysis under Article 6.1 of the SPS Agreement, the Panel addressed the potential implications of its findings under Article 6.3 for that analysis. The Panel noted the Appellate Body's statement in *India – Agricultural Products* that "an exporting Member claiming … that an importing Member has failed to determine a specific area within that exporting Member's territory as 'pest- or disease-free' – and ultimately adapt its SPS measures to that area – will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3."[264] However, the Panel also noted that, according to the Appellate Body, the above statement does not suggest that a Member adopting or maintaining an SPS measure can "*only*" be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3.[265] In particular, the Panel recalled the Appellate Body's statements that, "even in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1 in a situation where, for example, the concept of pest- and disease-free areas is relevant, but such Member's regulatory regime precludes the recognition of such concept."[266] Moreover, "pest- or disease-free areas and areas of low pest or disease prevalence, which are specifically addressed in Articles 6.2 and 6.3, are only a subset of the SPS characteristics that may call for the adaptation of an SPS measure pursuant to the first sentence of Article 6.1."[267] These considerations confirm that "a Member may act inconsistently with the obligation under the first sentence of Article 6.1 absent the objective demonstration provided for in Article 6.3 by an exporting Member."[268] Having noted these statements by the Appellate Body, the Panel concluded:

> We understand the Appellate Body's guidance as indicating that a determination of whether a Member ensures adaptation of its measures to the SPS characteristics of the importing Member or prevailing in its territory, pursuant to Article 6.1 of the SPS Agreement, can be found even when an exporting Member has failed to make the objective demonstration pursuant to Article 6.3. In light of this guidance, we will assess whether the import bans on the products at issue from Estonia, Latvia, Lithuania, and Poland, are adapted to the SPS characteristics of areas within those affected EU member States and of Russia.[269]

5.92. The Panel then turned to assess whether the country-specific bans imposed on imports of the products at issue from the four affected EU member States were adapted to regional SPS characteristics, as required under the first sentence of Article 6.1. The Panel found that, by imposing country-wide bans on imports of such products from the four affected EU member States (including Latvia), Russia failed to recognize the existence of ASF-free areas within these member States, and thus failed to adapt its measures to the SPS characteristics of such areas.[270] Moreover, the Panel noted that, starting in 2007, there had been ASF outbreaks in Russia, and that the

[262] Panel Report, para. 7.963. According to the Panel, the existence of ASF-free areas within the territory of Latvia continued through August 2015, despite the occurrence of several ASF outbreaks in other parts of the country. (See ibid., para. 7.1017)

[263] Panel Report, para. 7.995.

[264] Panel Report, para. 7.1009 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.156).

[265] Panel Report, para. 7.1010 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.157 (emphasis original)).

[266] Panel Report, para. 7.1010 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.157).

[267] Panel Report, para. 7.1010 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.157).

[268] Panel Report, para. 7.1010 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.157).

[269] Panel Report, para. 7.1011.

[270] Panel Report, para. 7.1020.

disease had not been eradicated.[271] The Panel took the view that the existence of a disease within the importing country was a "factor[] that affect[s] the potential risks presented by imported products and that thus must be considered when determining whether a particular measure is adapted to the SPS characteristics of the region to which a product is destined."[272] Thus, the Panel found that Russia had failed to adapt its measures to the SPS characteristics of the areas to which the products at issue were destined.[273] Finally, the Panel observed that Russia had not based either its EU-wide ban or the country-specific bans on imports of the products at issue from the four affected EU member States on a risk assessment. In the Panel's view, the lack of a risk assessment limited Russia's ability to assess the SPS characteristics of the areas from which the products at issue originated, and of the areas to which they were destined, with a view to ensuring adaptation of its measures to such characteristics.[274] Based on the foregoing, the Panel concluded that Russia's bans on imports of the products at issue from the four affected EU member States (including Latvia) were inconsistent with Article 6.1.

5.3.2.2 Whether the Panel erred in finding that Russia had failed to ensure adaptation of its ban on imports of the products at issue from Latvia to regional SPS characteristics

5.93. Russia maintains that, when an exporting Member has requested the recognition of a disease-free area, it must first demonstrate that the conditions of Article 6.3 of the SPS Agreement are met; only after the exporting Member has provided the necessary evidence pursuant to Article 6.3 is the importing Member's obligation triggered under Article 6.1 of the SPS Agreement. For Russia, the reference in the second sentence of Article 6.1 to the "level of prevalence of specific diseases or pests" in the relevant areas ties the importing Member's obligation to ensure adaptation directly to the exporting Member's objective demonstration under Article 6.3. Thus, Russia contends that, when an exporting Member has failed to provide the necessary evidence to objectively demonstrate to the importing Member, pursuant to Article 6.3, that areas within its territory are and are likely to remain pest- or disease-free or of low pest or disease prevalence, an importing Member has no obligation to adapt its measures to the SPS characteristics of such areas under Article 6.1.[275]

5.94. Russia further submits that the typical administrative steps of the process described in the Article 6 Guidelines, as well as Article 5.3.7 of the Terrestrial Code, all indicate that the importing Member's ability to adapt its measures to the SPS characteristics of areas within the exporting Member's territory depends on the exporting Member's objective demonstration as to the pest or disease status of such areas.[276] In Russia's view, the Panel erred in attaching no significance to the exporting Member's duty to provide the necessary evidence that a particular area is likely to remain disease-free, thereby depriving Article 6.3 of meaning and reducing this provision to "a nullity".[277] In support of its interpretation, Russia also relies upon the Appellate Body's statement in *India – Agricultural Products* that an exporting Member will have difficulties succeeding in a claim under Article 6.1 and/or Article 6.2 if it has not demonstrated its own compliance with Article 6.3.[278] Russia acknowledges that, according to the Appellate Body, a violation of Article 6.1 and/or Article 6.2 could be found even absent the exporting Member's compliance with Article 6.3 in certain specific situations.[279] However, Russia contends that this is not the case here.[280]

5.95. The European Union requests the Appellate Body to uphold 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 the Latvian territory. In particular, the European Union submits that the Panel did not err in its interpretation of the relationship between Article 6.1 and Article 6.3.[281] The

[271] Panel Report, para. 7.1022.
[272] Panel Report, para. 7.1023.
[273] Panel Report, paras. 7.1020-7.1023 and 7.1027.
[274] Panel Report, paras. 7.1026-7.1027.
[275] Russia's appellant's submission, para. 265.
[276] Russia's appellant's submission, paras. 278-283.
[277] Russia's appellant's submission, para. 291.
[278] Russia's appellant's submission, para. 293 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.156). See also Russia's appellant's submission, para. 294 (referring to Panel Report, *US – Animals*, para. 7.664).
[279] Russia's appellant's submission, para. 296 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.157).
[280] Russia's appellant's submission, para. 303. See also paras. 307-312.
[281] European Union's appellee's submission, para. 255.

European Union argues that the scenarios in which a violation of Article 6.1 and/or Article 6.2 could be found even absent the exporting Member's compliance with Article 6.3, as identified by the Appellate Body in *India – Agricultural Products*, do not constitute an exhaustive list. For example, in a situation where sufficient evidence is already in the possession of the importing Member, that Member could be found to breach Article 6.1 even if the exporting Member has not complied with Article 6.3. In addition, the European Union stresses that the Panel's finding that Russia failed to adapt its ban on imports of the products at issue from Latvia to the SPS characteristics of areas within Russia is, alone, sufficient to conclude that Russia's measure is inconsistent with Article 6.1.[282]

5.96. Russia's claim on appeal raises the issue of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement. In particular, we must ascertain what implications, if any, a finding that an exporting Member has failed to comply with Article 6.3 may have for an assessment of an importing Member's compliance with Article 6.1. At the outset of our analysis, we recall that, pursuant to the first sentence of Article 6.1, a Member must ensure the adaptation of its measures to the SPS characteristics of the area from which a product originated and of the area to which the product is destined. Under the second sentence of Article 6.1, that Member must assess the SPS characteristics of the relevant areas with a view to adapting its measures accordingly. In turn, Article 6.3 applies to the particular situation in which an exporting Member claims that areas within its territory are pest- or disease-free or of low pest or disease prevalence. In this situation, the exporting Member must, pursuant to the first sentence of Article 6.3, "provide the necessary evidence" in support of its claim "in order to objectively demonstrate to the importing Member" that the relevant areas "are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence".

5.97. The relationship between Article 6.1 and Article 6.3 of the SPS Agreement was addressed by the panel and the Appellate Body in *India – Agricultural Products*. The panel in that dispute stated that Article 6.3 "is not directly linked to the first two paragraphs of Article 6".[283] The Appellate Body expressed concern at that panel's statement.[284] It held that, while "there is no *explicit* conditional language linking Article 6.1 and Article 6.3", all the provisions composing Article 6 "need to be read together"[285], as they are all "linked to, and interact with, the overarching obligation to ensure that a Member's SPS measures are adapted to the SPS characteristics of the relevant areas".[286] Based on a holistic reading of the three paragraphs of Article 6, the Appellate Body explained that, when the importing Member has "received a request from an exporting Member to recognize an area within its territory as 'disease-free'", the exporting Member "will be able to establish that the importing Member's failure to recognize and determine that disease-free area, and to adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it took the steps prescribed in Article 6.3."[287]

5.98. The Appellate Body, however, also clarified that this should not suggest that "a Member adopting or maintaining an SPS measure can *only* be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3."[288] Rather, situations exist in which, "even in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1."[289] One such situation is, for instance, where "the concept of pest- and disease-free areas is relevant, but a Member's regulatory regime precludes the recognition of such concept."[290] Second, pest- or disease-free areas and areas of low pest or disease prevalence "are only a subset of the SPS characteristics that may call for the adaptation of an SPS measure pursuant to the first sentence of Article 6.1".[291] Third, under certain circumstances, the adaptation of a measure to regional SPS characteristics "may be accomplished by taking into account relevant criteria and

[282] European Union's response to questioning at the oral hearing.
[283] Panel Report, *India – Agricultural Products*, para. 7.674.
[284] Appellate Body Report, *India – Agricultural Products*, para. 5.144.
[285] Appellate Body Report, *India – Agricultural Products*, para. 5.155. (emphasis original)
[286] Appellate Body Report, *India – Agricultural Products*, para. 5.144. (fn omitted)
[287] Appellate Body Report, *India – Agricultural Products*, para. 5.156.
[288] Appellate Body Report, *India – Agricultural Products*, para. 5.157. (emphasis original)
[289] Appellate Body Report, *India – Agricultural Products*, para. 5.157.
[290] Appellate Body Report, *India – Agricultural Products*, para. 5.157.
[291] Appellate Body Report, *India – Agricultural Products*, para. 5.157.

guidelines developed by [the relevant international] organizations, if any".[292] Finally, the Appellate Body recalled that "the overarching requirement under Article 6.1 to ensure the adaptation of SPS measures is an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter."[293] The Appellate Body concluded that all of these considerations reinforce that a Member may be found to have acted inconsistently with the obligation under the first sentence of Article 6.1 even in the absence of the exporting Member providing the necessary evidence for an objective demonstration under Article 6.3.[294]

5.99. In the statements above, the Appellate Body was explaining that, on the one hand, the exporting Member's compliance or non-compliance with Article 6.3 will, in many cases, have implications for the importing Member's ability to assess the SPS characteristics of areas located within the exporting Member's territory and to adapt its measures accordingly, as required by Article 6.1. This is because, as discussed in paragraph 5.61 above, the exporting Member is usually best placed to gather and provide information about the level of pest or disease prevalence in areas located within its territory, such that, without its cooperation, an importing Member's ability to determine the pest or disease status of such areas and to adapt its measures to their SPS characteristics may, in certain cases, be impaired. On the other hand, the Appellate Body rejected the notion that an importing Member's violation of Article 6.1 would necessarily be contingent on the exporting Member's compliance with Article 6.3. Indeed, the Appellate Body considered that, in certain situations, the importing Member may be required to adapt its measures to regional SPS characteristics irrespective of the exporting Member's showing that it has complied with Article 6.3.

5.100. In light of the above, we consider that a panel should conduct a careful case-by-case examination, based on all relevant circumstances, before reaching its conclusions as to the relationship between the exporting Member's compliance or non-compliance with Article 6.3 and the alleged breach of Article 6.1 by the importing Member. In the present dispute, the Panel found, in the context of its analysis under Article 6.3, that the European Union had provided Russia with the necessary evidence to objectively demonstrate that, at any given point in time, there were ASF-free areas within the territory of Latvia.[295] However, the Panel also found that the European Union had not provided the necessary evidence for an objective demonstration that such ASF-free areas within Latvia were likely to remain so.[296] In our view, the issue of the potential implications of a finding that an exporting Member has not complied with Article 6.3 for an analysis of whether the importing Member has breached its obligations under Article 6.1 arises, in particular, in connection with the latter finding by the Panel, relating to the likelihood that areas within Latvia *would remain* ASF-free.

5.101. The Panel understood the Appellate Body's guidance as indicating that an importing Member's violation of Article 6.1 "can be found even when an exporting Member has failed to make the objective demonstration pursuant to Article 6.3".[297] This understanding by the Panel is not, in itself, at odds with the Appellate Body's statements in *India – Agricultural Products*. In fact, as discussed in paragraph 5.98 above, the Appellate Body recognized that, in certain situations, an importing Member may be required to adapt its measures to regional SPS characteristics irrespective of whether or not an exporting Member has complied with Article 6.3.

5.102. Yet, we recall that at the core of this dispute lies the European Union's request for Russia to recognize areas both outside and inside of each of the four affected EU member States as ASF-free and likely to remain so, and to adapt its SPS measures accordingly. In these factual circumstances, once the Panel had found that the European Union had failed to provide the necessary evidence to objectively demonstrate to Russia that the ASF-free areas within Latvia were likely to remain so[298], we would have expected the Panel to consider the potential implications of that finding for the question of whether Russia had complied with its obligation under Article 6.1 to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of those areas. To the extent the Panel considered that the factual circumstances of this dispute fell within one of the situations identified by the Appellate Body in

[292] Appellate Body Report, *India – Agricultural Products*, para. 5.157.
[293] Appellate Body Report, *India – Agricultural Products*, para. 5.157. (emphasis original; fn omitted)
[294] Appellate Body Report, *India – Agricultural Products*, para. 5.157.
[295] Panel Report, para. 7.963.
[296] Panel Report, para. 7.995.
[297] Panel Report, para. 7.1011.
[298] Panel Report, para. 7.995.

India – Agricultural Products, where an importing Member's violation of Article 6.1 may be found even though the exporting Member has failed to show compliance with Article 6.3, we would have expected the Panel to provide reasoning in this respect.

5.103. The Panel provided no explanation as to whether it considered the factual circumstances of this dispute to be akin to one of the situations identified by the Appellate Body in *India – Agricultural Products*. Nor did the Panel explore whether additional, comparable circumstances existed in this dispute that otherwise warranted a finding that Russia had failed to ensure the adaptation of the ban on imports of the products at issue from Latvia under Article 6.1 despite the fact that the European Union had failed to make an objective demonstration pursuant to Article 6.3. Rather, the Panel moved on to assess whether Russia had adapted its measures to the SPS characteristics of the relevant areas, including areas within the territory of Latvia, pursuant to the first sentence of Article 6.1. In so doing, the Panel did not attach any significance to its finding that the European Union had failed to provide the necessary evidence to objectively demonstrate to Russia that areas within the territory of Latvia were likely to remain ASF-free. We therefore find that the Panel erred in finding, in paragraph 7.1028 of the Panel Report, that Russia had failed to adapt the ban on imports of the products at issue from Latvia to the ASF-free areas within Latvia.

5.104. In light of this conclusion, we must now ascertain the consequences of the Panel's error for the Panel's ultimate conclusion that the ban on imports of the products at issue from Latvia is inconsistent with Article 6.1. In this respect, we recall the Panel's finding that "Russia did not base either its EU-wide ban or the bans on products at issue from the four ASF-affected member States on a risk assessment."[299] According to the Panel, the lack of a risk assessment limited Russia's ability to, *inter alia*, assess the SPS characteristics of the relevant areas within the territory of Latvia and to adapt its measure accordingly.[300] Therefore, the Panel found that Russia's failure to conduct a risk assessment "further reinforced" the conclusion that the ban on imports of the products at issue from Latvia is inconsistent with Article 6.1.[301] In paragraph 5.59 above, we have taken the view that the assessment of the SPS characteristics of an area may, but need not, be conducted as part of a Member's risk assessment. We have also explained that the assessment of the SPS characteristics of an area provides the basis for the adaptation of a measure to such SPS characteristics pursuant to the first sentence of Article 6.1. As Russia did not base the ban on imports of the products at issue from Latvia on a risk assessment, and did not show that its authorities had otherwise conducted an evaluation of scientific and technical evidence in respect of the SPS characteristics of areas within the Latvian territory, we fail to see the basis on which Russia could have adapted its measure to the SPS characteristics of such areas.

5.105. Moreover, we observe that Russia's failure to adapt the measure in question to the SPS characteristics of areas within the territory of Latvia was not the sole ground for the Panel's finding of inconsistency with Article 6.1. Rather, the Panel also found that Russia failed to adapt its measure to the SPS characteristics of areas within the territory of *Russia*, thereby breaching its obligation under Article 6.1 in respect of the SPS characteristics of the area "to which the product is destined".[302] While Russia does not appeal this latter finding by the Panel[303], it contends that this finding does not constitute an independent ground for finding an inconsistency with Article 6.1, because the Panel did not make relevant findings with respect to the SPS characteristics prevailing in Russia[304], and did not compare such characteristics to those prevailing in Latvia.[305]

5.106. We are not persuaded by Russia's contention that the Panel made no factual and legal findings with respect of ASF prevalence in the areas within the Russian territory "to which the product is destined". The Panel observed that, starting in 2007, there had been ASF outbreaks in Russia, and that the disease had not been eradicated.[306] According to the Panel, the presence of ASF in these areas was highlighted by the consulted experts several times during the course of the

[299] Panel Report, para. 7.1026.
[300] Panel Report, para. 7.1026.
[301] Panel Report, para. 7.1027.
[302] Panel Report, para. 7.1028.
[303] Russia's response to questioning at the oral hearing.
[304] Russia's appellant's submission, para. 309.
[305] Russia's appellant's submission, para. 311.
[306] Panel Report, para. 7.1022.

Panel proceedings.[307] In particular, the Panel referred to Dr Gavin Thomson's statements that the ASF problem "is a regional one encompassing the Caucuses, Baltic States, the Russian Federation and eastern parts of the EU", and that, "from an ASF perspective, the whole region seems to be in roughly the same position."[308] On this basis, the Panel took the view that the existence of a disease within areas of the importing Member's territory is a "factor[] that affect[s] the potential risks presented by imported products and that thus must be considered when determining whether a particular measure is adapted to the SPS characteristics of the region to which a product is destined."[309] In light of the above, we consider that the Panel sufficiently substantiated its reasoning and articulated its analysis as to the ASF situation in Russia as to provide an independent ground for a finding that Russia's ban on imports of the products at issue from Latvia is inconsistent with Article 6.1 of the SPS Agreement.

5.3.2.3 Conclusion on Russia's claim regarding the relationship between Article 6.1 and Article 6.3 of the SPS Agreement

5.107. 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, a 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.

5.108. 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.

5.3.3 The European Union's claim under Article 6.2 of the SPS Agreement

5.109. The European Union requests us to reverse the Panel's conclusions 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 country-specific bans on the importation of the products at issue from the four affected EU member States are not inconsistent with Russia's obligation under Article 6.2 of the SPS Agreement.[310] Furthermore, the European Union requests us to complete the legal analysis and find that Russia has failed to comply with its obligation under Article 6.2 to recognize the concept of regionalization in respect of ASF.[311]

5.110. For its part, Russia requests us to uphold the above conclusions of the Panel.[312] Furthermore, Russia requests that, in the event that we find that the Panel erred in its analysis under Article 6.2, we complete the legal analysis and find that Russia recognizes the concept of regionalization in respect of ASF.[313]

[307] Panel Report, para. 7.1022.
[308] Panel Report, para. 7.1023 (quoting Panel expert Dr Gavin Thomson's response to European Union's question No. 5, para. 1.128).
[309] Panel Report, para. 7.1023.
[310] European Union's other appellant's submission, para. 50 (referring to paras. 7.373, 7.379, 7.485, and 8.1.d.iii of the Panel Report with respect to the EU-wide ban, and to paras. 7.925, 7.1029, and 8.1.e.vi of the Panel Report with respect to the country-specific bans).
[311] European Union's other appellant's submission, para. 50.
[312] Russia's appellee's submission, paras. 76, 78, and 96.
[313] Russia's appellee's submission, para. 80.

5.3.3.1 The Panel's findings

5.111. Before the Panel, the European Union alleged that Russia is in breach of the obligation set out in the first sentence of Article 6.2 of the SPS Agreement to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence with respect to ASF. The European Union argued that the country-specific bans and the EU-wide ban on the importation of the products at issue fail to distinguish between ASF-free areas and areas considered infected with ASF within the European Union and the four partially affected EU member States.[314] Therefore, these measures do not match but, in fact, contradict the allegedly explicit recognition in Russian legislation.[315]

5.112. In response, Russia argued before the Panel that the obligation in Article 6.2 to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence does not impose an obligation on the importing Member to recognize a specific area in the exporting Member as pest- or disease-free or of low pest or disease prevalence, but that it merely requires the importing Member to allow for the consideration of regionalization.[316]

5.113. At the outset of its analysis, the Panel noted that Article 6 does not specify any particular manner in which a Member must "recognize" the concepts set out in Article 6.2.[317] The Panel then quoted from the interpretation of Article 6.2 developed by the Appellate Body in *India – Agricultural Products*, and went on to consider evidence submitted by Russia in support of its contention that the concept of regionalization is recognized in Russia's legal framework. In particular, the Panel considered several elements of Customs Union Decision No. 317[318], as well as the 2006 Memorandum between the European Union and Russia[319], and several elements of the EU–Russia bilateral veterinary certificates.[320]

5.114. Thereafter, the Panel referred to statements of the panels in *US – Animals* and *India – Agricultural Products* that Article 6.2 simply requires an acknowledgement of the concept of regionalization in the form of "abstract ideas" and thus imposes a less stringent or less exigent obligation than Article 6.1, which requires Members to "ensure" that a measure is "adapted" to the SPS characteristics of an area.[321] In light of this observation, the Panel found that "Russia's legislative framework recognizes the concept of regionalization within the meaning of Article 6.2."[322]

5.115. The Panel then stated that "the parties' arguments press us to further examine whether such recognition in a Member's legislative [or] regulatory framework suffices for a Member to comply with its obligations under the first sentence of Article 6.2 in respect of the specific SPS measures at issue in a given case."[323] In particular, the Panel noted the European Union's contention that "what matters for the present analysis 'is not the abstract, *distinct from and taken prior to*, recognition of the concept of disease-free areas in the Russian legislation, but the recognition of this concept *through and upon adoption of the very SPS measure* that is required to be adapted to the SPS characteristics of the relevant areas.'"[324]

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[314] European Union's second written submission to the Panel, para. 91.

[315] Panel Report, para. 7.374 (referring to European Union's second written submission to the Panel, para. 92).

[316] Panel Report, para. 7.374 (referring to Russia's second written submission to the Panel, para. 135, in turn referring to the Article 6 Guidelines).

[317] Panel Report, para. 7.367 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.136).

[318] Panel Report, paras. 7.369 and 7.371 (referring to Decision of the Customs Union Commission No. 317 of 18 June 2010 on Common Veterinary (Veterinary and Health) Requirements in relation to Goods Subject to Veterinary Control (Inspection), as amended (Customs Union Decision No. 317) (Panel Exhibit RUS-25.b)).

[319] Panel Report, para. 7.371 (referring to 2006 Memorandum (Panel Exhibit EU-61)).

[320] Panel Report, para. 7.371 (referring to Veterinary certificate for EU exports to Russia (Panel Exhibit EU-52); and other veterinary certificates set out in Panel Report, fn 248 to para. 7.141).

[321] Panel Report, para. 7.373 and fn 545 thereto (referring to Panel Report, *US – Animals*, para. 7.647, in turn referring to Panel Report, *India – Agricultural Products*, para. 7.670).

[322] Panel Report, para. 7.373. (fn omitted)

[323] Panel Report, para. 7.374.

[324] Panel Report, para. 7.374 (quoting European Union's second written submission to the Panel, para. 90 (emphasis original)).

5.116. The Panel then referred to the concerns expressed by the Appellate Body about certain statements made by the panel in *India – Agricultural Products*, which could be read as excluding that recognition of the concepts under Article 6.2 "could be done through and upon adoption of the very SPS measure that is adapted to the SPS characteristics of the relevant areas."[325] However, the Panel in the present dispute considered that, in *India – Agricultural Products*, the Appellate Body was addressing a situation "where an SPS measure adopted by a Member could recognize the concepts mentioned in Article 6.2 even in the absence of such recognition in a pre-existing regulatory framework".[326] In the Panel's view, it was faced in the present case with a different situation, because the measures at issue had been adopted in the context of a regulatory framework that contains "a general recognition of the concepts mentioned in the first sentence of Article 6.2".[327]

5.117. Finally, the Panel explained that the European Union's claim under Article 6.2 in the present case was "best examined in the context of [the] analysis of a Member's obligation under Article 6.1, rather than under Article 6.2 of the SPS Agreement".[328] In particular, the Panel expressed a concern not to analyse "a crucial element of [the] assessment under Article 6.1, i.e. whether Russia calibrated the measures at issue to the existence or not of ASF-free areas within the European Union, through the lens of Article 6.2" and thus to act against the principle of effective treaty interpretation.[329]

5.118. Based on these considerations, the Panel concluded 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 country-specific bans are not inconsistent with Russia's obligation under the first sentence of Article 6.2 of the SPS Agreement.[330]

5.3.3.2 Interpretation of Article 6.2 of the SPS Agreement

5.119. The European Union appeals the Panel's finding that Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF.[331] For its part, Russia requests us to affirm the Panel's finding.[332] We begin by setting out our interpretation of Article 6.2 of the SPS Agreement as relevant to the claim before us. We then turn to review the Panel's analysis and address the specific arguments raised on appeal by the participants.

5.120. The Appellate Body addressed the interpretation of Article 6.2 of the SPS Agreement in *India – Agricultural Products*. This provision is part of Article 6, which, as its title indicates, concerns the adaptation of measures to regional conditions. The overarching obligation is set out in the first sentence of Article 6.1, and stipulates that Members shall ensure that their SPS measures are "adapted" to the "sanitary or phytosanitary characteristics" of the areas from which the product originated and to which the product is destined.[333]

5.121. Article 6.2 elaborates on a specific aspect of that overarching obligation.[334] Beginning with the words "Members shall", Article 6.2 stipulates a general obligation.[335] This obligation is introduced with the words "in particular", which express a proposition in which something is said about some, but not all, of a class.[336] The words "in particular" connecting Article 6.2 to Article 6.1 thus clarify that the obligation in Article 6.2 regarding pest- or disease-free areas and areas of low

[325] Panel Report, para. 7.375 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.143).
[326] Panel Report, para. 7.375.
[327] Panel Report, para. 7.376.
[328] Panel Report, para. 7.376.
[329] Panel Report, para. 7.378.
[330] Panel Report, paras. 7.379, 7.925, 8.1.d.iii, and 8.1.e.vi.
[331] European Union's other appellant's submission, para. 50 (referring to paras. 7.373, 7.379, 7.485, and 8.1.d.iii of the Panel Report with respect to the EU-wide ban, and to paras. 7.925, 7.1029, and 8.1.e.vi of the Panel Report with respect to the country-specific bans). In this Report, we also refer to the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence" jointly as the concept of "regionalization".
[332] Russia's appellee's submission, paras. 76, 78, and 96.
[333] See Appellate Body Report, *India – Agricultural Products*, para. 5.141.
[334] Appellate Body Report, *India – Agricultural Products*, para. 5.141.
[335] See e.g. Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.
[336] Oxford English Dictionary online, definition of "in particular", available at: <http://www.oed.com/view/Entry/138260>.

pest or disease prevalence relates to a subset of the SPS characteristics that are relevant under Article 6.1.[337] We recall that, in *India – Agricultural Products*, with respect to the obligation in Article 6.1, the Appellate Body held that this is not a "static", but an ongoing obligation, requiring that SPS measures be adjusted over time so as to remain adapted to the SPS characteristics of the relevant areas.[338]

5.122. By referring to regional conditions "including" pest- or disease-free areas and areas of low pest or disease prevalence, the title of Article 6 further supports the understanding that the pest or disease status of an area is a subset of all the SPS characteristics of an area that may call for the adaptation of an SPS measure. As such, the pest and disease status is part of the broader set of regional conditions to be considered under Article 6.1.[339] In this vein, together with the title to Article 6, the words "in particular" in Article 6.2 underline the interlinkages between the first and second paragraphs of Article 6.[340] Furthermore, the Appellate Body highlighted the particular saliency of "pest- or disease-free areas" and "areas of low pest or disease prevalence" as factors to be taken into account in assessing the SPS characteristics of a region, pursuant to the second sentence of Article 6.1.[341]

5.123. Article 6.2 describes the scope of the Members' obligation as "recogniz[ing] the concepts" of pest- or disease-free areas and areas of low pest or disease prevalence. The definition of the word "concept" includes "a general notion or idea".[342] The verb "recognize", in turn, is defined as "[t]o accept the authority, validity, or legitimacy of" something.[343] Because the absence or low prevalence of a pest or disease is part of the broader set of regional conditions to be considered under Article 6.1, we must consider the meaning of the terms of Article 6.2 within the context of the principal obligation stipulated in Article 6.1, namely, that SPS measures be adapted to the SPS characteristics of the areas from which the product originated and to which the product is destined. Article 6.1 provides that Members shall "ensure" that their SPS measures are adapted to the SPS characteristics of the area from which the product originated. The Appellate Body noted that the verb "ensure" is defined as making certain the occurrence of a situation or outcome[344], and thus envisages that Members take steps towards the achievement of adaptation of their measures to the SPS characteristics of certain areas.

5.124. The Appellate Body understood the use of the verb "ensure" in connection with the adaptation of "SPS measures" in the plural as indicating something that should be done consistently and systematically by Members.[345] Moreover, the Appellate Body noted that the reference to "SPS measures" in the plural suggests that the obligation of adaptation to regional conditions applies generally, as well as in connection with each specific SPS measure maintained by a Member. At the same time, the Appellate Body attached significance to the fact that Article 6 does not specify any particular manner in which a Member must ensure adaptation of its SPS measures within the meaning of Article 6.1, or how it must recognize the concepts set out in Article 6.2.[346] The Appellate Body considered that this suggests that Members enjoy a "degree of latitude" in determining how to ensure adaptation of their SPS measures to regional conditions pursuant to Article 6.1, and how to recognize the relevant concepts pursuant to Article 6.2.[347]

5.125. The second sentence of Article 6.2 refers to a Member's "determination" of pest- or disease-free areas and areas of low pest or disease prevalence, and stipulates that such determination shall be based on factors such as those listed in that sentence.[348] As we see it, making a determination pursuant to Article 6.2 requires the importing Member to take specific

[337] Appellate Body Report, *India – Agricultural Products*, para. 5.140.
[338] Appellate Body Report, *India – Agricultural Products*, para. 5.132.
[339] Appellate Body Report, *India – Agricultural Products*, para. 5.133.
[340] Appellate Body Report, *India – Agricultural Products*, para. 5.133.
[341] Appellate Body Report, *India – Agricultural Products*, para. 5.133.
[342] Oxford English Dictionary online, definition of "concept", available at: <http://www.oed.com/view/Entry/38130>.
[343] Oxford English Dictionary online, definition of "recognize", available at: <http://www.oed.com/view/Entry/159656>.
[344] Appellate Body Report, *India – Agricultural Products*, para. 5.132.
[345] Appellate Body Report, *India – Agricultural Products*, para. 5.132.
[346] Appellate Body Report, *India – Agricultural Products*, para. 5.136.
[347] Appellate Body Report, *India – Agricultural Products*, para. 5.137.
[348] In particular, the second sentence of Article 6.2 refers to geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

steps, and thus envisages a certain process, for the determination of pest- or disease-free areas or areas of low pest or disease prevalence. In this vein, the Appellate Body has held that the assessment of whether a Member has complied with the obligations in Articles 6.1 and 6.2 may involve "scrutiny of the specific steps and acts that the Member has or has not taken" in light of the SPS characteristics of the relevant areas, as well as of broader aspects of the importing Member's regulatory regime governing SPS matters.[349] Specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may thus be relevant in the analysis of whether an importing Member complies with its obligation under the first sentence of Article 6.2. Where such instances of recognition are presented to a panel, these instances must be taken into consideration in the assessment of whether or not a Member has complied with its obligation under Article 6.2.

5.126. Furthermore, we attach significance to the fact that Article 6.3 envisages that the exporting Member may make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence. Taking into account the ongoing nature of the obligation to adapt SPS measures to regional conditions, 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 by an exporting Member affected by a specific SPS measure. Accordingly, we see Article 6.2 not as an obligation to acknowledge the concept of regionalization as an abstract idea[350]; rather, we see it as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.127. Finally, we note that Article 6.2 does not prescribe a particular manner in which Members must recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. We therefore consider that a Member's recognition of such concepts may be expressed in different ways. The recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence will often be embodied in a Member's regulatory framework. In that respect, the Appellate Body held that the assessment of the consistency of an SPS measure with the obligations of Article 6.1 and Article 6.2 will be facilitated in circumstances where Members put in place a regulatory scheme or structure that accommodates adaptation of SPS measures on an ongoing basis.[351]

5.128. At the same time, we recall that the Appellate Body held that recognition of the relevant concepts pursuant to Article 6.2 will not necessarily, and in every case, require an affirmative act that is "*distinct from* and *taken prior to*" the adoption of an SPS measure.[352] Accordingly, specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be relevant for assessing a Member's compliance with Article 6.2. In this vein, we can also conceive of the situation where recognition of the relevant concepts is not contained in the regulatory framework, but manifests itself in a Member's practice of giving an effective opportunity to an exporting Member to make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence.

5.129. In sum, while the assessment of a Member's compliance with Article 6.2 will be a function of the specific claims raised by the complainant and the circumstances of any particular case, we consider that, in any event, the obligation to "recognize the concepts" of pest- or disease-free areas and areas of low pest or disease prevalence pursuant to Article 6.2 is part of the overarching obligation of Members to ensure adaptation of their SPS measures to regional conditions under Article 6.1. Moreover, the obligation in Article 6.2 must also be interpreted in light of the fact that Article 6.3 envisages that an exporting Member may 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. In particular, we have found that the importing Member must provide an effective opportunity for the exporting Member to make such a claim and thus render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. 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

[349] Appellate Body Report, *India – Agricultural Products*, para. 5.137.
[350] See Panel Report, para. 7.373.
[351] Appellate Body Report, *India – Agricultural Products*, para. 5.138.
[352] Appellate Body Report, *India – Agricultural Products*, para. 5.143. (emphasis original)

pest or disease prevalence. All these elements may be relevant in an assessment of a Member's compliance with the obligation under Article 6.2 of the SPS Agreement. 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.

5.3.3.3 Whether 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

5.130. We now turn to review the Panel's analysis under Article 6.2 of the SPS Agreement, in order to assess 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. In particular, the European Union contends that the Panel erred in considering that Article 6.2 requires merely an "abstract" recognition of the concept of regionalization, for instance, in the form of a pre-existing regulatory framework.[353] The European Union highlights that the text of the first sentence of Article 6.2 does not refer to a particular manner in which a Member shall recognize the concept of regionalization and submits that, therefore, such recognition can occur in different ways, such as through a pre-existing regulatory framework or through the very measure at issue.[354]

5.131. For the European Union, a concrete measure post-dating the regulatory framework can in fact contradict the formal regulatory framework, effectively deny "regionalization", and thus amount to actual non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.[355] The European Union argues that, in such situations, an importing Member would only "pay lip service" to the recognition of the concept and at the same time refuse the imports of the products at issue.[356] Such conduct would not comply with the obligation under Article 6.2 to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.132. For its part, Russia submits that the Panel correctly found that Article 6.2 requires an importing Member to make the application of regionalization legally possible, but it does not require an examination of whether a particular challenged SPS measure is applied in a manner consistent with "regionalization" requirements.[357] Russia argues that Article 6.2 requires proof only of an express recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, not of a Member's proper application of the concept of regionalization in a particular challenged SPS measure.[358]

5.133. Russia submits that the approach advocated by the European Union would conflate Article 6.1 and Article 6.2 of the SPS Agreement: if an SPS measure accords recognition to a "regionalization" request, it will likely comply with Article 6.1 and, consequently, with Article 6.2. Conversely, "if an importing Member has determined not to accord recognition to a regionalization request in violation of Article 6.1 and/or has failed to adapt its challenged SPS measure to domestic SPS characteristics", then the panel would have to make "a negative finding of 'recognition' under Article 6.2", even where it is undisputed that the importing Member has detailed the various concepts of regionalization in its regulatory framework.[359] For Russia, this could lead to an "absurd situation" in which a panel finds, "solely on the basis of the WTO-inconsistent application of a regionalization request, that a Member, in its entirety, does not *recognize* the concept[s] of pest- or disease-free areas, or areas of low pest or disease prevalence under Article 6.2, even if that Member has in place a robust and well-functioning regionalization framework, and has actively recognized and applied regionalization in many different contexts over a considerable period of time."[360]

[353] European Union's other appellant's submission, para. 30.
[354] European Union's other appellant's submission, para. 38.
[355] European Union's other appellant's submission, para. 33.
[356] European Union's other appellant's submission, para. 36.
[357] Russia's appellee's submission, para. 51.
[358] Russia's appellee's submission, para. 28.
[359] Russia's appellee's submission, para. 66.
[360] Russia's appellee's submission, para. 64. (emphasis original)

5.134. Turning to consider the Panel's analysis, we note that the Panel began by recalling the Appellate Body's statement in *India – Agricultural Products* that Article 6 of the SPS Agreement does not specify any particular manner in which a Member must "recognize" the concepts set out in Article 6.2 and that it does not prescribe whether recognition of the relevant concept must be "done in writing through a formal governmental act, or whether it may be accomplished in some other manner".[361] The Panel then reviewed a number of legal instruments relied upon by Russia in support of its contention that it recognizes the concept of regionalization[362], and found that Russia's regulatory framework recognizes such concept within the meaning of Article 6.2.[363] The Panel explained that this finding rested on the basis that the acknowledgement of particular "abstract ideas" is sufficient for the purposes of Article 6.2, which it considered to be a less stringent obligation than that of "ensuring" that a measure is "adapted" to the SPS characteristics of an area under Article 6.1.[364] The Panel also considered that it could not take into account in its analysis under Article 6.2 specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. The Panel explained that, if it did take into consideration specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, it would be examining a crucial element of the assessment under Article 6.1 – i.e. whether Russia calibrated the measures at issue to the existence or not of ASF-free areas within the European Union – through the lens of Article 6.2. For the Panel, this would reduce parts of Article 6 of the SPS Agreement to redundancy and inutility and thus be incompatible with the principle of effective treaty interpretation.[365]

5.135. We have set out in paragraphs 5.119-5.129 above our interpretation of Article 6.2 of the SPS Agreement. We consider that Article 6.2 elaborates on a specific aspect of the overarching obligation in Article 6.1 that Members shall ensure that their SPS measures are "adapted" to the SPS characteristics of the areas from which the product originated and to which the product is destined.[366] Furthermore, we consider that the obligation in Article 6.2 must be seen in light of the fact that Article 6.3 envisages that the exporting Member may make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence, and in light of the ongoing nature of the obligation to adapt SPS measures to regional conditions. We have concluded 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 claims from an exporting Member affected by a specific SPS measure, and thus render operational the concept of regionalization. Accordingly, we disagree with the Panel that the obligation in Article 6.2 is separate from and "less exigent" or "less stringent" than that of Article 6.1, and that it requires merely an acknowledgement of the concept of regionalization in the form of "abstract ideas".

5.136. Moreover, we consider that the Panel erred in finding itself precluded from taking into account in its analysis under Article 6.2 specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence because this would be incompatible with the principle of effective treaty interpretation. As explained above, Article 6.2 and Article 6.1 do not set out separate, unrelated obligations. Rather, as the Appellate Body clarified in *India – Agricultural Products*, there are common elements throughout Article 6, which reveal the interlinkages that exist among the paragraphs of that Article.[367] Because Article 6.2 elaborates on one specific aspect of the overarching obligation in Article 6.1 that Members ensure that their SPS measures are adapted to regional conditions, the question of whether a Member recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be a relevant consideration under both Article 6.1 and Article 6.2. It follows from this that consideration of specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be relevant for the analyses under both Articles 6.1 and 6.2. Against this background, the concern

[361] Panel Report, para. 7.367 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.136).
[362] Panel Report, paras. 7.369 and 7.371 (referring to Customs Union Decision No. 317 (Panel Exhibit RUS-25.b); 2006 Memorandum (Panel Exhibit EU-61); and Veterinary certificate for EU exports to Russia (Panel Exhibit EU-52), fn 1)).
[363] Panel Report, para. 7.373.
[364] Panel Report, para. 7.373.
[365] Panel Report, paras. 7.377-7.378.
[366] Appellate Body Report, *India – Agricultural Products*, para. 5.141.
[367] Appellate Body Report, *India – Agricultural Products*, para. 5.141.

articulated by the Panel, and embraced by Russia on appeal, about an overlap in the analyses under Articles 6.1 and 6.2 seems inapposite.

5.137. Furthermore, we have found above that recognizing the relevant concepts under Article 6.2 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 such elements may be relevant to the assessment of a Member's compliance with the obligation to recognize the relevant concepts pursuant to Article 6.2. Different elements may contribute to different degrees to the overall compliance by that Member with its obligation to recognize the relevant concepts. Accordingly, we consider that a panel must take into account in its analysis all elements that may be relevant in a particular case and, on that basis, reach a conclusion as to whether, overall, the Member complies with the obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. We therefore consider that the Panel erred in finding that it could not take into account in its analysis under Article 6.2 specific instances of recognition or non-recognition of the concept of regionalization.

5.138. In sum, we disagree with the Panel that Article 6.2 sets out a less stringent obligation as compared to Article 6.1 of the SPS Agreement, requiring 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. 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.

5.139. This brings us to the question of whether we can complete the legal analysis of whether Russia recognizes the concept of regionalization within the meaning of the first sentence of Article 6.2 of the SPS Agreement. The European Union requests us to complete the legal analysis and find that Russia fails to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and that therefore the EU-wide ban and country-specific bans on the importation of the products at issue are inconsistent with Russia's obligation under Article 6.2.[368] In this regard, the European Union refers to findings made by the Panel in its analysis under Article 2.3 of the SPS Agreement, and asserts that, according to those findings, neither on the face of the measures at issue nor in their application does Russia recognize the concept of regionalization.[369]

5.140. In response, Russia requests that, in the event that we reverse the Panel's findings under Article 6.2, we complete the legal analysis and find that Russia recognizes the concept of regionalization.[370] Russia refers to several letters sent by its authorities to the European Union explaining its "regionalization" requirements and requesting proof that the areas claimed by the European Union to be ASF-free were in fact ASF-free, and submits that these letters demonstrate that Russia recognizes the concept of regionalization.[371]

5.141. At the outset, we note that the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute when sufficient factual findings by the panel or undisputed facts on the panel record allowed it to do so.[372] However, the Appellate Body has declined to complete the legal analysis where doing so would

[368] European Union's other appellant's submission, para. 50.

[369] In particular, the European Union refers to findings made by the Panel in paragraphs 7.1357-7.1360 of the Panel Report. (European Union's other appellant's submission, para. 47)

[370] Russia's appellee's submission, para. 80. See also para. 82.

[371] Russia's appellee's submission, paras. 82-89.

[372] See e.g. Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *EC – Hormones*, para. 222; *EC – Poultry*, para. 156; *US – Shrimp*, paras. 123-124; *Australia – Salmon*, paras. 117-118; *Japan – Agricultural Products II*, para. 112; *US – FSC*, para. 133; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2nd complaint)*, paras. 1272-1274.

involve addressing claims that the panel had not examined at all[373], particularly where, at the appellate review stage, the participants did not sufficiently address the issues the Appellate Body would have needed to resolve in order to complete the legal analysis, including the probative value of the evidence not considered by the panel.[374]

5.142. Turning to the request at issue that we complete the legal analysis with respect to the European Union's claim under Article 6.2, we recall that, in principle, compliance with the obligation of Article 6.2 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 and areas of low pest or disease prevalence. A panel must take into account in its analysis all elements that may be relevant in a particular case and, on that basis, reach a conclusion as to whether, overall, the Member complies with Article 6.2. Furthermore, we recall that the obligation in Article 6.2 must also be seen in light of the fact that Article 6.3 envisages that the exporting Member may make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence, and in light of the ongoing nature of the obligation to adapt SPS measures to regional conditions. On this basis, we have concluded 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 claims from an exporting Member affected by a specific SPS measure. Accordingly, we have found that Article 6.2 requires Members to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.143. With these considerations in mind, and in order to complete the legal analysis, we turn to assess whether there are sufficient findings by the Panel and undisputed evidence on the Panel record to allow us to determine whether or not Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. We begin by noting that, in order to determine whether Russia complies with the obligation to recognize these concepts, the Panel considered several aspects of Customs Union Decision No. 317. In particular, the Panel noted that this Decision states:

> "Regionalisation" is the determination of the well-being or otherwise of a country or its administrative territory (republic, region, district, land, county, state, province, etc.) in terms of the contagious animal diseases included in the list of dangerous and quarantinable diseases of the Party, and in the control entities of third countries – in terms of the diseases referred to in these Requirements.[375]

The Panel noted that the same legal instrument also states: "Regionalization is carried out in accordance with the recommendations of the World Organization for Animal Health [OIE]".[376]

5.144. With respect to the definition of the term "regionalization" contained in Customs Union Decision No. 317, we note that it reflects the fact that a pest or disease may be limited to a certain area. In particular, it refers to "republic, region, district, land, county, state, and province". The definition itself, however, provides no effective opportunity for the European Union to make the claim, addressed to Russia, that areas within the European Union are pest- or disease-free or of low pest or disease prevalence. Thus it does not render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.145. The Panel further found that Customs Union Decision No. 317 states that "Regionalization is carried out in accordance with the recommendations of the World Organization for Animal Health [OIE]".[377] This raises the question of whether, on the basis of these recommendations, an exporting Member has an effective opportunity to make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence. Because the Panel had found that

[373] Appellate Body Reports, *EC – Poultry*, para. 107; *EC – Asbestos*, paras. 79 and 82; *US – Section 211 Appropriations Act*, para. 343; *EC – Export Subsidies on Sugar*, para. 337.

[374] See e.g. Appellate Body Report, *Japan – DRAMs (Korea)*, para. 142.

[375] Panel Report, para. 7.369 (quoting Customs Union Decision No. 317 (Panel Exhibit RUS-25.b), "Terms used in the Common Veterinary (Veterinary and Health) Requirements", p. 1).

[376] Panel Report, para. 7.369 (quoting Customs Union Decision No. 317 (Panel Exhibit RUS-25.b), "Terms used in the Common Veterinary (Veterinary and Health) Requirements", p. 1).

[377] Panel Report, para. 7.369 (quoting Customs Union Decision No. 317, "Terms used in the Common Veterinary (Veterinary and Health) Requirements", p. 1).

Article 6.2 merely requires the acknowledgement of regionalization in the form of "abstract ideas"[378], the Panel did not explore to what extent the OIE recommendations referred to in Customs Union Decision No. 317 or other legal instruments provide an effective opportunity for the European Union to make the claim that certain areas within the European Union are pest- or disease-free or of low pest or disease prevalence, thus rendering operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.146. We note that Customs Union Decision No. 317 refers to the recommendations of the OIE generally, without identifying any specific recommendations. We consider that this reference may be directed at Section 4, "General Recommendations: Disease Prevention and Control", of the Terrestrial Code. In particular, Chapter 4.3 is concerned with "Zoning and Compartmentalisation". Be that as it may, we note that the recommendations in Section 4 of the Terrestrial Code are directed at OIE member countries and envisage that when OIE member countries adopt SPS measures, they do so in accordance with such recommendations. However, the OIE recommendations themselves provide no effective opportunity for the European Union to make the claim, addressed to Russia, that areas within the European Union are pest- or disease-free or of low pest or disease prevalence, and thus do not render operational the concept of regionalization.

5.147. Furthermore, we note that the Panel found that Customs Union Decision No. 317 comprises chapters containing veterinary requirements applicable to imports of a number of products into the Customs Union territory. In particular, the Panel noted that Chapter 7 provides that:

> [t]he import into the customs territory of the Customs Union and/or the transfer between Parties of healthy breeding and commercial pigs originating from territories free from the following contagious animal diseases shall be permitted … [including] African swine fever – during the last 36 months in the territory of the country or administrative territory in accordance with regionalization.[379]

The Panel also considered relevant that all the chapters that refer to the products at issue in this dispute include reference to the "ASF situation necessary for accepting imports of the respective products" and to "the territory of the country *or administrative territory*".[380]

5.148. We note the Panel's finding that these elements of Customs Union Decision No. 317 refer to the concept of regionalization. However, we do not see that these elements of Customs Union Decision No. 317 provide an effective opportunity for the European Union to make the claim, addressed to Russia, that areas within the European Union are pest- or disease-free or of low pest or disease prevalence. At the same time, we are cognizant of the fact that, because the Panel had found that Russia complies with the obligation of Article 6.2 by acknowledging regionalization in the form of "abstract ideas"[381], the Panel did not further explore whether or to what extent Russia's regulatory framework provides an effective opportunity for the European Union to make the claim that certain areas within the European Union are pest- or disease-free or of low pest or disease prevalence, thus rendering operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.149. Given the absence of Panel findings as to whether elements of Russia's regulatory framework other than Customs Union Decision No. 317 recognize the concept of regionalization, we must proceed to assess specific instances of application of this concept in order to determine whether or not Russia is in compliance with its obligation under Article 6.2. The Panel made no findings with respect to instances of application of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence concerning legal instruments other than the specific SPS measures at issue. However, the Panel made a number of findings with respect to the specific SPS measures at issue in the context of its analysis under Article 2.3 of the SPS Agreement. In particular, the Panel found that "[n]one of the measures at issue contains any explicit indication

[378] Panel Report, para. 7.373.
[379] Panel Report, para. 7.370 (quoting Customs Union Decision No. 317 (Panel Exhibit RUS-25.b), Chapter 7).
[380] Panel Report, para. 7.370 (quoting Customs Union Decision No. 317 (Panel Exhibit RUS-25.b), Chapter 7). (emphasis added by the Panel)
[381] Panel Report, para. 7.373.

that there is a possibility to recognize ASF-free zones or compartments from the territory of the European Union."[382] The Panel also found that the same holds true in respect of the *application* of both the EU-wide ban and the country-specific bans.[383] On the basis of these findings by the Panel, we consider that the SPS measures at issue provide no effective opportunity for the European Union to make the claim, addressed to Russia, that areas within the European Union are pest- or disease-free or of low pest or disease prevalence. These measures thus do not render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

5.150. Finally, we have found above that compliance with the obligation in Article 6.2 does not necessarily require the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in the regulatory framework or in a specific SPS measure, but that it may also be demonstrated on the basis of an importing Member's practice of providing 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, thus rendering operational the concept of regionalization. However, because the Panel had found that Russia complies with the obligation in Article 6.2 by acknowledging regionalization in the form of "abstract ideas"[384], the Panel did not explore whether or to what extent Russia's administrative practice with respect to SPS matters provided an effective opportunity for the European Union to make the claim that certain areas within the European Union are pest- or disease-free or of low pest or disease prevalence, thus rendering operational the concept of regionalization.

5.151. In light of the above considerations, we note that the Panel's findings with respect to Customs Union Decision No. 317 and with respect to the specific SPS measures at issue suggest that Russia fails to provide an effective opportunity for the European Union to make the claim that areas within its territory are ASF-free, and thus fails to render operational the concept of regionalization. At the same time, we note that, because the Panel had found that Russia complies with the obligation in Article 6.2 by acknowledging the concept of regionalization as an "abstract idea"[385], and because the Panel erroneously considered itself to be precluded from taking into account specific instances of recognition of the concept of regionalization by Russia, the Panel did not explore whether or to what extent Russia otherwise recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF. In particular, the Panel made no findings with respect to the recognition of the concept of regionalization with respect to ASF in instruments of Russia's regulatory framework other than Customs Union Decision No. 317. In addition, because the Panel considered itself precluded from taking into account specific SPS measures, it neither explored specific instances of recognition, nor was it in a position to determine whether there was an administrative practice in Russia in respect of the recognition of the concept of regionalization.

5.152. In sum, we note that, while the considerations relating to Customs Union Decision No. 317 and the Panel findings regarding the SPS measures at issue suggest that Russia fails to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence with respect to ASF, we lack findings by the Panel as to whether or not other elements of Russia's regulatory framework relating to SPS matters, as well as Russia's administrative practice, suggest that Russia recognizes these concepts. We are therefore not in a position to complete the legal analysis and determine, based on findings by the Panel or undisputed evidence before the Panel, whether or not Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF.

5.3.3.4 Conclusion on the European Union's claim under Article 6.2 of the SPS Agreement

5.153. 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 Article 6.2 of the SPS Agreement, we consider that Article 6.2

[382] Panel Report, para. 7.1358. Furthermore, the Panel found that, while the measures on Estonia, Latvia, Lithuania, and Poland impose a "temporary restriction" on imports of the products at issue, they do not explicitly provide for potential regionalization in the European Union. (Ibid., para. 7.1359)
[383] Panel Report, para. 7.1360.
[384] Panel Report, para. 7.373.
[385] Panel Report, para. 7.373.

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:

Shree Baboo Chekitan Servansing
Presiding Member

Ricardo Ramírez-Hernández
Member

Peter Van den Bossche
Member

WORLD TRADE ORGANIZATION

WT/DS475/AB/R/Add.1

23 February 2017

(17-1108)

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

NOTICES OF APPEAL AND OTHER APPEAL

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.[1]

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.[2] 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[3], the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol,[4] 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.[5] 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.[6] 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.[7] 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.

[1] 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.

[2] 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.

[3] See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.

[4] See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.

[5] 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.

[6] 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.

[7] 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[8], 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.[9] 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.[10] 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.[11] 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.[12] 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.[13]

[8] See, e.g., Panel Report, para. 7.963.

[9] See, e.g., Panel Report, paras. 7.976, 7.985, 7.1001, 7.1003, and 7.1004 (second and third sentences).

[10] 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.

[11] See, e.g., Panel Report, paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027, 7.1028.

[12] See, e.g., Panel Report, paras. 7.995, and 7.1028.

[13] 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:[1]

(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.

[1] 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

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.[1]

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.[2] 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[3], the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol[4], 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.[5] 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.

[1] See, e.g., Panel Report, paras. 7.390, 7.965.
[2] 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.
[3] See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.
[4] See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.
[5] 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".[6] 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[7], 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.[8]

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-freed 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

[6] 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.

[7] See, e.g., Panel Report, paras. 7449, 7.455 7.456. and 7.963.

[8] 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.[9] 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.[10] Thus, the Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation[11], 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,

[9] 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.

[10] Panel Report, paras. 7.963 and 7.1003.

[11] 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 its 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.[12] 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[13], 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.[14]

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/compartment and having it recognized for international

[12] See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.
[13] See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.
[14] 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[1]

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.

[1] 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[1]

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).

[1] 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[1]

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

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

[1] Total number of words (including footnotes but excluding executive summary) = 10071; total number of words of the executive summary = 965.

[2] 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.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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.[1]

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.

[1] 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 seem 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.

ANNEX D

PROCEDURAL RULING

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.[1] We therefore see no impediment for a WTO Member to include individuals providing interpretation

[1] 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.

WORLD TRADE ORGANIZATION

WT/DS475/AB/R/Add.1

23 February 2017

(17-1108)

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

NOTICES OF APPEAL AND OTHER APPEAL

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.[1]

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.[2] 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[3], the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol,[4] 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.[5] 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.[6] 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.[7] 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.

[1] 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.

[2] 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.

[3] See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.

[4] See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.

[5] 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.

[6] 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.

[7] 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[8], 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.[9] 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.[10] 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.[11] 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.[12] 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.[13]

[8] See, e.g., Panel Report, para. 7.963.

[9] See, e.g., Panel Report, paras. 7.976, 7.985, 7.1001, 7.1003, and 7.1004 (second and third sentences).

[10] 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.

[11] See, e.g., Panel Report, paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027, 7.1028.

[12] See, e.g., Panel Report, paras. 7.995, and 7.1028.

[13] 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:[1]

(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.

[1] 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

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.[1]

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.[2] 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[3], the Panel's failure to give full legal effect to the Russian Federation's Accession Protocol[4], 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.[5] 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.

[1] See, e.g., Panel Report, paras. 7.390, 7.965.
[2] 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.
[3] See, e.g., Panel Report, paras. 7.76, 7.77, 7.78, 7.80, 7.81, 7.82, 7.83 and 7.84.
[4] See, e.g., Panel Report, paras. 7.108, 7.109, 7.110, 7.111, 7.112, 7.114, 7.115, 7.116.
[5] 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".[6] 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[7], 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.[8]

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-freed 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

[6] 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.

[7] See, e.g., Panel Report, paras. 7449, 7.455 7.456. and 7.963.

[8] 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.[9] 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.[10] Thus, the Russian Federation requests the Appellate Body to reverse the Panel's erroneous legal interpretation[11], 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,

[9] 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.

[10] Panel Report, paras. 7.963 and 7.1003.

[11] 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 its 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.[12] 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[13], 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.[14]

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/compartment and having it recognized for international

[12] See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.
[13] See, e.g., Panel Report paras. 7.365, 7.1011 (second sentence), 7.1020, 7.1027 and 7.1028.
[14] 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[1]

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.

[1] 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[1]

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).

[1] 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[1]

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

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

[1] Total number of words (including footnotes but excluding executive summary) = 10071; total number of words of the executive summary = 965.

[2] 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.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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.[1]

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.

[1] 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 seem 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.

ANNEX D

PROCEDURAL RULING

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.[1] We therefore see no impediment for a WTO Member to include individuals providing interpretation

[1] 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.